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Vol.
61

THE
AMERICAN DECISIONS

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED BY

A. C. FREEMAN,

COUNSELOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

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Vol. LXI.

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AMERICAN DECISIONS.

VOL. LXI.

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AMERICAN DECISIONS.
VOL. LXI.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

CAMPBELL v. PEOPLE.

[16 ILLINOIS, 17.]

ON TRIAL FOR MURDER, EVIDENCE THAT DECEASED MADE THREATS against the accused on the day of his death, and at other times shortly before that day, is properly admitted, in connection with other testimony, for the purpose of showing that the accused acted in necessary self-defense, where the proof was that the deceased, having a hatchet in his hand, sought the accused at his own house, with the design of assaulting or arresting him.

ACTUAL AND POSITIVE DANGER IS NOT INDISPENSABLE TO JUSTIFY SELF-DEFENSE, and an instruction which may be understood by the jury as denying to the accused on a trial for murder the right to defend himself unless his danger was not only apparently imminent, but real and positive, is erroneous.

WHERE PERSON IS PURSUED OR ASSAULTED in such a way as to induce in him a reasonable and well-grounded belief that he is actually in danger of losing his life or of suffering great bodily harm, he is justified in defending himself, whether the danger was real or only apparent.

IF IT IS UNCERTAIN WHICH ONE OF TWO OR MORE PERSONS IS GUILTY PARTY, all must be acquitted, although it may be positively proved that some one of them committed the crime.

ON TRIAL FOR MURDER, COLOR OF ACCUSED IS NO GROUND OF DISTINCTION in applying the principles of the law applicable to the case.

INDICTMENT for murder. The opinion states the case.

J. Jack, for the plaintiff in error.

J. A. Logan, district attorney, for the people.

By Court, CATON, J. The plaintiff in error, who is a negro, was indicted for the murder of Goodwin Parker. The evidence in the case tends very strongly to show that the deceased made

an assault upon the prisoner, and that the homicide was committed in necessary self-defense. It appears that the deceased and three others went to seek the prisoner at his father's house in the night-time. The deceased went to the door of the house, leaving his companions thirty or forty yards back, to whom he was to give warning if Campbell was in the house. Shortly after the deceased went to the door, he called to the others to come on, and informed them that the negro was there. They rushed up, when the deceased and the prisoner were seen some distance from the house engaged together, and there the deceased was stabbed and died in a few minutes. When the deceased went to the house he had a hatchet in his hands, which was found near the spot where he was killed; and after the negro was committed to jail, a wound was observed upon his head which penetrated to the skull, and which appeared to have made with a hatchet, an ax, or a hammer. There was no pretense that there was any sort of justification or legal cause for arresting or assaulting the prisoner. Upon the trial, the defense offered to prove that on that day, and at other times shortly before his death, the deceased had made threats against the prisoner. This evidence the court ruled out, and an exception was taken. In this the court unquestionably erred, although they may never have come to the knowledge of the defendant till after the homicide was committed. If the deceased had made threats against the defendant, it would be a reasonable inference that he sought him for the purpose of executing those threats, and thus they would serve to characterize his conduct towards the prisoner at the time of their meeting and of the affray. If he had threatened to kill, maim, or dangerously beat the defendant, it would be a fair inference, especially so long as the evidence shows that he had a hatchet in his hands, that he had attempted to accomplish his declared purpose, and if so, then the prisoner was justified in defending himself, even to the taking of the life of his assailant if necessary. While the threats of themselves could not have justified the prisoner in assailing and killing the deceased, they might have been of the utmost importance in connection with the other testimony in making out a case of necessary self-defense. The evidence offered was proper, and should have been admitted.

The second instruction given for the prosecution, and which was excepted to, was as follows: "If the jury believe from the evidence that the defendant was pursued by the deceased, Goodwin Parker, and turned upon him and slew him with a knife, or

other instrument capable of producing a like death, when it was not necessary for self-preservation or in necessary self-defense, or to prevent his receiving great bodily harm, although they believe there was no previous malice on the part of the defendant towards the deceased, yet they are bound to find the defendant guilty of manslaughter, and fix his term of confinement in the penitentiary of the state at not more than eight years." This instruction, if not absolutely wrong, was at least liable to misconstruction, and to be understood by the jury as depriving the defendant of the right of self-defense unless his danger was not only apparently imminent, but was real and positive. If so understood, the instruction was wrong. If the defendant was pursued or assaulted by the deceased in such a way as to induce in him a reasonable and a well-grounded belief that he was actually in danger of losing his life or suffering great bodily harm, when acting under the influence of such reasonable apprehension, he was justified in defending himself, whether the danger was real or only apparent. Actual and positive danger is not indispensable to justify self-defense. If one is assaulted with a sword in such a way as to indicate an intent to take his life, and with an apparent ability to accomplish such intent, he is not bound to stop and inquire whether the sword is but a lath, or whether the assault is but a jest, before he repels it with the necessary force to protect himself against the threatened harm. Or if one is assaulted with a pistol in such a way as to manifestly show a design to slay him, he may be justified in killing his assailant, although it should turn out the pistol was not loaded, and the only design was to frighten him. Men when threatened with danger are obliged to judge from appearances, and determine by the actual state of things, from the circumstances surrounding them, at least as much as if placed in other and less exciting positions; and it would be monstrous to say that if they act from real and honest convictions, induced by reasonable evidence, they shall be held responsible criminally for a mistake in the extent of the actual danger, where other reasonable and judicious men would have been alike mistaken. A contrary rule would make the law of self-defense a snare and a delusion. It would become but a mockery of the sacred right of self-preservation.

The eleventh instruction asked by the prisoner should have been given. It is this: "If it is uncertain, from the evidence, in the minds of the jury, which one out of two or more persons inflicted the stab, that would operate to acquit the pris-

oner, unless there is proof that the prisoner aided or abetted the person ascertained to have killed him." While this instruction is inartificially drawn, and is liable to verbal criticism, yet it contains an important principle of law, of the benefit of which the prisoner should not have been deprived. There was evidence tending to show that the mother and sister of the prisoner were at or very near the place of the affray at the time the wound was inflicted, and his counsel had the right to insist before the jury that one of them struck the blow without his knowledge or procurement, while he was simply trying to flee from his pursuer; and had the jury so far concurred in that view of the case as to entertain a reasonable doubt whether one of the others did not strike the blow without the procurement of the prisoner, he was entitled to an acquittal. Although it may be positively proved that one of two or more persons committed a crime, yet if it is uncertain which is the guilty party, all must be acquitted. No one can be convicted till it is established that he is the party who committed the offense.

The thirteenth instruction asked for the prisoner was this: "It is the duty of the jury to consider the prisoner's case as if he were a white man, for the law is the same, there being no distinction in its principles in respect of color." This, too, was refused by the court, and an exception taken. It was not pretended on the argument that the law of this case, by which the prisoner's guilt or innocence was to be established, was not precisely the same as if he were a white man; and it was even insisted on the argument that the proposition is so plain and so universally understood and recognized that it would have been an insult to the understanding of the jury for the court to have instructed them on that point. The proposition is undoubtedly exceedingly plain and altogether undeniable, and I trust is universally understood and recognized; but it was still the right of the prisoner to have the law, plain as it was, declared to the jury by the court. But again it was objected that the instruction asserts the absolute equality in all respects, under our law, of the black man with the white. Even if the wording of the instruction was thus broad, it could only be understood as applying to the case upon trial, where the equality is admitted. With the rights of the defendant in any other regard the jury could have nothing to do. The only object of the instruction could have been to enlighten them as to the law of that case; and whether their belief of the relative rights of the defendant in other respects were right or wrong was a matter of no sort

of moment to any party. But by reference to the purport of the instruction, it will be seen that it was especially asked in reference to the case on trial, for the jury was asked to be directed to consider the prisoner's case as if he were a white man, for the reason that our law makes no distinction in respect of color, which, of course, can only be understood in respect to such a case. Any other construction of that instruction is altogether too refined for practical justice. The instruction should have been given.

The judgment must be reversed and the cause remanded.

Judgment reversed.

THREATS BY DECEASED, ADMISSIBILITY OF EVIDENCE OF, IN TRIALS FOR MURDER.—Mere naked threats made by the deceased against the accused are not admissible in evidence either to justify or to mitigate a homicide, where there is no evidence of any overt act on the part of the deceased at the time of the killing indicating his intention to carry his threats into execution. Evidence of threats by the deceased, offered for the purpose of proving that the prisoner had the right to kill the deceased, there being no proof of a hostile demonstration by the latter, is clearly inadmissible. No man has the right to kill another simply because the latter has made threats against him. The law will not justify a homicide unless it is shown that the slayer was, at the time of the killing, in apparent imminent danger of losing his life or of sustaining serious bodily injury. And previous threats, however violent, do not afford any reasonable ground for apprehending such danger, where they are unaccompanied with overt acts showing an intention to carry them into immediate effect. The authorities are uniform on this point: Whart. on Hom., 2d ed., sec. 694; Whart. Cr. Ev., 9th ed., sec. 757; *Hughey v. State*, 47 Ala. 97; *Payne v. State*, 60 Id. 80; *Myers v. State*, 62 Id. 599; *Roberts v. State*, 68 Id. 153; *Green v. State*, 69 Id. 6; *People v. Scoggins*, 37 Cal. 676; *People v. Taing*, 53 Id. 602; *People v. Iams*, 57 Id. 115; *People v. Campbell*, 59 Id. 243; *People v. Tamkin*, 62 Id. 468; *People v. Westlake*, Id. 303; *Hawkins v. State*, 25 Ga. 207; *Peterson v. State*, 50 Id. 142; *Oder v. Commonwealth*, 80 Ky. 32; *State v. Leonard*, 6 La. Ann. 420; *State v. Mullen*, 14 Id. 570; *Turpin v. State*, 55 Md. 462; *Evans v. State*, 44 Miss. 762; *Harris v. State*, 47 Id. 318; *Edwards v. State*, Id. 581; *Holly v. State*, 55 Id. 424; *Kendricks v. State*, Id. 436; *State v. Hays*, 23 Mo. 287; *State v. Harris*, 59 Id. 550; *State v. Brown*, 64 Id. 367; *State v. Alexander*, 66 Id. 148; *State v. Harris*, 73 Id. 287; *State v. Hall*, 9 Nev. 58; *State v. Turpin*, 77 N. C. 473; *Myers v. State*, 33 Tex. 525; *Talbert v. State*, 8 Tex. App. 316; *Sims v. State*, 9 Id. 586; *Thomas v. State*, 11 Id. 315; *United States v. Leighton*, 13 N. W. Rep. 347. In delivering the opinion of the majority of the court in *People v. Scoggins*, 37 Cal. 683, Crockett, J., said: "A person whose life has been threatened by another, who he knows or has reason to believe has armed himself with a deadly weapon for the avowed purpose of taking his life or inflicting a great personal injury upon him, may reasonably infer, when a hostile meeting occurs, that his adversary intends to carry his threats into execution. The previous threats alone, however, unless coupled at the time with an apparent design then and there to carry them into effect, will not justify a deadly assault by the other party. There must be such a demonstration of an immediate intention to execute the threat as to induce a reasonable belief that the party threatened will lose his

life or suffer serious bodily injury unless he immediately defends himself against the attack of his adversary. The philosophy of the law on this point is sufficiently plain. A previous threat alone, and unaccompanied by any immediate demonstration of force at the time of the rencounter, will not justify or excuse an assault, because it may be that the party making the threat has relented or abandoned his purpose, or his courage may have failed, or the threat may have been only idle gasconade, made without any purpose to execute it. On the other hand, if there be at the time such a demonstration of force as would induce a well-founded belief in the mind of a reasonable person that his adversary was on the eve of executing the threat, and that his only means of escape from death or great bodily injury was immediately to defend himself against the impending danger, the law of self-defense would justify him in the use of whatever force was necessary to avert the threatened peril." Threats made by even the most lawless character are not admissible in evidence either to justify or mitigate the offense of killing him, when they are unaccompanied by acts or conduct on his part showing real or apparent danger of their execution: *Oder v. Commonwealth*, 80 Ky. 32. Where the evidence shows that, at the time of the homicide, the deceased made no attempt to execute a threat previously made by him, that he did not seek the difficulty which resulted in his death, and that the accused was the aggressor, the threat will constitute no excuse or justification for the homicide: *State v. Harris*, 73 Mo. 287. Nor will even past attempts to execute threats previously made by the deceased justify a felonious homicide. There must be an actual impending danger to the slayer at the time of the fatal blow, or such a state of facts as is justly calculated to impress upon his mind a reasonable belief of the necessity to take life: *Hughey v. State*, 47 Ala. 97. When the accused was the aggressor, evidence of threats made by the deceased against him is not admissible, unless there was some impending purpose, real or apparent, to carry out such threats: *Myers v. State*, 62 Id. 599. Where the accused is charged with murder, and there is no evidence that the fatal act was committed in self-defense, a threat made by the deceased that he would kill the accused before the latter should marry a certain woman is not admissible in evidence: *Green v. State*, 69 Id. 6. Threats made by the deceased to take the life of a person other than the defendant can not justify the latter in killing the deceased, and the exclusion of evidence of such threats is not error: *Talbert v. State*, 8 Tex. App. 316. And threats by the deceased to kill the prisoner, made several weeks before the homicide, will not mitigate the offense, where the evidence shows that the killing was not necessary in self-defense: *State v. Scott*, 42 Am. Dec. 148.

THREATS WHEN PART OF RES GESTÆ.—All the authorities agree that threats made by the deceased a short time before the homicide, and continued uninterruptedly down to that time, whether communicated to the accused or not, are admissible in evidence as part of the *res gestæ* to explain the defendant's act, and to show whether or not he acted in necessary self-defense: *Carroll v. State*, 23 Ala. 28; *Pitman v. State*, 22 Ark. 354; S. C., *Horr. & Thomp. on Self-defense*, 574; *State v. Sloan*, 47 Mo. 604; *State v. Keene*, 50 Id. 357. Even those courts that have held uncommunicated threats to be generally inadmissible have admitted evidence of such threats when they formed part of the *res gestæ*: *Carroll v. State*, 23 Ala. 28. And in *Dickson v. State*, 39 Ohio St. 73, which was a trial for a homicide caused by a deadly weapon in the hands either of the accused or of his brother, both of whom were engaged in the affray with the deceased, in which the latter first attacked the defendant's brother, there being a conflict in the evidence as to

who struck the fatal blow, evidence of threats of the deceased, which may have referred to the brother, made to a person previous to the attack, though not communicated to the accused or to his brother, was held to be admissible as part of the *res gesta*.

COMMUNICATED THREATS.—Threats made by the deceased against the accused, which had been made known to the latter before the time of the homicide, are admitted for the purpose of showing that the circumstances attending the killing were such as to excite the reasonable fears of the defendant that his life was imperiled, or that he was in danger of serious bodily injury, and thus to justify his act: *Dupree v. State*, 33 Ala. 380; *People v. Arnold*, 15 Cal. 476; *People v. Scoggins*, 37 Id. 676; *People v. Tampkin*, 62 Id. 468; *Howell v. State*, 5 Ga. 48; *Russell v. State*, 11 Tex. App. 288. And some courts hold that communicated threats are admissible without proof of any overt act on the part of the deceased at the time of the homicide: *Jackson v. State*, 6 Baxt. 452; S. C., Horr. & Thomp. on Self-defense, 476; *Pridgen v. State*, 31 Tex. 420; S. C., Horr. & Thomp. on Self-defense, 416; *contra*: *State v. Hays*, 23 Mo. 287; S. C., Horr. & Thomp. on Self-defense, 492. In delivering the opinion of the court in *Keener v. State*, 18 Ga. 194, 228; S. C., Horr. & Thomp. on Self-defense, 539, Lumpkin, J., said, "The true distinction, we apprehend, as to the admissibility of evidence of threats, and one apparently overlooked in many cases, is this: when sought to be introduced by the defendant as a justification for the homicide, and without any overt act, he must show that they have been communicated; otherwise they can furnish no excuse for his conduct; but when offered to prove a substantive fact, namely, the state of feeling entertained by the deceased toward the accused, it is competent testimony, whether a knowledge of the threats be brought home to the defendant or not. I will merely add, that the remoteness or nearness of time, as to threats and declarations pointing to the act subsequently committed, makes no difference as to the competency of the testimony." On a trial for murder, evidence of threats made by the deceased against the accused, and communicated to him before the homicide by a person since deceased, is admissible, not to prove that such threats had been actually made, but that the defendant had heard that they had been made: *Carico v. Commonwealth*, 7 Bush, 124; *State v. Harris*, 76 Mo. 361.

UNCOMMUNICATED THREATS.—It has been decided in some cases that threats made by the deceased, but which were not made known to the accused prior to the homicide, are not admissible in evidence for the purpose of justifying or mitigating the killing: *Carroll v. State*, 58 Am. Dec. 282; *State v. Maloy*, 44 Iowa, 104; *State v. Elliott*, 45 Id. 486. In the last case it is said that the only exception to this rule occurs where violent threats are made by the deceased a short time before the occurrence, and the question arises whether or not the defendant perpetrated the act in self-defense. But the great weight of judicial authority in the more recent decisions of courts, whose opinions are entitled to the highest respect and consideration, is in favor of the admissibility of such uncommunicated threats in the following cases:

1. Where evidence of communicated threats has been already given, for the purpose of corroborating that evidence: *Roberts v. State*, 68 Ala. 156; *Holler v. State*, 37 Ind. 57; S. C., 10 Am. Rep. 74; *Cornelius v. Commonwealth*, 15 B. Mon. 539; *State v. Turpin*, 77 N. C. 473; S. C., 24 Am. Rep. 455; Horr. & Thomp. on Self-defense, 521, note; Whart. on Hom., sec. 695. In *Cornelius v. Commonwealth*, *supra*, the accused on trial for murder proved threats of the deceased to kill him, which threats had been communicated

to him before the killing. He then offered to prove other threats made by the deceased, but which had not been communicated to him. The trial court refused to admit this evidence, but the court of appeals held its exclusion to be error, and Simpson, J., delivering the opinion, said: "We think that this testimony should, under the circumstances in this case, have been admitted. It tended to confirm the other evidence that Hopson had made threats against the prisoner, and to counteract a presumption of fabrication by the witness who gave that testimony. Besides, Hopson's intention to make an attack on the accused was an important matter, as well as the belief of the existence of such an intention on the part of the prisoner."

2. Where the question whether the prisoner or the deceased commenced the encounter which resulted in the homicide is in any manner in doubt, evidence of previous threats made by the deceased against the accused is admissible for the purpose of illustrating or determining who was the first assailant: Whart. on Hom., sec. 695; Whart. Cr. Ev., 9th ed., sec. 757; *Burns v. State*, 49 Ala. 370; *Roberts v. State*, 68 Id. 156; *People v. Arnold*, 15 Cal. 476; *People v. Scoggins*, 37 Id. 676; *People v. Alitire*, 55 Id. 263; *People v. Travis*, 56 Id. 251; *People v. Tamkin*, 62 Id. 468; *State v. Turpin*, 77 N. C. 473; S. C., 24 Am. Rep. 455; *Little v. State*, 6 Baxt. 491; *Wiggins v. People*, 93 U. S. 465. McFarland, J., delivering the opinion of the court in *Little v. State*, 6 Baxt. 493; S. C., Horr. & Thomp. on Self-defense, 487, said: "But in all cases where the acts of the deceased in reference to the fatal meeting are of a doubtful character, then evidence which may tend to show that he sought the meeting or began or provoked the combat is admissible. And in this view, previous threats made by the deceased, though not communicated to the prisoner, may yet tend to show the *animus* of the deceased, and to illustrate his conduct and motives, and in some cases might be important, in the absence of more direct evidence, to show which party began or provoked the fight."

3. Where there is evidence tending to show that the accused began the affray, and that the case was one of self-defense, evidence of uncommunicated threats made by the deceased is admissible to show the *quo animo* with which he advanced to the encounter or provoked the quarrel: *Roberts v. State*, 68 Ala. 156; *State v. Turpin*, 77 N. C. 473; Whart. on Hom., sec. 695; Horr. & Thomp. on Self-defense, 521, note. In the case of *Roberts v. State*, *supra*, it was decided that where a case of self-defense is shown, evidence of uncommunicated threats recently made is admissible for the purpose of showing the *quo animo* of the demonstration or attack by the deceased, and that evidence of uncommunicated threats is also frequently admitted in corroboration of communicated threats which have been admitted, and that where it is doubtful which party commenced the difficulty, evidence of such threats is admissible to show who was probably the aggressor. And Somerville, J., in delivering the opinion in that case, said: "These views as to the admissibility of threats are not in harmony with the former decisions of this court, but are, as we think, in full accord with the true doctrine as established by the more recent cases of the highest courts in this country." The former decisions here referred to, which are thus expressly overruled on this point, are *Powell v. State*, 19 Ala. 577; *Edgar v. State*, 43 Id. 45; *Burns v. State*, 49 Id. 370; and *Rogers v. State*, 62 Id. 170.

4. Where the question in the case is whether or not the attempt to carry out the threats was in fact made, evidence of the threats is admissible, although it is not shown that they came to the knowledge of the accused before the time of the killing: *Holloway v. Commonwealth*, 11 Bush, 344; *State v.*

McNeely, 34 La. Ann. 1022; *Bisfield v. State*, Sup. Ct. Neb., May, 1884, 19 N. W. Rep. 607; *Stokes v. People*, 53 N. Y. 164. In the case last cited, Grover, J., delivering the opinion of the court, said: "The counsel for the accused offered to prove that the deceased, a short time before the occurrence, had made violent threats against him, such as that he 'would beggar him first and then kill him;' 'I go prepared for him all the time; so sure as my name is Jim Fisk, I will kill him;' 'I would kill him as soon as I would a ferocious dog.' This was objected to by the prosecution, and rejected by the court, to which the counsel for the accused excepted. In determining the competency of this testimony, it must be borne in mind that evidence had been given making it a question for the jury whether the case was one of excusable homicide, upon the ground that the act was perpetrated by the accused in defending himself against an attempt by the deceased to murder or inflict some great bodily injury upon him, and the further question whether it was not perpetrated in resisting an attack made upon him by the deceased, from which he had reasonable ground to apprehend a design to murder or inflict upon him some great bodily injury. Evidence of threats made by the deceased, which had been communicated to the accused, was received by the court. Proof of the latter facts was competent, as tending to create a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased, when, in the absence of such threats, such acts and motions would cause no such belief. But why admissible upon this ground? For the reason that threats made would show an attempt to execute them probable when an opportunity occurred, and the more ready belief of the accused would be justified to the precise extent of this probability. But an attempt to execute threats is equally probable when not communicated to the party threatened as when they are so; and when, as in this case, the question is whether the attempt was in fact made, we can see no reason for excluding them in the former that would not be equally cogent for the exclusion of the latter, the latter being admissible only for the reason that the person threatened would the more readily believe himself endangered by the probability of an attempt to execute such threats. Threats to commit the crime for which a person is upon trial are constantly received as evidence against him, as circumstances proper to be considered in determining the question whether he has, in fact, committed the crime, for the reason that the threats indicate an intention to do it, and the existence of this intention creates a probability that he has in fact committed it. Had the deceased, just previous to his going into the hotel where the transaction occurred, declared that he was going there to kill the accused, and that he was prepared to execute this purpose, we think the evidence would have been competent upon the question whether he had in fact made the attempt when that question was litigated. And yet there is in principle no difference between this and the testimony offered and rejected. The difference is only in degree."

Wharton, in his work on homicide, sec. 695, thus discusses the question under consideration: "Undoubtedly it has frequently been held that to make the deceased's threats prior to the encounter admissible, they must be proved to have been brought to the knowledge of the defendant. But it is difficult to understand the reason why an acquaintance by the defendant with the deceased's threats should strengthen the admissibility of such threats. If the defendant knew beforehand that his life was threatened, he should have applied to the law for redress; if he did not know, and was attacked without warning by the deceased, then proof of the deceased's

hostile temper, whether such proof consist of preparations or declarations, is pertinent to show that the attack was made by the deceased. The question whether A. (the defendant) or B. (the deceased) was the aggressor in the fatal collision is to be determined; and if in such case A.'s threats are admissible to prove that A. was the aggressor, B.'s threats, by the same reasoning, are admissible to prove that B. was the aggressor. For the purpose, therefore, in cases of doubt, of showing that the deceased made the attack, and if so, with what motive, his prior declarations, uncommunicated to the defendant, are clearly evidence." And the same learned author, in an article on "Disputed Questions of Criminal Law," contributed to volume 4 of the *Southern Law Review*, p. 263, says: "It may be objected that such evidence is hearsay. To this it may be answered: 1. It is primary; and hearsay when primary is admissible when relevant. The question at issue is, Did the deceased attack the defendant? Self-defense being set up by the defendant in confession and avoidance, to prove an attack by the deceased—to show, in other words, that his object in meeting the defendant was to attack him—the deceased's intention is material. How is this intention to be discovered? If the deceased were alive, we would call him and ask him as to the facts. He is not alive, and the best evidence we can have of an intended attack on his part is his own expressions, whether in word or in deed. If we reject these expressions, then we have no other way of proving a material fact. 2. Whenever the condition of a party's mind is at issue, then expressions of the party are admissible when tending to throw light upon such condition." From the foregoing quotations it will be seen that, after some fluctuation and contradiction in the decisions on the subject of the admissibility of uncommunicated threats, the doctrines enunciated above may now be considered as firmly established.

THE PRINCIPAL CASE IS CITED in several of the cases mentioned in the foregoing note, and is included by Messrs. Horrigan & Thompson in their collection of cases on the law of self-defense, page 282. It is also cited to the point that apparent danger will justify self-defense in the following cases: *Hopkinson v. People*, 18 Ill. 266; *Schnier v. People*, 23 Id. 28; *Maher v. People*, 24 Id. 243; *Adams v. People*, 47 Id. 379; *Davison v. People*, 90 Id. 231.

HOMICIDE DEEMED JUSTIFIABLE ON GROUND OF SELF-DEFENSE, WHEN AND WHEN NOT: See *Shorter v. People*, 51 Am. Dec. 286, note 295, where other cases are collected.

CREWS v. BLEAKLEY.

[16 ILLINOIS, 21.]

EVIDENCE TENDING TO ESTABLISH PAYMENT may be given under the general issue.

ACTION for work and labor. The opinion states the case.

S. Beecher, for the appellant.

N. L. Freeman, for the appellee.

By Court, CATON, J. This action was brought by the plaintiff below for the work and labor of her son. The evidence shows

that the son of the plaintiff lived with and served the defendant about two years; that he was sent to school by the defendant about six months during the time; that he was sick several times, and nursed by the defendant when unwell; that he was a member of the defendant's family, and treated by him like one of his own children; and that he was a good boy, and could earn from five to eight dollars per month during the "cropping season." When the boy went to live with the defendant, he told the plaintiff he would give her what the boy was worth. No terms were agreed upon; but the plaintiff remarked at the time that she and the defendant would fix it afterwards. Subsequently the defendant proposed that if the plaintiff wished to hire the boy out by the month, to give her five dollars per month during the "cropping season," but the plaintiff replied that she wanted the boy to go back to the defendant and live, as he had done. It is unnecessary now to inquire whether this evidence shows that it was the intention of the parties that wages were to be paid for the services of the boy, or whether it was their intention that he should be adopted into and form a part of the defendant's family, to be provided for, taken care of, and schooled by him, as a compensation for his services; for in either event the court unquestionably should have permitted the defendant to have proved, as he offered to do, that the clothes, boarding, and schooling of the boy were worth as much as his services, what was the condition of the boy's clothing at the time he went to live with the defendant, and also that the defendant furnished him clothes while he was living with him. This evidence would legitimately have tended to establish payment for the services rendered, in the event it should be found that the plaintiff was entitled to wages for those services. Evidence tending to prove payment may be given under the general issue; besides, the action was commenced before a justice of the peace, where no special pleas are required.

The judgment of the circuit court must be reversed and the cause remanded.

Judgment reversed.

PROOF OF PAYMENT UNDER GENERAL ISSUE AND UNDER GENERAL DENIAL. In England, prior to 1833, in actions of *assumpsit* and in actions on the case, proof of payment might be made under the general issue: 1 Ch. Pl., 16th Am. ed., 489; *Hatton v. Morse*, 1 Salk. 394; *Paramour v. Johnson*, 12 Mod. 376; *Bird v. Randall*, 3 Burr. 1345. "In *assumpsit*, before the pleading rules, Hil. T., 4 Wm. IV., almost every matter might be given in evidence under the general issue *non assumpsit*, on the ground, as was said, that as the action is founded on the contract and the injury is the non-performance of it,

evidence which disaffirms the continuing obligation of the contract at the time when the action was commenced goes to the gist of the action:" 1 Ch. Pl., 16th Am. ed., 489. And Lord Mansfield, in delivering the opinion of the court in *Bird v. Randall*, *supra*, said: "But an action on the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and in effect is so; and therefore, such a former recovery, release, or satisfaction need not be pleaded, but may be given in evidence. For whatever will in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery may, in this action, be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only." This rule of the common law was also in force in this country until altered or modified by statute: *Baylies v. Fettyplace*, 7 Mass. 325; *Falconer v. Smith*, 18 Pa. St. 130; *Fuller v. Hershey*, 90 Id. 363; *Kassing v. International Bank*, 74 Ill. 16; *Jeffrey v. Schlasinger*, Hempst. 12; *Hanna v. Mills*, 34 Am. Dec. 216. Under the general issue in debt, it seems that evidence of payment was also admitted: *Fidler v. Hershey*, 90 Pa. St. 363; *McKyring v. Bull*, 16 N. Y. 297, 302. In the former of these cases, Trunkey, J., delivering the opinion of the court, said: "The plea of *nil debet* puts in issue the existence of the debt claimed, and anything may be given in evidence under it which shows there is nothing due at the time of pleading, as payment, release, or other matter in discharge. Formerly this rule was in force in England, and still is in Pennsylvania." The rule, adopted in 1833, Hil. T., 4 Wm. IV., limited the effect of the plea of the general issue, and required all matters in confession and avoidance to be specially pleaded: See 1 Ch. Pl., 16th Am. ed., 754. The effect of these rules is thus stated by Selden, J., in *McKyring v. Bull*, 16 N. Y. 302: "Thus the whole practice, which had continued for centuries, of receiving evidence of payment, and other special defenses, under the plea of *nil debet* and *non assumptit*, was swept away."

PAYMENT MADE AFTER COMMENCEMENT OF ACTION may be given in evidence for the purpose of reducing the damages, but is not admissible to defeat the action: *McMillian v. Wallace*, 3 Stew. 185; *Pemigewasset Bank v. Brackett*, 4 N. H. 557; *Williams v. Tappan*, 23 Id. 385.

PROOF OF PARTIAL PAYMENT MAY BE GIVEN UNDER GENERAL ISSUE IN ASSUMPSIT: *Pierce v. Tyler*, 1 Tyler, 140; *Worthen v. Dickey*, 54 Vt. 277.

PROOF OF PAYMENT UNDER GENERAL DENIAL.—The supreme court of California has decided "that a general denial has the same influence as the general issue at common law:" *Gavin v. Annan*, 2 Cal. 494, 497. And Heydenfeldt, J., delivering the opinion of the court in *McLaren v. Spalding*, Id. 513, said: "It seems clear to me from this review that the statute could not have more distinctly provided for the use in pleading of the general issues at common law, even if it had indicated their propriety by using the common-law terms by which they are designated. It did not do so, because its object is that parties shall not be confined to the particular form of language belonging to the various general issues respectively, but allowing a general denial in plain language to be equivalent in its effect to any general issue which at common law would be necessary to meet the subject-matter of the action. Nor has this sensible reform altered the rule in relation to the admissibility of various defenses under these pleas. The effect of a general denial by virtue of the code of practice is the same in regard to the admission of defenses under it as is that of the plea of *non assumptit* by the old practice. Any matter may be given in evidence which shows that the plaintiff never had any cause of action, and most matters even in discharge

of the action. And under the general issue *nil debet*, the defendant may give in evidence eviction, payment, release, and various other matters of discharge." See also *Frish v. Caler*, 21 Cal. 71; *Fairchild v. Amsbaugh*, 22 Id. 572, 575; *Dawson v. Eggenhoff*, 43 Id. 395, 397; *Wetmore v. San Francisco*, 44 Id. 294. A different view of this question seems to prevail in most if not all of those states in which the reformed procedure has been adopted. The general issue at common law is held to be inadmissible under the Arkansas code, unless it in itself amounts to a specific denial of some material allegation: *McIlroy v. Buckner*, 35 Ark. 525. Under the Iowa practice, there is nothing corresponding to the general issue at common law, and nothing is admissible under a general denial, unless it tends to negative some fact essential to be proved under the pleading denied: *Scott v. Morse*, 54 Iowa, 732. Under the Georgia code, all matters in satisfaction or avoidance must be specially pleaded: *Jones v. Lavender*, 55 Ga. 228. In Indiana, the defendant can not avail himself of the defense of payment without pleading it: *Hubler v. Pullen*, 9 Ind. 273. And where the only issue in an action for work and labor is a general denial, evidence of payment is not admissible: *Baker v. Kistler*, 13 Id. 63. In Kansas, proof of payment is not admissible under a general denial, where the complaint sets out the facts upon which the indebtedness is founded: *Stevens v. Thompson*, 5 Kan. 305. In Wisconsin, in an action on a note, proof of payment is not admissible under a general denial: *Martin v. Pugh*, 23 Wis. 184.

Professor Pomeroy, in discussing the question under consideration, says: "It is the settled rule, except perhaps in California, that when the complaint or petition is in the customary form, not averring the fact of non-payment in so distinct a manner that an issue would be raised upon it by a denial, the defense of payment is new matter, and must be pleaded as such:" Pomeroy on Rem., sec. 700; *McIlroy v. Buckner*, 35 Ark. 555; *Jones v. Lavender*, 55 Ga. 228; *Hubler v. Pullen*, 9 Ind. 273; *Baker v. Kistler*, 13 Id. 63; *Scott v. Morse*, 54 Iowa, 732; *Stevens v. Thompson*, 5 Kan. 305; *McKyring v. Bull*, 16 N. Y. 297; *Morrell v. Irving Fire Ins. Co.*, 33 Id. 429; *Texier v. Gouin*, 5 Duer, 389; *Hall v. Olney*, 65 Barb. 27; *Martin v. Pugh*, 23 Wis. 184.

But if the complaint alleges non-payment in such a manner that a traverse of its averments is equivalent to an allegation of payment, then a general denial raises an issue under which the defense of payment may be proved: Pomeroy on Rem., sec. 700; *Marley v. Smith*, 4 Kan. 183; *Quin v. Lloyd*, 41 N. Y. 349; *White v. Smith*, 46 Id. 418; *McElwee v. Hutchinson*, 10 S. C. 436; *contra: Bassett v. Lederer*, 1 Hun, 274. In the case last cited, McIver, A. J., delivering the opinion of the court, said: "There can be no doubt but that, as a general rule, the defense of payment to an action on a note can not be given in evidence under a general denial. This rule, however, only applies where the complaint is in the usual form, stating only such facts as are necessary to constitute a cause of action. If, however, other facts are stated, a denial of which raises an issue as to whether there has been a partial or total payment, then the defense of payment may be given in evidence under a general denial." And Kingman, C. J., in delivering the opinion in *Marley v. Smith*, 4 Kan. 186, discussing this question, said: "The answer denies each and every allegation of the petition. Under these pleadings it is obvious that neither proof of set-off or counter-claim can be admitted. And if the question was free from embarrassment growing out of decisions and commentaries, it would seem equally obvious that payment could be proven under the issue as made up. The petition avers that at a certain time the defendant was indebted to the plaintiff, and that the indebtedness still con-

tinues. This is denied, and to sustain the denial, proof of payment is offered. Can any fact be plainer than that if payment was made, the indebtedness does not last? Can a man owe a debt that he has paid? Can he be indebted when he has extinguished the indebtedness by payment? There can be but one answer to these questions, and this answer shows that, logically and without any straining upon such a petition and answer, the proof of payment could be legitimately made."

The case of *Quin v. Lloyd*, 41 N. Y. 349, was an action brought to recover for work and labor. The complaint alleged the agreement, the performance of the services for a stipulated price, and that on a certain day the defendant "was indebted to the plaintiff in the sum of three hundred and thirty-three dollars, being the balance remaining due after sundry payments made by the defendant to the plaintiff." The answer was a general denial, and the court of appeals held that the defendant ought to have been permitted to prove payments made by him on account. Lott, J., in delivering his opinion, said: "The denial involved an issue upon all the facts above stated and denied, not only of the agreement and of the time which the plaintiff worked, but necessarily of the different payments made, so as to determine what in fact was the balance of the defendant's debt. That balance could not be ascertained without an inquiry as to the amount of the payments, as well as the value of the work performed." And Woodruff, J., delivering a concurring opinion, said: "It was wholly unnecessary for the plaintiff to sue for a balance as such. He might allege the contract, performance on his part, and claim payment, and then, if the defendant desired to prove payment, he must allege payment in his answer. But where the plaintiff sues for a balance, he voluntarily invites examination into the amount of the indebtedness, and the extent of the reduction thereof by payment."

PHINNEY v. BALDWIN.

[16 ILLINOIS, 108.]

NOTE CONTINUES TO BEAR INTEREST AT RATE STIPULATED THEREIN so long as the principal remains unpaid.

CONTRACT VALID IN STATE WHERE MADE IS ENFORCEABLE IN ANOTHER STATE, unless it is clearly contrary to good morals, or repugnant to the policy or positive institutions of that state.

ASSUMPSIT. The opinion states the case.

Williams and Lawrence, for the plaintiff in error.

Wheat and Grover, for the defendant in error.

By Court, TREAT, C. J. Phinney brought an action of *assumpsit* against Baldwin, and declared upon the following note:

"\$200. BRIGHTON, CAL., October 3, 1850.

"Thirty days after date, I promise to pay to the order of Harvey Phinney two hundred dollars, for value received, with interest from date at five per cent per month.

"E. D. BALDWIN."

The pleas were *non assumpsit* and payment. On the trial, the

plaintiff introduced the note described in the declaration, and proved that the legal rate of interest in California, in the absence of any agreement of the parties, was ten per cent per annum; but that it was lawful for parties to contract for any higher or different rate of interest. The note was credited with fifty dollars paid on the fourth of October, 1851; and with one hundred dollars paid on the twenty-ninth of the same month. The court entered judgment against the defendant for ninety-two dollars and forty-four cents, and the plaintiff sued out a writ of error.

There can be no reasonable doubt as to the true construction of the instrument. It is a promise to pay two hundred dollars in thirty days, and interest thereon from date at the rate of five per cent per month. The note continues to bear that rate of interest so long as the principal remains unpaid. The maker undertakes to pay interest at that rate, while he withholds payment of the principal. That is the compensation which the payee is to receive for the forbearance of the money. We entertain no doubt that this was the real understanding of the parties. It was not their intention that this rate of interest should cease on the maturity of the note, and that it should thereafter only bear interest at the rate of ten per cent per annum. Such a construction could not be put upon the instrument without doing violence to the intentions of the parties. It would in effect be making a new contract for them. They evidently contemplated but one rate of interest, and that rate was to continue until payment should be made. The plaintiff was entitled to recover interest on the principal at the rate of sixty per cent per annum from the date of the note until the rendition of judgment. And the circuit judge erred in not making this the basis for assessing the damages. The agreement to pay this rate of interest was valid by the law of California, and the courts of this state are bound to enforce it. A contract that is valid in the state where it is made is to be recognized and enforced in another state, unless it is clearly contrary to good morals, or repugnant to the policy or positive institutions of that state. This contract is not obnoxious to any such objection. As the rate of interest is specified in the note, and is according to the law of the place where the instrument was executed, the payee is entitled to recover the stipulated rate of interest, that being of the substance of the contract.

The judgment is reversed and the cause remanded.

Judgment reversed.

MONEY DEMANDS DRAW INTEREST AFTER MATURITY at the rate specified in the written contract: *Etnyre v. McDaniel*, 28 Ill. 203; *Union Institution for Savings v. Boston*, 129 Mass. 91; *Ohio v. Frank*, 103 U. S. 698, all citing the principal case. See also *Kohler v. Smith*, 56 Am. Dec. 369, and note 370, where other cases are collected.

LAW OF PLACE OF MAKING CONTRACT, HOW FAR GOVERNS: See *May v. Breed*, 54 Am. Dec. 700, note 715, where other cases are collected. Contracts made in other states will be enforced in Illinois, although they do not conform to its laws, if they are in accordance with the laws of the state where they are executed: *Mumford v. Cauty*, 50 Ill. 376, citing the principal case. To ascertain the validity of a contract, we must look to the law of the place where it was entered into, and not to the law of the place where it is to be enforced: *Rosandree v. Baker*, 52 Id. 244, citing the principal case.

ADAMS v. KING.

[16 ILLINOIS, 169.]

PERSON TO WHOM BILL OF EXCHANGE OR PROMISSORY NOTE IS MADE PAYABLE should be specified; but this may be done without inserting his name. And if the payee be so certainly described or referred to as to be easily ascertained by allegations and proofs, the promise will be valid.

ALLEGATIONS IN DECLARATION ON PROMISSORY NOTE, THAT PLAINTIFFS WERE ADMINISTRATORS of a certain person deceased at the time the promise was made, and that it was made to them personally by that name and description, are traversable allegations, and must be denied under oath.

ASSUMPSIT. The opinion states the case.

J. S. Bailey, for the appellants.

Williams and Lawrence, for the appellees.

By Court, SCATES, J. The error assigned is for overruling a demurrer to the declaration. It was in *assumpsit*, and contained two counts; each upon a promissory note, made by plaintiffs in error to "the administrators of Abner Chase, deceased," for four hundred dollars, with six per cent interest from date, for value received, dated the seventh of March, 1853, one payable in six and the other in twelve months.

The declaration further avers that defendants were the administrators of Abner Chase on the seventh of March, 1853, with profert of the letters of administration, dated the nineteenth of December, 1851; and that the notes were executed, delivered, and made payable to the defendants by the name and style of the "administrators of Abner Chase, deceased."

The objections taken are, that this is not a promissory note;

that there is no payee, or that the payee is uncertain; or if there be a payee, it is a promise to defendants in their representative character, and they should sue as administrators.

We do not assent to either objection. The general rule in relation to bills of exchange and promissory notes requires that the person to whom they are made payable shall be specified: Chit. Bills, 156. But this may be done without inserting the name; for that is certain which may be rendered certain; and if the payee be so certainly described or referred to as to be easily ascertained by allegations and proofs, the promise will be valid. The declaration avers that plaintiffs were "administrators of Abner Chase, deceased," at the time these promises were made; and that they were made to them personally by that designation and description. These are traversable allegations, and must be denied under oath by our statute, as settled in *Frye v. Jenkins*, 15 Ill. 339. The same rule was applied in ascertaining the promisors in *Dwight v. Newell*, Id. 333. They have not sued as administrators, and it was therefore unnecessary to aver that they were administrators at the time this action was commenced. The demurrer admits the promise to be to defendants personally, by a descriptive phraseology.

The case referred to, *Smith v. Bridges*, Breese, 2, was ruled upon the ground that there was no payee; and the case of *Coles v. County of Madison*, Id. 155, was upon the same ground. The case of *Berry v. Hawby*, 1 Scam. 468, was put upon the ground of a want of power in a county treasurer to take under such a promise. The cases in 15 Illinois, *supra*, are decisive of this in principle.

The judgment must therefore be affirmed.

Judgment affirmed.

PROMISSORY NOTE IN WHICH PAYEE IS REFERRED TO BY DESCRIPTION may be sued on by him in his individual name as a promissory note: *Davis v. Garr*, 55 Am. Dec. 387, note 391, where other cases are collected.

CHICAGO AND MISSISSIPPI R. R. Co. v. PATCHIN.

[16 ILLINOIS, 198.]

IN ILLINOIS RAILROAD COMPANY IS NOT BOUND TO FENCE ITS ROAD, nor, on the other hand, is the owner of cattle compelled to prevent them from running at large.

LAW EXACTS FROM RAILROAD COMPANIES, AS TO PASSENGERS AND FREIGHTS, HIGHEST DILIGENCE, skill, and care, and for the want of them measures
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their liability for slight negligence. But the party injured must be free from such negligence as contributes to the injury complained of.

RIGHT OF RAILROAD COMPANY TO LAND UPON WHICH THEIR ROAD IS BUILT is an absolute ownership in fee for railroad purposes. If it be allowable to graze cattle on such land, it is not a matter of right, but at most an immunity, not a privilege.

PARTY PERMITTING HIS CATTLE TO BE ON RAILROAD TRACK is not blameless.

MERE PROOF OF KILLING OF CATTLE ON RAILROAD TRACK is not sufficient to charge the company with negligence. Wanton, willful, or gross negligence on the part of the company must be shown in order to make it liable.

CASE for negligence. The opinion states the facts.

J. M. Palmer, for the appellants.

D. A. Smith, for the appellee.

By Court, **SCATES, J.** In case for negligence, defendant recovered seventy-seven dollars and fifty cents for killing seven hogs and one cow. The declaration charges that plaintiffs, by their servants, "so negligently and unskillfully managed and controlled said trains and locomotives, and so ignorantly, negligently, and carelessly drove, guided, and governed the same, that said locomotives and trains of cars, for want of good and sufficient care and management thereof as aforesaid, then and there struck," etc.

At the instance of defendant, the court instructed: "That there is no law that requires the Chicago and Mississippi Railroad Company to fence their road, nor is there any law that makes it incumbent on the owners of stock to prevent them from running at large. If stock running at large should be found upon the railroad track, it is the duty of those having charge of the locomotives and trains to use such care and means as may be in their power, by the proper management of their trains, to prevent accidents; and any such omission on the part of the agents and servants having the management of the trains is negligence, and any injury resulting therefrom will render the company liable for such damages as the injured party may sustain. Whenever, however, a plaintiff charges negligence on the part of the agents or servants of the company he must prove such negligence as charged in the declaration."

The court also refused the following instructions asked by the plaintiffs: "1. That if they believe from the evidence that the stock of plaintiff were roaming at large upon open, uninclosed land belonging to some other person than the plaintiff, at the

time they were killed, the plaintiff can not recover in this suit; 2. That if from the evidence they believe that the cars of defendants (plaintiffs here) at the time of killing the stock, were running at the usual speed, upon the usual track, they are not liable for the stock killed; 3. That unless they believe from the evidence that the stock sued for were killed by the cars of defendants while on some crossing over the road of defendants, they will find a verdict for defendants."

The testimony clearly shows the killing, and that the stock was on the track, in a flat, open prairie, whence there was no lane or crossing; that defendant owned land and lived near the railroad, but did not own the tracts on either side of the road where the stock was killed. Nothing hindered the engineers from seeing the stock, and that no alarm was given by whistle, speed of train was not checked, nor does it appear that any attempt or effort was made to do so. Stock was killed at different times, by different trains, all in day-time. Witness thought the freight-train that killed the cow rather increased speed. Such is the case.

What, by law, are the rights and liabilities of the parties? This must depend, on the part of the defendant, upon that degree of protection the law affords for his stock, while in a position of technical trespass, if any; and from what degree of negligence, if any, as well as willfulness.

There would be but little difficulty in charging the plaintiffs for willful injuries and gross negligence, if the parties to the record were alone interested and involved in the principle governing the case, nor even if the safety and preservation of goods on freight alone were concerned. But when we take into account and consideration the irreparable damage to life from casualties to trains from running over stock, and that the imminence of hazard to passengers is increased in proportion to the protection given to the passive negligence of stock-owners in knowingly permitting their stock to frequent, stand, graze, and lie upon the track, the rule becomes much more difficult of adjustment. The court instructed, and very properly, in accordance with decisions of this court, that neither party was bound to fence his road or his stock: *Alton & Sangamon R. R. Co. v. Baugh*, 14 Ill. 211; *Seeley v. Peters*, 5 Gilm. 138; and in the latter case, that the common law in relation to inclosing and confining and restraining stock within such inclosures is inapplicable, and not in force in this state. Although made by a divided court, against a very learned and able dissenting opin-

ion, we are not disposed to question its authority. The same modification of the common law had been recognized the year before in Pennsylvania, in *Knight v. Abert*, 6 Pa. St. 472 [47 Am. Dec. 478], and confirmed in 1852 in *New York & Erie R. R. Co. v. Skinner*, 19 Id. 301 [57 Am. Dec. 654].

The defendant may therefore lawfully permit his stock to run upon the range and browse on uninclosed woodlands, for which, at most, he is but a technical trespasser. What further rights may he claim of protection to, them while in the enjoyment of this *quasi* permissive easement, whether it extends to a grazing privilege of highways, but more especially to that class used as railways? We may readily admit that there is a protection, incident to and accompanying it, against all willful and malicious mischief and injury.

The lowest degree of protection above these is that which requires common care, skill, or diligence, and charges a party only for gross negligence. Is the defendant under the facts in this case entitled to this degree of protection? If so, is the instruction given proper? and do the proofs raise a liability under it? The courts have laid down the rule as requiring plaintiffs "to use such care and means as may be in their power, by the proper management of their trains, to prevent accidents;" and "any such omission is negligence, and any injury resulting therefrom will render the company liable for such damages as the injured party may sustain." The instruction is general, and does not define the degree of care required, nor the degree of negligence for which they are liable. It would as well apply to the strictest as to common or ordinary care, and to slight as to gross negligence. The rule laid down is true as a proposition or rule of law, but in its higher degrees of care and negligence, and its plastic variableness of meaning, can have no just application to this case. The evidence clearly brings the case within so general, indefinite a rule; but it is much more questionable under the lowest degrees of care and negligence, especially in relation to some if not all of the hogs; for it does not appear that signals were not given or efforts used to prevent running over them, as was shown in relation to the cow.

The instructions asked by the plaintiffs here are equally involved in and will be settled by a proper rule defining the degree of care required and culpable negligence.

While the courts will as to passengers and freights apply the enforcement of the strictest diligence, skill, and care, and for want of them measure the liability for slight negligence, yet the

injured party must be free from such negligence as contributes to the injury complained of: *Galena & Chicago Union R. R. Co. v. Yarwood*, 15 Ill. 475; *Galena & Chicago Union R. R. Co. v. Loomis*, 13 Id. 551 [56 Am. Dec. 471]; *Aurora Branch R. R. Co. v. Grimes*, Id. 586; *Knight v. Abert*, *supra*; *New York & Erie R. R. Co. v. Skinner*, *supra*; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 264 [49 Am. Dec. 239]; S. C., 4 N. Y. 357; *Clark v. Syracuse & Utica R. R. Co.*, 11 Barb. 114; *Talmadge v. Rensselaer & Saratoga R. R. Co.*, 13 Id. 496; *Marsh v. New York & Erie R. R. Co.*, 14 Id. 365.

These decisions concur in this as a general rule, and are sustained by more than fifty decisions referred to in them, made upon a great variety of circumstances. An exception to the rule allowed in *Lynch v. Nurdin*, 1 Ad. & El., N. S., 29; S. C., 41 Eng. Com. L. 422, in favor of a plaintiff, a child of seven years old, who received an injury by getting into the defendant's cart while it was carelessly left in the street, was not sanctioned or allowed in principle in *Hartfield v. Roper*, 21 Wend. 615, and *Brown v. Maxwell*, 6 Hill, 592; and these are cited with approbation in *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 359; S. C., 5 Denio, 264 [49 Am. Dec. 239].

Was there, then, any negligence on the part of defendant? I presume the right to the land upon which railroads are built is not strictly analogous to the easement of the public in highways, leaving the fee in the owner of the soil, but is an absolute ownership in fee for railroad purposes, and that characteristic or incident of a public highway has relation alone to the business of the company as common carriers upon it. If it be excusable as a trespass to browse or graze upon another's lands, it is not matter of right; it is at most an immunity, not a privilege: *Knight v. Abert*, *supra*. The owner of an uninclosed woodland, in which he had dug an ore-pit, was not therefore liable for an ox which had wandered into the woodland and fallen into the pit.

This application of the rule was again made, where damages were claimed for killing a cow on the railroad track. The train was running at its usual speed, the usual signals were made, brakes put on, and engine reversed. The cow run at large, had been driven off the track once or twice before, and the owner notified: *New York & Erie R. R. Co. v. Skinner*, *supra*. The same rule is very fully adopted in New York, and put upon the same ground, that defendant is not blameless in permitting his cattle to be upon the railroad track: See *Tonawanda R. R. Co. v.*

Munger, supra; *Clark v. Syracuse & Utica R. R. Co.*, 11 Barb. 114; *Tilmage v. Rensselaer & Saratoga R. R. Co.*, 13 Id. 496; *Marsh v. New York & Erie R. R. Co.*, 14 Id. 365; *Williams v. Michigan Central R. R. Co.*, 2 Mich. 261 [55 Am. Dec. 259]; *contra*: see *Kerubaker v. Cleveland etc. R. R. Co.*, Am. Law Reg. April, 1855.

These roads, with the mode of operating them, would become dangerous to travel, and almost useless to their owners and the communities, if the immunities of herds of wandering, loitering cattle upon them can be put upon the footing of protected privileges. We do not feel called upon to close our eyes to the carelessness of owners if apprised of these habits.

Nor should we feel that a case of negligence on the part of the railroad had been made out by showing simply the killing of the stock. Railroads may and ought to be liable for malicious mischief or willful injuries; nor should the scrutiny be too critical in cases of convictions for that gross negligence which indicates the absence of the lowest degree of care or attention: *Wynn v. Allard*, 5 Watts & S. 524; such reckless conduct might render the company liable.

Railroads may not omit all care, prudence, or skill, and ground themselves upon an immunity from all responsibility, because they are lawfully pursuing their own business upon their own land. They are ever under the strictest duty of care, and liable for slight neglect, while there are passengers or freights to be endangered, by experiments in running on stock. But even without this, they may not with impunity, wantonly or willfully, nor with such total or gross negligence as evidences willfulness, run upon and injure persons or stock trespassing upon the road.

The proofs of negligence offered are, that the whistle was not sounded, nor speed of train checked, but apparently increased, when the cow was killed. As to different hogs, an omission to sound the whistle, without any particular fact as to omissions of other means; but when one hog was killed, there is no testimony save the killing without slackening speed; and in each instance that the road was level, in open prairie, and stock might have been seen. Did the engineer or other proper person on the lookout see this stock? If so, when? Was it in time and at a distance that signals would be available or the train stopped? If so, what should have been done? and what was neglected? Speed in the transit and punctuality in arrivals and connections are desirable, are required in this mode of conveyance.

They are lawful. Speed may be regulated by the companies to suit the times and the places. Trains running at high speed can not be suddenly stopped, nor will the same means effect it within the same distance. It must depend more or less upon the condition of the rail, the grade, the weight of train, and rate of speed. A casual spectator may possess little knowledge of the adequacy of the means in particular cases.

When such obstructions as cattle, which may be thrown from the track, are discovered too near to avoid collision by stopping the train, it has been said, and with a high degree of probability, that the greater the speed, the greater the safety to the train in the collision. Such may have been the necessities in this case with the cow. The increased speed in this case may have a double solution, as care for the safety of the train, for which the highest degree of care was required, or as evidence of wantonness or willfulness.

The defendant's instruction is too broad and general, embracing higher degrees of care than the law will require for its protection to stock in this condition. The plaintiffs admit none, except at crossings, or by implication on defendant's own land, which can not be, I conceive, on the railroad which belongs to them.

The true medium in this case is between and would embrace wanton or willful and gross negligence.

Judgment reversed and cause remanded for new trial.

CATON, J. I concur in the judgment and rule laid down in this case.

Judgment reversed.

LIABILITY OF RAILROAD COMPANY FOR KILLING ANIMALS ON ITS TRACK: See *Louisville & F. R. R. Co. v. Milton*, 58 Am. Dec. 647, note 653, where other cases are collected. Even where the company is not bound to fence its road, it is liable for gross, wanton, or willful negligence in killing stock on its road: *Galena & C. U. R. R. Co. v. Jacobs*, 20 Ill. 488; *Illinois Central R. R. Co. v. Phelps*, 29 Id. 448; *Headen v. Rust*, 39 Id. 192; *Toledo, W. & W. R. R. Co. v. Fergusson*, 42 Id. 451, all citing the principal case. See also *Jackson v. Rutland & B. R. R. Co.*, 60 Am. Dec. 246, and note. And it is liable for gross or willful negligence although the animals killed were improperly on the track: *Illinois Central R. R. Co. v. Wren*, 43 Ill. 80, citing the principal case; *Jackson v. Rutland & B. R. R. Co.*, 60 Am. Dec. 246, and note, where other cases are collected. But where the plaintiff was clearly negligent, the company is only liable for gross negligence, which implies willful injury: *Illinois Central R. R. Co. v. Goodwin*, 30 Ill. 119, citing the principal case. And a railroad company is not liable for want of ordinary care and diligence in running its trains, whereby stock upon its road is killed, but only for wanton.

gross, or willful negligence: *Illinois Central R. R. Co. v. Middlenorth*, 46 Id. 498, citing the principal case.

RAILROAD COMPANY HAS RIGHT OF EXCLUSIVE OCCUPANCY of the land taken by it for its road: *Jackson v. Rutland & B. R. R. Co.*, 60 Am. Dec. 246; *Williams v. Michigan Central R. R. Co.*, 55 Id. 59.

THE PRINCIPAL CASE IS ALSO CITED in *Edgerton v. Huff*, 26 Ind. 47, in support of the statement that herds of wandering, loitering cattle are not protected privileges on railroads; and in *Bellefontaine Ry Co. v. Hunter*, 33 Id. 362, to the point that the plaintiff can not recover if his negligence contributed to the injury.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

BATES v. PRICKET.

(5 INDIANA, 22.)

UNDATED ASSIGNMENT OF NOTE IS PRESUMED TO HAVE BEEN MADE at the date of the note.

PRESUMPTION, LIKE FACT PROVED, REMAINS AVAILABLE TO PARTY IN WHOSE FAVOR IT ARISES until overcome by opposing evidence.

APPEAL from the Grant circuit court. The opinion states the case.

A. J. Harlan and I. Blackford, for the appellant.

J. Brownlee, for the appellee.

By Court, STUART, J. Debt on an assigned note. The defendant pleaded the general issue with notice of set-off. The set-off consisted of three notes made by the payee of the note sued upon, and indorsed to the defendant Pricket. There was no date to the indorsements.

The only point made below or in this court is that these notes were not admissible as a set-off unless the defendant proved that they were assigned to him before the commencement of the suit. The court below admitted the notes without such proof, and gave judgment for Bates, deducting the set-off. To reverse this judgment, the third clause of section 204, chapter 40, R. S. 1843, and the case of *Hurd v. Earl*, 6 Blackf. 39, are relied upon.

The statutory provision referred to is: "It [the matter of set-off] must have existed at the time of the commencement of the suit, and must then have belonged to the defendant."

The assignments on these notes not being dated, the court

will presume that they were made at the date of the notes: *Ewing v. Sills*, 1 Ind. 125. The dates of the notes are all prior to the commencement of the suit. The set-off is therefore within the foregoing statutory provision. A presumption, like a fact proved, remains available to the party in whose favor it arises until overcome by opposing evidence. *Hurd v. Earl*, *supra*, contains nothing favorable to the plaintiff's view of the case. It rather, on the contrary, goes to show that the proof of fraud, and by analogy the assignment of the set-off after the commencement of the suit, unless it appear otherwise in the record, as, for instance, by the date of the assignment itself, is devolved on the plaintiff.

Nor do we see any mischief resulting from the rule which a prompt notice of the assignment to the maker of the note will not obviate.

The judgment is affirmed, with costs.

UNDATED INDORSEMENT PRESUMED TO HAVE BEEN MADE AT INCEPTION OF NOTE: *Colburn v. Averill*, 50 Am. Dec. 630; before the maturity of the note: *Mobley v. Ryan*, 56 Id. 488. In *Dawson v. Vaughan*, 42 Ind. 397, the principal case is cited to the point that indorsement without date is presumed to have been made at date of note.

PRESUMPTION REMAINS AVAILABLE UNTIL OVERCOME BY OPPOSING EVIDENCE or broken in upon by a countervailing presumption. The principal case is cited to this point in *Adams v. State*, 87 Ind. 576; see *Thompson v. Porter*, 53 Am. Dec. 653.

GRANT v. LEXINGTON FIRE, LIFE, AND MARINE INSURANCE COMPANY.

[5 INDIANA, 23.]

INSURANCE COMPANY CAN NOT TAKE ADVANTAGE OF FAILURE TO BRING ACTION FOR LOSS WITHIN TIME STIPULATED in the policy when the delay is mainly caused by hopes of amicable adjustment held out by the company.

INSURANCE POLICIES ARE LIBERALLY CONSTRUED IN FAVOR OF ASSURED, and exceptions therein are strictly construed against the underwriter.

TERMINATION OF VOYAGE FROM L. TO N., during which, and eight days thereafter, a cargo of hay is insured, is N., the place of landing and discharging the cargo, and not a neighboring but separate municipality, though the latter is the usual hay-market where sales of hay are negotiated; and the risk is not terminated by a delay of more than eight days at the latter place.

UNDERWRITER IS BOUND TO KNOW NATURE AND PECULIAR CIRCUMSTANCES OF BRANCH OF TRADE to which policy relates.

DISCHARGING NUMBER OF HANDS EMPLOYED ON FLAT BOAT CONVEYING INSURED CARGO before termination of voyage according to usage is not in contravention of a condition in the policy that the boat should be manned by a competent number of hands. The insurers are bound to know the usage, and evidence as to this is admissible.

STIPULATION IN INSURANCE POLICY THAT BOATS CONVEYING INSURED CARGO SHALL BE MANNED with a specified number of hands is an executory stipulation or promissory warranty.

EXECUTORY STIPULATION OR PROMISSORY WARRANTY INSERTED IN INSURANCE POLICY is a binding condition on the insured and requires strict performance, and the breach of it, whether the thing warranted was material or not, renders the policy void from its inception.

COOK IS COMPETENT HAND WITHIN MEANING OF STIPULATION IN INSURANCE POLICY requiring boats to be manned by a certain number of competent hands.

STIPULATION IN POLICY OF INSURANCE ON CARGO OF FLAT BOAT that company shall not be liable for loss arising from specified causes, "nor in any case if towed by a steamboat," discharges the company only as to any loss accruing from such towing by steamer.

ERROR to the Dearborn circuit court. Among the stipulations in the policy upon which the company relied was one that "all claims under this policy are debarred unless prosecuted within one year from the date of the loss." The case is otherwise sufficiently stated in the opinion.

D. Macy and S. H. Spooner, for the plaintiffs in error.

P. L. Spooner and B. J. Spooner, for the defendants in error.

By Court, STUART, J. *Assumpsit* on a policy of insurance on two flat boats loaded with hay, owned by Grant & Walters, and bound from Lawrenceburgh to New Orleans. Each boat contained ninety-five tons. The hay was worth two thousand five hundred and fifty dollars. The defendant insured the whole cargo on one boat and fifty tons on the other. The amount insured is valued in the policy at two thousand one hundred and seventy-five dollars; premium paid, one hundred and eight dollars and seventy-five cents. The defense, consisting of the general issue, and a special plea of limitation leading to an issue of fact, raises no question on the pleadings for our consideration. The trial by jury resulted in a verdict and judgment in favor of the insurance company.

The risk taken was for the voyage to New Orleans, and eight days thereafter. Among the conditions, it was stipulated that the boats should be manned with a competent number of hands; and that it might be lawful for them to touch at intermediate points, with the privilege of coasting and transacting any law-

ful business connected with the voyage, provided the delays caused thereby should not exceed thirty days in all.

There is a further stipulation in the policy in these words: "And it is hereby agreed that this insurance company is not liable for loss or damage arising from or caused by the said flat boats being unduly laden, nor for loss or damage during any time in which the said flat boats may be lashed or fastened to any other boat, either floating or landing therewith (except in the Ohio or Mississippi rivers), nor in any case if towed by a steamboat, or if more than two boats are lashed or fastened together." These cover the only points material to be considered in the present case.

The evidence is made part of the record. It appears that the boats reached Freeport, three miles above New Orleans, on the twenty-fourth of June, 1846. There, three days after landing, all the hands but two were paid off and discharged. About the first of July, 1846, one of the boats was towed down to the flat-boat landing at New Orleans by a steamer; the other still lay at Freeport. The object of hay-boats stopping of Freeport was to give time to make sale. At the flat-boat wharf at New Orleans, it appears they can only lie four days, and then are compelled to sell. On the evening of the third of July, 1846, a violent storm came on, which destroyed both boats. The witnesses all agree that a removal of the hay from the boats during the storm would have been unavailing, even had it been possible, for that the torrents of rain falling at the time would have been equally destructive to the cargo.

The witnesses also agree that by means of pumps, etc., great exertions were made to save the boats; but that such was the violence of the storm that all reasonable exertions were in a great measure fruitless. One of the witnesses says that after the landing at Freeport the same number of hands is not necessary; that hay-boats stop there to avoid paying wharfage; that such articles as hay purchasers living in New Orleans expect to find and contract for at Freeport. Another witness says with all articles like hay it is the usage and custom to land at Freeport, and there remain till sales are made, and then drop down to flat-boat landing at New Orleans. The witness adds: "Hands on flat boats have a right at the end of three days after the flat boat lands at any point in Louisiana, and remains at any one place that length of time, to demand their pay and leave the boat." This seems to be the usual course of that trade on the river.

This cause was submitted here in December, 1851. In the only brief we could find among the paper, there are but two or three authorities cited, and these to a point of minor importance. It is, therefore, to be presumed that in a cause of such intricacy and magnitude, elaborate briefs were filed, and that in the confusion incident to the coming in of the new court they have been mislaid. Such misfortunes throw upon us great additional labor, and consequently delay the business of the court.

The grounds assumed by the insurance company against the recovery of Grant & Walters, as we gather them from the records, are: 1. That the landing at Freeport was, within the meaning of the policy, the town, city, or market-place of destination, and that eight days after reaching such market-place the risk terminated. 2. If the risk still continued at Freeport, was the discharge of the hands in contravention of the terms of the policy? 3. Were the boats from the beginning manned with a competent number of hands? 4. Was the towing of the boat from Freeport to New Orleans by a steamer a discharge of the insurers?

There are several other questions suggested by the evidence and instructions, which need not be noticed; for example, the issue formed on the delay to bring suit. But the record clearly shows that the delay is a result to which the insurance company mainly contributed by holding out hopes of an amicable adjustment. It should not, therefore, be permitted to take advantage of its own wrong.

Another preliminary consideration of vital moment is the rule of construction to be adopted in such cases. In *Yeaton v. Fry*, 5 Cranch, 335, it is said that policies of insurance are generally the most informal instruments brought before the courts; and that none are more liberally construed to carry out the real intention of the parties, if that intention can be discovered. But Judge Duer, writing long after this decision, and no doubt fully aware of it, seems to hold to a different rule. Insurance policies are to be liberally construed in favor of the assured; and an exception is to be strictly construed against the underwriters: 1 Duer on Ins. 161. The facts in the case of *Yeaton v. Fry*, *supra*, fully illustrate the strictness of the rule of construction as to exceptions.

First, then, as to the termination of the voyage at Freeport; the risk was taken from Lawrenceburgh to New Orleans, and eight days thereafter, with privilege of thirty days' coasting, etc. It has been seen from the evidence that Freeport is made in prac-

ties the New Orleans hay-market. This is for the convenience of all the parties, and to save the expense incurred at the New Orleans wharf. The evidence shows that Freeport is a separate municipality, three miles above New Orleans. Lafayette, also a separate municipality, intervenes. Nor does Freeport appear to be the place of landing hay, but only a place of exhibiting for the purpose of sale. The flat-boat wharf at New Orleans is the place of landing and discharging the cargo. The latter is, therefore, the termination of the voyage. Freeport is no more New Orleans, within the express terms of the policy, than Memphis or any other town on the river. The stop at Freeport is clearly the "coasting and transacting lawful business connected with the voyage," which the underwriters have expressly provided for and licensed. It is not contended that the delay caused thereby exceeded thirty days. And as will appear in the sequel, it is presumed that the underwriters were acquainted with this usage of the trade to which their policy related: *Grant v. Paxton*, 1 Taunt. 463; *Noble v. Kennoway*, 2 Doug. 510. There is, therefore, nothing in the first objection.

2. If the risk still continued at Freeport, was the discharge of the hands in contravention of the terms of the policy? Some evidence was given to show that such was the usage of the trade. The plaintiff offered to give further evidence on that point, but upon objection being made, the court refused to admit it. This ruling, and the evidence to the same effect, which was received without objection, as well as some instructions asked by the defendant and given by the court, present the question just stated. The law is well settled both against the ruling and the instructions. In *Noble v. Kennoway*, *supra*, Lord Mansfield held that the underwriter is bound to know the nature and peculiar circumstances of the branch of trade to which the policy relates. The insurance to which he referred was on cargoes of two ships, the *Hope* and the *Ann*, in the Labrador and Newfoundland trade. The one arrived safe on the twenty-second of June, 1778, and the other on the fourteenth of July following. The crews of these vessels were immediately employed in fishing. On the thirteenth of August following, an American privateer took both vessels, finding no one at the time on board. The action was brought to recover the value of the goods. The underwriters set up in defense that there had been unnecessary delay in unloading the cargoes. The plaintiffs rested their case on the terms of the policy and the usage of trade. "If," says the court, "the underwriters do

not know the usage, they ought to inform themselves. It is no matter if the usage has only been for a short period. But this trade has existed for several years. It is well known that fishing is the chief object of the voyage. The evidence as to the usage was properly admitted:" *Noble v. Kennoway*, *supra*. Accordingly: *Grant v. Paxton*, 1 Taunt. 463; *Moxon v. Alkins*, 3 Camp. 200; *Salvador v. Hopkins*, 3 Burr. 1707; *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151; *Hasard's Adm'r v. N. E. Marine Ins. Co.*, 8 Id. 537; *Coggeshall v. American Ins. Co. of N. Y.*, 3 Wend. 283; *Coit v. Commercial Ins. Co.*, 7 Johns. 385 [5 Am. Dec. 282]; *Keeler v. Fireman's Ins. Co.*, 3 Hill (N. Y.), 250.

On the strength of these authorities, the evidence as to the usage of discharging the hands at Freeport should therefore have been admitted. The case of *Noble v. Kennoway*, *supra*, is much stronger than the case at bar. The merchandise was insured till safely landed. It had lain on board four or five weeks. In consequence of that delay, it was captured by the privateer. In the case at bar, the evidence shows that the risk was not affected by the discharge of the hands—that no reasonable exertions of a full and competent crew could have saved the hay. There is nothing in the second objection.

3. Were the boats, at the inception and during the voyage, manned with a competent number of hands? The evidence conduces to prove that the one boat was eighty feet long; the other ninety or ninety-five feet long. The policy expressly requires that boats from seventy to ninety feet should have not less than four competent hands and a pilot; and boats from ninety to ninety-five feet, five competent hands and a pilot. The two boats, lashed together on the voyage, had eight hands, two pilots, and a cook. The question is, Was this a competent number of hands within the terms of the policy?

This was what the books call an executory stipulation or promissory warranty inserted in the policy, and which became a binding condition on the insured, and required strict performance. The breach of it, whether the thing warranted was material or not, renders the policy void from its inception: *Bond v. Null*, Cowp. 601; *De Hahn v. Hartley*, 1 T. R. 343; *Hore v. Whitmore*, Cowp. 784; *Pawson v. Watson*, Id. 785. In *Goix v. Low*, 1 Johns. Cas. 341, and *Barker v. Phoenix Ins. Co.*, 8 Johns. 307 [5 Am. Dec. 339], the vessels were respectively called "American" in the policy, and this was held a warranty that they were American property, the proof of which was essential to a right to recover. So also as to warranty: *Duncan v. Sun Fire Ins*

Co., 6 Wend. 494 [22 Am. Dec. 539]; *American Ins. Co. v. Ogden*, 15 Id. 532.

If, therefore, there was not the requisite number of hands, according to the executory conditions of the policy, the assured has no right of action. It is objected that the cook was not a competent hand. But this case is clearly within the rule in *Bean v. Stupart*, 1 Doug. 11. There the express stipulation was, "thirty seamen besides passengers;" the defense set up that there were not thirty seamen on board. To make up that number, it was necessary the steward, cook, surgeon, and some boys learning to be seamen should be counted. But only twenty-six persons signed the ship's articles. It was urged that the difference between seamen and boys was as well understood as that between clergymen and laymen; that "seaman" meant an able-bodied man, trained to maritime pursuits. But the court, Lord Mansfield, held the terms of the policy substantially complied with. If the cook was a seaman in Mansfield's time, he can not be much less than a competent flat-boat hand in our day. The large boat had a force of five hands and a pilot, and the small boat four hands and a pilot, which was a substantial compliance with the executory stipulation of the policy, and the dimensions of the boats as disclosed in evidence.

4. Did the towing of the hay-boat from Freeport to New Orleans by a steamer operate to discharge the underwriters? If so, it could only be as to the boat thus towed in contravention of the policy. And whether as to that even must depend on the terms used. By reference to that particular clause above quoted, it appears that the insurance company was to be discharged only as to any loss accruing from such towing by a steamer. The loss in this case did not accrue from that cause. It was a common calamity, involving the destruction alike of the boat that had been so towed and that lying at Freeport, and resulted from one of the perils insured against.

We are clearly of opinion that upon the whole case made the insurance company is liable. The new trial should have been granted. The instructions of the court upon the several points alluded to were erroneous, and well calculated to mislead the jury.

The judgment is reversed, with costs. Cause remanded, etc.

USAGE AS AFFECTING CONTRACT OF INSURANCE: See *Glendale Woolen Co. v. Protection Ins. Co.*, 54 Am. Dec. 309, and cases cited in the note 321.

USAGES OF TRADE, UNDERWRITERS BOUND TO KNOW: *Cox v. Charleston F. & M. Ins. Co.*, 45 Am. Dec. 771, and note citing prior cases. The principal

case is cited in *Harper v. Pound*, 10 Ind. 38, to the point that commercial usages are presumed to have entered into the minds of the parties and to have made a part of the contract.

WARRANTY THAT VESSEL IS SUPPLIED WITH COMPETENT MASTER AND CREW, CONSTRUCTION OF: See *St. Louis Ins. Co. v. Glasgow*, 41 Am. Dec. 661, and note; *Bell v. Western etc. Ins. Co.*, 39 Id. 542; *Caldwell v. Western etc. Ins. Co.*, 36 Id. 667.

CONSTRUCTION OF EXCEPTIONS IN POLICY.—In *Mark v. Aetna Ins. Co.*, 29 Ind. 394, it is said: "It was held in *Grant v. Lexington etc. Ins. Co.*, 5 Ind. 23, that exceptions are to be strictly construed against underwriters. Conceding the justice of this rule, still a strict construction can not deny to the language of the exception the meaning which the words used plainly and clearly import. Indeed, it is the purpose of strict construction to confine the meaning to the plain and direct import of the language used." When the terms of the policy are explicit, they must control: *Bell v. Western etc. Ins. Co.*, 39 Am. Dec. 542, and cases cited in the note 549.

WARRANTY IN INSURANCE POLICY MUST BE STRICTLY FULFILLED: See *Burritt v. Saratoga etc. Ins. Co.*, 40 Am. Dec. 345, and cases cited in the note 349. In *Phœnix Ins. Co. v. Benton*, 87 Ind. 137, it is said that while a warranty relating to an existing fact must be literally true or the policy does not attach, that which is promissory in its nature is not so strictly construed, the later cases holding that it is sufficient if substantially true or performed. The court then notes the principal case, as applying the same rule of strict performance to executory stipulations or promissory warranties. In *Peoria Marine and Fire Ins. Co. v. Walser*, 22 Id. 84, the principal case is cited to the effect that executory stipulations become binding conditions upon the insured, and must be performed to entitle him to recover, whether the thing stipulated be material or not.

STIPULATION IN INSURANCE POLICY LIMITING TIME WITHIN WHICH SUIT SHALL BE BROUGHT can not be set up by the company in bar of a suit brought after that time, where their own acts have contributed to the delay. The principal case is cited as authority to this effect in *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 448; *Fullam v. New York Ins. Co.*, 7 Gray, 63. In *Amesbury v. Bowditch etc. Ins. Co.*, 6 Id. 605, the principal case is also cited as deciding this point. But there is no intimation, said the court, "that such a limitation, agreed on by the parties, was in itself invalid for any reason." In *Behler v. German etc. Ins. Co.*, 68 Ind. 351, the principal case is cited to the point that an insurance company can not take advantage of a breach of a condition when they themselves have assisted in the breach.

ADDINGTON v. WILSON.

[5 INDIANA, 137.]

CIRCUIT COURT OF INDIANA MAY HOLD OVER TO COMPLETE TRIAL IN PROGRESS at the expiration of the regular term of the court, under the statute of 1843.

PERSON COMPETENT TO MAKE WILL MAY DISINHERIT HIS CHILDREN, and his motives therefor can not be called in question.

DISINHERITING CHILDREN IS OF NO WEIGHT, further than as a circumstance to be considered with other evidence tending to show insanity or other mental defect.

AM. DEC. VOL. LXI—6

BELIEF IN WITCHCRAFT IS NOT OF ITSELF EVIDENCE OF SUCH INSANITY as disables a person to make a will.
EVIDENCE THAT TESTATOR DISINHERITED CHILDREN FOR UNDUTIFUL CONDUCT, which he attributed to the fact of their being bewitched, is not evidence of his insanity.

APPEAL from the Randolph probate court. The opinion states the case.

J. Morrison, B. McClelland, and N. B. Hawkins, for the appellant.

D. Kilgore, for the appellee.

By Court, PERKINS, J. John Wilson, the executor therein named, presented to the Randolph probate court, in 1849, for probate, the alleged last will and testament of Francis Stephen, deceased. Addington, and others interested, filed objections. Issues were made and tried by a jury, and the will decided to be valid. A new trial was denied. The trial was in progress at the expiration of the regular term of the court, and the court held over to complete the trial. There was no error in so doing: R. S. 1843, p. 733, sec. 325.

The second objection is that the evidence does not support the verdict. It is claimed that the testator was insane when he executed the will. It appears that he was an ordinarily prudent, judicious business man, an average farmer, and that he had acquired property; that he had five children by a wife who was deceased, and with whom he had, for some time before her death, lived unhappily, and at whose death he expressed joy; that a portion of his children left him a while before his decease, and before the making of his will, owing, as they asserted, to domestic difficulties, and refused to return. To those children he left nothing by his will. It further appears that the testator believed in witchcraft, that his wife had been a witch, and that "at her death she had left her witch-sticks to her children, or some of them." He complained of having been very badly treated by some of his daughters, as he said he had been by his wife, and he expressed the belief that this bad treatment originated in the fact of their being witches. In short, the testator seems to have differed from men in general in these particulars alone, that he believed in witchcraft, believed that his wife and daughters were witches, and that they practiced their infernal arts upon him.

By our law, a person competent to make a will may entirely disinherit his children if he pleases to do so; nor can his motives for such an act, where it is done, be called in question. The

right is absolute to dispose of all of one's property, over and above the portion required to pay debts and expenses. The hardship of the case, therefore, where children are disinherited, is of no weight further than as a circumstance for the consideration of the jury, in connection with the other evidence submitted, tending to show insanity or other mental defect.

As to the line of conduct pursued by the wife and daughters towards the testator, and that of the testator towards them, the record discloses nothing; and we can not, therefore, judge whether that of the former was such as to justify the latter in believing that they were possessed by evil spirits, or not; nor whether that of the latter towards his wife and daughters was such as tended to indicate insanity, or not.

The fact, therefore, that the testator believed those members of his family witches, unaccompanied with the grounds for his belief, would furnish an unsatisfactory basis on which to rest a conclusion; for the tenor of the evidence makes the impression that it was a course of harsh, undutiful treatment of the testator on the part of the disinherited daughters that occasioned the disherison; and that he attributed that conduct to the fact of their being bewitched. In other words, that the testator disinherited his daughters for bad conduct, not on account of their harboring bad spirits. If the reason he assigned was false, they should have shown it, to destroy the effect the inference drawn from that reason might have with the jury.

The case, then, so far as this court is at liberty to control its decision, must turn on this simple question: Is a belief in witchcraft evidence of such insanity as disables a person to make a will?

From the visits of the angels to Lot and others of the patriarchs (without referring to the scenes in the garden of Eden), down to this time, when the spirits, like Poe's stately midnight raven, come gently rapping, rapping at the chamber-doors of modern mediums, some of whom are eminent persons, the world, pagan, Jewish, and Christian, have, to a greater or less extent, believed in spiritual existences, some being good and some evil, which have maintained a connection with and manifested their powers through human beings—in the case of the witch of Endor to even raising the dead; while scarcely any pretend to be, and no one in fact is, able to explain the mystery, to unfold the manner of their operations, or lay down the laws governing them. The prevalence of the belief, however, and the authority on which it rests, are sufficiently extensive and

respectable to shield any individual indulging it from the charge, if not of weakness, at least of insanity, simply on account of such belief. There might be cases where a belief in witchcraft, as well as in millerism or the doctrine of predestination, if permitted too constantly to occupy the mind, might have the effect to obscure its perceptions, destroy its balance in regard to the ordinary transactions of life—make the believer, in short, a monomaniac. But the evidence was not such in this case as to make it clear that the jury should have so returned their verdict.

Lord Chief Justice Hale, one of the ablest and purest of the judges that have graced the English bench, sentenced persons to death for the crime of witchcraft, and Lord Campbell, speaking of the fact, says: "I would very readily have pardoned him for an undoubting belief in witchcraft, and I should have considered that this belief detracted little from his character for discernment and humanity. The holy scriptures teach us that in some ages of the world wicked persons, by the agency of evil spirits, were permitted, through means which exceed the ordinary powers of nature, to work mischief to their fellow-creatures. These arts, which were said to be much practiced in popish times, were supposed to have become still more common at the reformation. Accordingly, the statute of 33 Hen. VIII., c. 8, made all witchcraft and sorcery felony without benefit of clergy, and by 1 Jac. I., sec. 12 (passed when Lord Bacon was a member of the house of commons), the capital punishment was extended to 'all persons invoking an evil spirit, or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit, or taking up dead bodies from their graves, to be used in any witchcraft, sorcery, charm, or enchantment:'" *Lives of the Chief Justices*, vol. 1, p. 443.

The judgment is affirmed, with costs.

MOTIVES OF TESTATOR FURNISH NO GROUND FOR SETTING ASIDE WILL if not against good morals or public policy: *Trumbull v. Gibbons*, 51 Am. Dec. 253.

TESTAMENTARY CAPACITY, WHAT CONSTITUTES: See *Terry v. Buffington*, 56 Am. Dec. 423, and note citing prior cases 429. Upon the question of insanity as affecting testamentary capacity, see *Clark v. Fisher*, 19 Id. 402, and cases cited in the note 408; see also *Rigg v. Wilton*, 54 Id. 419, and note. The principal case is cited as sustaining general principles on the question of insanity in *Coryell v. Stone*, 62 Ind. 313; *Kingsbury v. Whitaker*, 32 La. Ann. 1066.

ECCENTRICITY OF TESTATOR IS NO GROUND FOR INVALIDATING WILL: *Lee v. Lee*, 17 Am. Dec. 722; *Kinne v. Kinne*, 21 Id. 732; *Potts v. House*, 50 Id.

320. Partial insanity is not sufficient when the disposition of the property may be accounted for on other grounds: *Trumbull v. Gibbons*, 51 Id. 253; but if the disposition is the offspring of the monomania, it will be invalid: *Potts v. House*, 50 Id. 329.

BELIEF IN WITCHCRAFT AS EVIDENCE OF TESTAMENTARY INCAPACITY.—The principal case is cited in *Orme v. Boyd*, 10 Ind. 388, to the point that the fact that a husband believes his wife to be bewitched does not render him incompetent to make contracts; and to much the same effect as regards the sanity of a testator, in *Kingsbury v. Whitaker*, 32 La. Ann. 1066. A belief that one is tormented by witches, devils, or evil spirits is not *per se* evidence of insanity: *Lee v. Lee*, 17 Am. Dec. 122.

TESTATOR MAY DISINHERIT CHILDREN.—The principal case is cited to this point in *Noel v. Ewing*, 9 Ind. 60; and in *Dean v. Lyon*, 8 Id. 73, to the point that a testator may dispose of all his personal estate away from his widow. But in order to disinherit an heir at law, there must be an express devise or necessary implication so strong that a contrary intention can not be supposed: *Wright v. Hicks*, 56 Am. Dec. 451, and note citing prior cases; *Doe d. Clendinning v. Lanius*, Id. 518, and note 521, giving a synopsis of *McIntire v. Cross*, 3 Ind. 444, an analogous case.

PERSONS v. MCKIBBEN.

(5 INDIANA, 261.)

RATIFICATION OF ASSIGNMENT OF NOTE MADE BY AGENT NOT AUTHORIZED TO ASSIGN It relates back to the time of the assignment.

NEGATIVE EVIDENCE IS ADMISSIBLE WITHIN REASONABLE LIMITS.

TESTIMONY BY JOINT MAKER OF NOTE THAT THERE HAS BEEN NO DEMAND, evidence having been introduced of a demand upon the other maker, though evidence of the feeblest kind, is admissible.

IMPROPER EXCLUSION OF EVIDENCE IS NOT GROUND FOR REVERSAL, when verdict is substantially sustained by other evidence.

ONE BENEFITED BY LABOR OR PROPERTY OF ANOTHER must answer for it on implied assumption.

MAKER OF NOTE PAYABLE IN JOB OF WORK TO BE PERFORMED FOR PAYEE by debtor of maker, the maker to be bound by the note unless the job is completed, is entitled to credit on the note for the value of the labor performed though his debtor die before completing the work.

ERROR to the Vermillion circuit court. The opinion states the case.

J. P. Usher, for the plaintiff.

S. B. Gookins, for the defendant.

By Court, STUART, J. Debt by Persons against McKibben, on the following sealed note:

“\$325. On or before the first day of March next, for value received, I promise to pay John L. Persons three hundred and twenty-five dollars, which is to be paid to Jonathan Beasley, or

credited on said Beasley's note, which I now hold. As witness my hand and seal, November 16, 1847.

"THOMAS MCKIBBEN. [Seal.]"

Underneath was this memorandum:

"If the aforesaid Beasley does not complete a certain job of work according to a plan submitted to him by John L. Persons, then said McKibben is bound to said Persons for the above note. As witness my hand and seal, November 16, 1847.

"THOMAS MCKIBBEN. [Seal.]"

The pleader avers that the job of work referred to in the writing obligatory was digging a mill-race and excavating a tunnel, according to certain plans and specifications submitted by Persons to Beasley; that a reasonable time had elapsed for completing the work, yet that meanwhile Beasley had died, leaving the work unfinished. The pleadings, modeled on the old system, extended to rejoinders and surrejoinders. As the demurrers filed do not remain for decision, no question is raised on the sufficiency of the pleadings. The issues were submitted to a jury. Verdict and judgment for McKibben for one hundred and twenty-three dollars and fifty cents. The evidence is made part of the record in the proper mode. Persons brings the case to this court. In his defense, McKibben claimed the value of the work done by Beasley on the mill-race; also three notes made by Persons, and assigned by the payees to McKibben. On these claims, the judgment in favor of the latter over and above the sealed note is predicated.

The main question presented relates to the work of Beasley. Before discussing that, it will be proper to dispose of the questions arising out of the other parts of the defense. McKibben, as the assignee of Baxter, held a note against Persons. The assignment was denied under oath. It seems this note had been placed in the hands of Welty, an attorney, etc., for collection. Welty assigned it to McKibben thus: "J. S. Baxter, by D. Welty." To prove the assignment, Baxter was introduced. He testified that Welty was authorized to collect, but not to transfer the note; that when witness first heard of the assignment he refused to ratify it; but that afterwards, at the instance of McKibben, it was ratified; and that the indorsement was in the handwriting of Welty.

The note was assigned March 9, 1849; this suit was commenced March 17, 1849; and the ratification was in May or June following. This is sufficient to entitle McKibben to the

benefit of the set-off. The ratification related back to the time of the assignment, and necessarily included the act of Welty, with all its circumstances and incidents. Until plea pleaded denying the assignment under oath, the note was *prima facie* a good set-off in the hands of McKibben, and but for that plea would have remained good. The plea merely put upon McKibben the proof of the assignment, and did not change his rights or relative position to Baxter or Persons. The note, with the assignment thus ratified, was properly admitted.

The next question relates to the Iles note, payable in lumber or sawing. It was the joint and several note of Persons and one Mondy. The evidence of Iles, the payee, tended to prove that he had made demand of Persons, one of the makers of the note. Mondy was offered as a witness to prove that there had been no demand. The record shows he was objected to, and the objection was sustained. The evidence, at best, must have been of the feeblest character; no less than fifty men in the court-house could have testified, namely, that they knew of no such demand. Still, whatever it was worth, the party, within reasonable limits, had a right to introduce even negative evidence.

But even if the Iles note be excluded, then taking the other matters of set-off at such estimates as the jury were at liberty from the evidence to place upon them, and the verdict is still substantially sustained. In such cases the judgment will not be reversed: *Parker v. State*, 8 Blackf. 292.

The note in suit was primarily payable in Beasley's work. The only remaining question is, whether, since the mill-race was not completed, Persons was liable for the value of what had been done by Beasley. It has been often held by this court that he who is benefited by the labor or property of another must answer for it on an implied *assumpsit*: *Lomax v. Bailey*, 7 Blackf. 599. In *Coe v. Smith*, 4 Ind. 79, the authorities were collected and reviewed. There is a case in the Massachusetts reports very similar in many respects to this. Fuller agreed to work for Brown, and give him four weeks' notice before quitting his employ. He rendered valuable services, and left without notice in consequence of sickness. It was held that Fuller was entitled to a reasonable compensation for the services he had rendered: *Fuller v. Brown*, 11 Met. 440.

The case of *Kettle v. Harvey*, 21 Vt. 301, to which counsel for Persons have referred us, is in conflict with the repeated adjudications of this court, and with the numerous authorities cited to sustain them. We think the law clearly with McKibben.

The judgment is affirmed, with five per cent damages and cost.

RATIFICATION OF ASSIGNMENT BY UNAUTHORIZED AGENT—COMPARISON OF PRINCIPAL CASE WITH WITTENBROCK v. BELLMER, 57 CAL. 12.—In opposition to the decision in the principal case is *Wittenbrock v. Bellmer*, 57 Cal. 12. In that case an action was brought to foreclose a mortgage. The plaintiff claimed under an assignment of the note and mortgage, which was denied in the answer. The court found for the plaintiff; and this case was an appeal from the order granting a new trial. The mortgage was originally made to the Germania Building and Loan Association. Before suit brought, the president of the association attempted to assign the note and mortgage to the plaintiff; but it appeared from the evidence that he had no authority from the association sufficient for that purpose. After the action had been pending for several months, however, the association ratified the assignment by their president, and the plaintiff claimed that this ratification related back to the date of the act ratified in accordance with the maxim, *Omnis ratihabitis retrotrahitur, et mandato priori æquiparatur*. Of this claim of the plaintiff the court says: "That such was its effect as between the association, its president, and the assignee, we do not doubt. And yet we are unable to discover any principle upon which the defendant's rights could be affected by such ratification. Conceding that at the date of the commencement of the action the plaintiff had no cause of action, it does not seem to us that he could maintain the action upon a cause of action subsequently acquired against the defendant. The case was at issue, and if it had been tried at any time prior to the date of the ratification, the judgment must have been for the defendant. Could a stranger to the action step in at any time before the trial and deprive the defendant of that right, by placing in the hands of his adversary an instrument upon which he might have maintained an action—or one which he alleged that he had, but in fact did not have, when he commenced the action? Clearly not. If a party has no cause of action at the time of the institution of his action, he can not maintain it by filing a supplemental complaint founded upon matters which have subsequently occurred. It is only when the plaintiff is, at the time of the commencement of his action, entitled to some relief, that he can avail himself of facts which afterwards occur, by setting them out in a supplemental complaint. In this case the plaintiff could not have availed himself of the facts occurring after the commencement of his action, either by an amendment to his original complaint or by filing a supplemental complaint, and *a fortiori* he could not without doing either." And upon this ground the order granting a new trial was affirmed. In the principal case it is said that the ratification of the assignment of the note related back to the time of the unauthorized assignment, though the ratification was made after suit commenced. The only difference between the two cases is that in the California case the claim under the ratified assignment was made by the plaintiff, while in the principal case the same claim was made by the defendant as matter of set-off. But this distinction is immaterial, for as the plaintiff's cause of action must have accrued before suit brought, so in case of set-off "the defendant must have a subsisting right of cross-action against the plaintiff. This is necessarily one of the guiding principles. Nothing can be set off upon which an independent action against the plaintiff could not be immediately maintained. * * * Hence a claim assigned conditionally, for the purpose of being used as a set-off, with the understanding

that if not so used it will revert to the assignor, will not be allowed as a set-off." Note to *Gregg v. James*, 12 Am. Dec. 153. Indeed, a defendant, as far as he is connected with matters of set-off, may be looked upon as a *quasi* plaintiff. For this reason the difference in the parties claiming under the assignment in the two cases under comparison is immaterial.

The claim under the assignment in the principal case may be considered as advanced by a plaintiff. And the reasoning of the California case applies with equal force to the facts of the principal case. The decision in the California case we believe to be the true rule. It is true, the court leaps the general principle of agency that ratification relates back to the time of the act ratified by the negative evasion of inability "to discover any principle upon which the defendant's rights could be affected by such ratification." But it is not necessary to consider the case of suit brought upon a subsequently ratified assignment as a single exception to the rule of the retroactive character of ratification. It may, we think, be classed with a well-settled, clearly distinguished species of exceptions to this general rule. This exception is that the ratification in relating back to the time of the act ratified can not, by this means, divest vested rights of third persons, generally speaking: Wharton on Agency, sec. 78; Story on Agency, secs. 246, 247. Treating of the effect upon third persons of a ratification of an unauthorized act, Story says: "Where an act is beneficial to the principal, and does not create an immediate right to have some other act or duty performed by a third person, but amounts simply to the assertion of a right on the part of the principal, there the rule [of relation back] seems generally applicable. Thus, for example, if a continual claim or an entry to avoid a fine, or an entry for condition broken, is made by a person having no present authority, the principal may bring an action upon any of these acts, and his ratification and adoption of them will supply the want of original authority. On the other hand, if the act done by such person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses for the non-performance of that act or duty, or would defeat a right or an estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it so as to bind such third persons to the consequences." Story on Agency, secs. 245, 246. Examples of this exception are notice to quit, given to a tenant by an unauthorized person, and a demand by such a person upon a debtor to pay a debt. In these cases the subsequent ratification can have no effect upon the tenant or debtor. See also Wharton on Agency, secs. 78, 79. Now, in the case under consideration, a right has vested in the defendant at the institution of the suit against him. That right is that the plaintiff's cause of action shall have accrued at the institution of the suit. Its accrual at any later time is of no assistance to the plaintiff. It is as if he had made a demand before maturity. The existence of this rule is too well established and its efficacy too obvious to admit the argument that the case under consideration should constitute an exception. The plaintiff's remedy in this, as in other like cases, is to commence a new action. The ratification, therefore, of an unauthorized assignment to a plaintiff after suit commenced thereon divests a right in the defendant, and the ruling of the California case, that the suit embraces no cause of action, and is for that reason not maintainable, is the better decision.

RATIFICATION OF AGENT'S ACTS IS EQUIVALENT TO ORIGINAL AUTHORITY, except where the rights of third persons are invaded: *Clealand v. Walker*, 46 Am. Dec. 238, and note citing prior cases; *McMahan v. McMahan*, 53 Id.

481; *Planters' Bank v. Sharp*, 43 Id. 470; *Despatch Line v. Bellamy Mfg. Co.*, 37 Id. 203; *Wood v. McCain*, 42 Id. 612.

RECOVERY IN ASSUMPSIT FOR PART PERFORMANCE OF ENTIRE CONTRACT: See *Coe v. Smith*, 58 Am. Dec. 618, and note 622; *Gleason v. Smith*, 57 Id. 62; *Winstead v. Reid*, Id. 571; *Lee v. Ashbrook*, 55 Id. 110, and cases cited in the note. The principal case is cited to the point that work not performed according to the terms of the contract, if accepted and used, must be paid for by the party benefited, upon an implied promise, in *Adams v. Cosby*, 49 Ind. 156; *Cosby v. Adams*, 1 Wil. Sup. Ct. 350.

WRIGHT v. STATE.

[5 INDIANA, 290.]

PERSON IS ONCE IN JEOPARDY whenever he has been given in charge, on a legal indictment, to a regular jury, and that jury is unnecessarily discharged, and the discharge is equivalent to a verdict of acquittal.

FAILURE TO EMBODY PROVISION IN INDIANA STATUTE OF 1843 concerning continuance of term of circuit court, when the completion of the trial of a case requires it, in the act of 1852, which was a substantial re-enactment of the former statute with respect to the courts of common pleas, is a *casus omissus*, and the provision is continued in force by the section of the act of 1852, continuing in force laws and usages relative to pleading and practice in criminal actions.

ALL RELATING TO MANNER AND TIME IN WHICH CASE SHALL BE CONDUCTED AND TRIED, from its inception to final judgment and execution, is generally embraced under the title of practice.

UPON WRIT OF HABEAS CORPUS, COURT CAN NOT DISCHARGE PRISONER REMANDED TO JAIL to await another trial, although he has been once in jeopardy by reason of the unnecessary discharge of the jury engaged in the trial of his case, under the Indiana statute, which provides that "no court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, * * * upon a warrant issued * * * upon an indictment or information;" for the prisoner was still in custody awaiting his trial under an indictment.

PRISONER, THOUGH ONCE IN JEOPARDY UNDER INDICTMENT, IS STILL IN CUSTODY under that indictment until the case has been finally disposed of, and he is released by judgment of the court.

PRISONER ONCE IN JEOPARDY MAY BE DISCHARGED ON MOTION by the court having jurisdiction over the indictment, or he may plead the jeopardy in bar of a second trial.

APPEAL from the Elkhart court of common pleas. The opinion states the case.

J. L. Jernegan and T. G. Harris, for the appellant.

R. A. Riley, N. B. Tylor, and J. Coburn, for the state.

By Court, HOVER, J. On the eleventh of October, 1853, Fleming Wright was indicted for murder in the Elkhart circuit court. To this indictment he pleaded not guilty, and on the fourteenth of October a jury was impaneled to try the charge. The trial progressed until the succeeding Saturday, when the court, holding that the legal term expired on that day, and being satisfied that the trial could not be closed on that day, discharged the jury, notwithstanding the objections of the prisoner, who insisted that the trial should proceed to its conclusion. The court thereupon remanded the prisoner to jail, and ordered a *venire de novo*, returnable at the next term. On the twenty-fourth of the same month, Wright applied to the Hon. Joseph H. Mather, judge of the court of common pleas, for a writ of *habeas corpus*. The writ was granted, and on the hearing, the foregoing facts were made to appear, and the judge remanded the prisoner to jail, to await his trial in the circuit court. From the judgment remanding him to prison upon the hearing of the *habeas corpus*, Wright appeals to this court.

The facts as presented by the record require the investigation of two questions: 1. What was the effect of discharging the jury by the circuit court? 2. What is the duty of a judge upon the hearing of a case under a writ of *habeas corpus*, where the return shows that the applicant is held in custody to answer an indictment?

1. The constitution of the United States and the constitution of this state both provide that no person shall be put in jeopardy twice for the same offense. Similar provisions will be found in nearly all of the constitutions of the respective states. There is some diversity of opinion in the decisions of the different courts as to what amounts to being put in jeopardy; but we are satisfied that the ruling of this court in the case of *Weinsorpflin v. State*, 7 Blatchf. 186, is in accordance with reason and the current of authorities.

Whenever a person shall have been given in charge, on a legal indictment, to a regular jury, and that jury unnecessarily discharged, he has been once put in jeopardy, and the discharge is equivalent to a verdict of acquittal. If a court has the right during the trial capriciously to discharge the jury, and continue the cause until the next term, the liberty of those indicted for offenses not bailable would be completely within the hands of the judge. He might at every term impanel, discharge, and continue, and thus rob the prisoner of his liberty, by preventing a final investigation. It may be said that such a position

throws distrust upon judicial discretion. We do not wish to be so understood. But we can not regard that rule as wise or safe which places arbitrary or unguarded discretion in the hands of any one when it can be reasonably avoided.

We are aware that the courts in New York have gone to the other extreme, and have decided, in the case of *People v. Green*, 18 Wend. 55, that the court might discharge the jury, after thirty minutes' consultation, although the prisoner objected; that he might be again indicted and convicted for the same offense; and that the exercise of such discretion, in discharging the jury, could not be reviewed on error; but with deference to that court, we can not coincide with the learned judge who delivered that opinion. We think it would be trusting unguarded power where it might be seriously abused, and that more especially from the fact that they deny the correction of that abuse by resort to the higher courts. The answer to the first question, then, turns entirely upon the discharging of the jury without the consent of the prisoner. Was the discharge necessary or unnecessary?

Section 332, 2 R. S. 1852, p. 113, authorizes the court to discharge the jury on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing; but we have been unable to find any provision which will permit the court to discharge the jury for the want of time to try the cause.

The counsel for the state insist that the discharge was necessary, as the regularly allotted time for the adjournment of the court was about expiring, and as the act of 1853 required the same judge to open court in the county of Lagrange on the succeeding Monday.

By the revised statutes of 1843, sec. 325, p. 739, it is provided that "if at the expiration of the time fixed by law for the continuance of the term of any court the trial of a cause shall be progressing, said court may continue its sitting beyond such time, and require the attendance of the jury and witnesses, and do, transact, and enforce all other matters which shall be necessary for the determination of such cause; and in such case, the term of said court shall not be deemed to be ended until the cause shall have been fully disposed of by said court."

In 2 R. S. 1852, sec. 32, p. 21, a similar provision is inserted in the act organizing courts of common pleas; but there is noth-

ing said in the revision in regard to trials in the circuit court, although the necessity for such a provision for the business of that court is far greater than for the former. The peculiar character of criminal trials, over which the circuit courts have exclusive jurisdiction, demands a similar section, so as to place it beyond the possibility of counsel being able to postpone the execution of justice by delaying or speaking a case into a continuance. We think, then, it is but reasonable to infer that the failure to embody such a section in the revised statutes of 1852, in relation to circuit courts, was a *casus omissus*, and that being such, section 325, *supra*, is continued in force by 2 R. S. 1852, sec. 172, p. 383, which provides that "the laws and usages of this state relative to pleading and practice in criminal actions, not inconsistent herewith, as far as the same may operate in aid hereof, or to supply any omitted case, are hereby continued in force." The position assumed by counsel, that section 325 does not relate to practice, is untenable. All that relates to the manner and time in which a case shall be conducted and tried, from its inception to final judgment and execution, is generally embraced under the title of practice.

By these provisions, the circuit court had the right to continue the case from Saturday until the following week, when it could have been finally disposed of; and the discharging of the jury without so doing was unnecessary, and equivalent to a verdict of acquittal.

2. What was the duty of the judge upon the hearing of the *habeas corpus*? The writ of *habeas corpus* was well known to the common law, and has been regarded by English jurists as one of the greatest safeguards to the liberty of the subject. Its great object is the liberation of those who may be imprisoned without just cause, and it has been so favorably regarded in this country that the provisions of the English act, 31 Car. II., c. 2, have been substantially adopted by the several states. We have even gone further, and by the twenty-seventh section of the bill of rights in our constitution provided that "the privilege of the writ of *habeas corpus* shall not be suspended, except in case of rebellion or invasion, and then only if the public safety demand it."

Although it is the privilege of every one who may conceive himself illegally detained in custody to demand this writ as a matter of right, it by no means follows that the court or judge before whom the cause may be brought can in all cases investigate the merits of the detention; but we will not attempt at

this time to draw the difficult line between those cases where the judge may or may not investigate the merits for the purpose of remanding or discharging.

So far as this case is affected by that question, section 725, 2 R. S. 195, 196, is sufficiently explicit to meet it. That section reads: "No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following: 1. Upon process issued by any court or judge of the United States, where the court or judge has exclusive jurisdiction; or 2. Upon any process issued on any final judgment of a court of competent jurisdiction; or 3. For any contempt of any court, officer, or body having authority to commit; but an order of commitment as for a contempt, upon proceedings to force the remedy of a party is not included in any of the foregoing specifications; 4. Upon a warrant issued from the circuit court or court of common pleas, upon an indictment or information.

The facts in this case show that the prisoner was in custody, awaiting his trial under an indictment for murder; and we are clearly of opinion that although the discharging of the jury by the circuit court was equivalent to a verdict of acquittal, yet as the case was not finally disposed of, and as there was no release of the prisoner by any judgment of the court, he must be regarded as in custody under the indictment. Had there really been a verdict of acquittal rendered by the jury, without further action by the circuit court, the judge of the court of common pleas could not have discharged him. If he could at this stage of the case, why not at any other? Why not even take the case from the hands of the jury in the midst of their investigation? Such is not the object or true meaning of our act of *habeas corpus*: See *State v. Sheriff of Middlesex*, 3 Green, 68; *Johnson v. United States*, 3 McLean, 89. In the case of *Commonwealth v. Deacon*, 8 Serg. & R. 73, the prisoners, Roosevelt and Eddy, were indicted for forgery, acquitted on some of the counts of the indictment, and upon the others the jury failed to return a verdict. The mayor's court committed them for trial on these counts, and the question as to the legality of their commitment was raised by *habeas corpus*. The court, in delivering the opinion, said: "The indictment is still pending in the mayor's court. No judgment has been given on the verdict, nor do we know what judgment will be given. But we know that the mayor's court has jurisdiction over the offense

with which the prisoners are charged, and if they should give an erroneous judgment, remedy may be had by writ of error, which will bring the case properly before us." Prisoners remanded.

The judge of the court of common pleas was compelled by statute, upon the petition, to award the writ, but upon the return of the facts above set forth, it was his duty to remand the prisoner to the circuit court. He has done so. That court has still jurisdiction over the prisoner, and may discharge him on motion, or he may plead the discharge of the jury in bar to a second trial: *Commonwealth v. Clue*, 3 Rawle, 501; *Weinsorpf v. State*, 7 Blackf. 194.

The judgment is affirmed, with costs.

WHAT FACTS SUSTAIN PLEA OF FORMER ACQUITTAL OR CONVICTION are discussed in the note to *Roberts v. State*, 58 Am. Dec. 536-549.

WHAT CONSTITUTES JEOPARDY: See this subject discussed in the note to *State v. McKee*, 21 Am. Dec. 505, and authorities referred in the note to *Roberts v. State*, 58 Id. 537.

DISCHARGE OF JURY WITHOUT LEGAL JUSTIFICATION ACQUITS PRISONER: *Williams v. Commonwealth*, 44 Am. Dec. 403; *Mahala v. State*, 31 Id. 591; but a discharge of a jury under a void indictment is no ground for the prisoner's release: *State v. Ray*, 33 Id. 90. The principal case is cited to the point that a jeopardy occurs when the prisoner has been given in charge on a legal indictment to a regular jury which has been unnecessarily discharged without rendering a verdict: *Miller v. State*, 8 Ind. 327; *Reese v. State*, Id. 416; *Morgan v. State*, 13 Id. 216; *Joy v. State*, 14 Id. 146; *State v. Walker*, 26 Id. 350; *Logg v. People*, 8 Brad. App. 106; *People v. Webb*, 38 Cal. 478. But where the jury has been necessarily discharged, the prisoner has not been once in jeopardy, but may be again put upon trial. So the discharge of the jury after a protracted deliberation, because of their inability to agree, will not release the prisoner from a second trial: *State v. Nelson*, 26 Ind. 368, citing the principal case.

ON HABEAS CORPUS, COURT CAN NOT DISCHARGE PRISONER STILL IN CUSTODY, although he has been once in jeopardy. The principal case is cited to this point in *Wentworth v. Alexander*, 66 Ind. 41; *Ex parte McLaughlin*, 41 Cal. 220. The court can not go behind a judgment to inquire into the legality of an imprisonment: *Bell v. State*, 45 Am. Dec. 130; *Commonwealth v. Lecky*, 26 Id. 37; nor can it inquire into the guilt or innocence of a prisoner in custody under an indictment: *People v. McLeod*, 37 Id. 323, and note, 364, 365. *Miller v. Snyder*, 6 Ind. 4, held that upon *habeas corpus* the court might inquire into the jurisdiction of the court by whose sentence a prisoner is detained, distinguishing the principal case as not even analogous, for in that case the judgment under which the prisoner was held was voidable merely, and not void, as where the court has no jurisdiction.

CONTINUATION OF TERM OF CIRCUIT COURT OF INDIANA: See *Addington v. Wilson*, ante, p. 81. In *Bridgewater v. Bridgewater*, 62 Ind. 84, the principal case is cited to the point that a trial commenced during a term of a circuit court may be continued beyond the term if necessary to complete the trial.

In *Morgan v. State*, 12 Id. 450, it was held that where a circuit judge adjourned his court before the end of the term without giving his reasons, as required by statute, it would constitute a discontinuance of the cause on trial, distinguishing the principal case with respect to the point that the circuit court may continue its sitting until a case on trial before it is fully determined.

TABER v. HUTSON.

[5 INDIANA, 522.]

MERE INTRODUCTION OF EVIDENCE IN DEFENSE OF ACTION OF TRESPASS can not be considered in aggravation of damages, no matter for what purpose it was offered.

ERRONEOUS REFUSAL OF INSTRUCTION IS NOT GROUND FOR REVERSAL when the court has virtually given it in other instructions.

OBJECTION THAT INSTRUCTIONS WERE NOT REDUCED TO WRITING comes too late in the appellate court when the law does not require the court to reduce its charges to writing unless requested to do so by a party, and no such request was made, and no objection interposed.

PUNITORY DAMAGES ARE NOT TO BE AWARDED IN CIVIL SUIT for torts punishable criminally, for one is not to be punished twice for the same act.

COMPENSATORY DAMAGES ONLY ARE TO BE AWARDED IN TRESPASS FOR ASSAULT AND BATTERY, for the defendant is liable to indictment for the offense.

COMPENSATORY DAMAGES IN TRESPASS FOR ASSAULT AND BATTERY are not confined to the plaintiff's actual pecuniary loss, but the jury may consider every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind, and his individual happiness.

WEALTH OF DEFENDANT IS NOT TO BE CONSIDERED in awarding compensatory damages.

APPEAL from the Cass circuit court. The opinion states the case.

D. D. Pratt, for the appellant.

H. P. Biddle, L. Chamberlain, and B. W. Peters, for the appellee.

By Court, **DAVISON, J.** Trespass by Hutson against Taber. The declaration contains four counts; the three first for assault and battery and for false imprisonment, and the fourth for an assault and battery. Plea, the general issue. Verdict for the plaintiff of six hundred dollars. New trial refused, and judgment for the plaintiff.

During the trial it was proved that Taber committed an assault and battery on Hutson, and also charged him before the

mayor of Logansport with having stolen and concealed in his house eight hundred dollars, the property of Taber; upon which charge Hutson's house was searched without finding the money, and he himself was imprisoned in the county jail.

Thereupon Taber produced evidence tending to show that on a previous occasion Hutson's house had been searched by an officer of the law, upon a charge of stolen property being therein concealed. To the introduction of this evidence Hutson assented, but Taber, when it was given, disavowed any purpose to impugn Hutson's character; its object being to show that he was under suspicion of dishonesty, and that on that account Taber was justified in proceeding on less evidence than would be required to charge one who had always stood fair in the community. But in connection with this, it was shown that such previous search did not result in finding the property sought; nor was the search directed against Hutson's premises on suspicion that he himself was in possession of the lost property; but that it had been stolen by another person, who was at the time stopping with him.

The evidence relative to the previous search was commented upon by the plaintiff's counsel, in his argument to the jury, as showing a continuous malice on the part of Taber towards Hutson, and as adding insult to injury.

In relation to this branch of the case, the defendant moved the court to instruct the jury that "the fact of Taber having on this trial, while disavowing any purpose to blacken Hutson's character, introduced evidence tending to show that his premises were upon another occasion searched by an officer, as extenuating Taber's conduct for making the search in question, is not to be considered by the jury as aggravating the present wrong complained of; such course in his defense, taken with Hutson's consent, gives him no title to increased damages."

This instruction was refused. We think it was pertinent to the case, and involved a proper direction to the jury. The mere introduction of the evidence, no matter what Taber's purpose may have been in offering it, could not properly be considered in estimating the damages. Still the refusal, though erroneous, can not be allowed to reverse the judgment; because the court, in its charge, virtually covered the ground assumed by the refused instruction. The jury were explicitly told that "if they should find Taber guilty, the damages assessed by them must be based alone on the trespass and false imprisonment alleged in Hutson's declaration, and the violent matters of

aggravation immediately consequent thereon." This charge was delivered without being reduced to writing, and for that reason it is said to be objectionable. We think differently. The law in force when the instruction was given did not require the court to reduce its charges to writing, unless requested to do so by a party to the suit. In the present case no such request appears to have been made; nor was the charge objected to in the court below because it was given orally; and such objection being first made in this court comes too late: R. S. 1843, c. 40, sec. 326.

At the plaintiff's request, the court instructed that "in giving exemplary damages, it is proper for the jury to consider the wealth of the defendant, and if they find him to be a wealthy man, they may increase the exemplary damages, because what would tend to repress injury and outrage in a poor man might have no such effect in a man of wealth; and it is the true policy of the law in such cases not only to give compensation for the actual loss, but to give such additional damages as will tend to prevent such conduct, and give peace and security to private rights and the community in general." Upon the subject of this instruction, the authorities are numerous, but not uniform. They are principally cited in 2 Greenl. Ev., sec. 253, note 2; also in Sedgwick on Damages, 38 et seq.

Mr. Greenleaf lays down the rule, that "damages should be precisely commensurate with the injury; neither more nor less." But Mr. Sedgwick says that "whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, it blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender." These authors support their respective positions with great ability. But it seems to us that the rule laid down by either is not applicable to the case presented by this record. Where the defendant is sued for the commission of a tort, such as slander, an offense not the subject of criminal punishment, the rule that gives damages "to punish the offender" may, with some degree of propriety, be applied, because it is the only mode in which, by public example, the various rights in community to personal security and private property can, under the sanction of law, be protected from injury and outrage. In such a case, there is

wisdom in permitting a jury to "blend together the interest of society and of the aggrieved individual."

But there is a class of offenses the commission of which, in addition to the civil remedy allowed the injured party, subjects the offender to a state prosecution. To this class the case under consideration belongs; and if the principle of the instruction be correct, Taber may be twice punished for the same assault and battery. This would not accord with the spirit of our institutions. The constitution declares that "no person shall be twice put in jeopardy for the same offense;" and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment, and no more.

The state has undertaken to vindicate her own wrongs; and can there be any valid reason why such vindication should be the result of a suit in favor of a private individual? It matters little to the offender what be the form in which he pays the penalty, so that he pays but once; but the rules of pleading and evidence do not permit a judgment like the present to be set up as a bar to a state prosecution. Hence the defendant still remains liable to be tried and convicted for a public offense. Though liable to be punished, a criminal proceeding may not, it is true, be instituted against him; but that contingency does not affect the principle involved, because the penalty which he has incurred belongs to the state, and her failure to sue for it would furnish no reason for its recovery in this action.

We are advised that the view just taken is in conflict with several decisions entitled to grave consideration; but the more recent adjudications on this subject evidently lean against the rule in *Sedgwick*, so far as it allows damages in civil suits by way of punishing the defendant for offenses punishable criminally.

Whitney v. Hitchcock, 4 Denio, 461, was trespass for an assault and battery committed under circumstances of great aggravation. The court below charged the jury that they had a right to render a verdict for an amount beyond the actual damages proved, and that they were at liberty, if they pleased, to give exemplary damages. This instruction was held erroneous by the supreme court. So in *Austin v. Wilson*, 4 Cush. 273, which was an action for a libel, the court say: "If exemplary, vindictive, or punitive damages can ever be legally awarded as an

example to deter others, or as punishment of the defendant, they can not be recovered in an action for an injury which is also punishable by indictment, as libel and assault and battery. If they could be, the defendant might be punished twice for the same act." See also 9 Law Rep. 529 et seq.; 10 Id. 238.

These decisions, in our opinion, involve a correct principle, and we are inclined to follow them. Taber was liable to indictment for the assault and battery charged in this action, and damages could not, therefore, be given beyond a compensation for the plaintiff's injury. He was not, it is true, "confined to the proof of actual pecuniary loss; the jury might have taken into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind—in short, his individual happiness." But we think the jury had no right, as charged by the circuit court, "to give such additional damages as would tend to prevent such conduct, and give peace and security to private rights and the community in general." Nor could they, in estimating the damages, regard the wealth of the defendant, because that circumstance was wholly unconnected with the offense, and could not be considered in the way of recompense for the injury.

We are of opinion that the instruction was erroneous, and may have misled the jury. The judgment must be reversed.

The judgment is reversed, with costs. Cause remanded, etc.

STUART, J., having been concerned as counsel, was absent.

EXEMPLARY DAMAGES MAY BE AWARDED WHEN TORT IS FRAUDULENT, MALICIOUS, OR DELIBERATE AND AGGRAVATED: See *Milburn v. Beach*, 55 Am. Dec. 91; *Merrill v. Tariff Mfg. Co.*, 27 Id. 682; *Harker v. Dement*, 52 Id. 670; note to *Austin v. Wilson*, 50 Am. Dec. 767.

ALLOWANCE OF EXEMPLARY DAMAGES FOR CRIMINAL TORTS.—This subject is discussed at length in the note to *Austin v. Wilson*, 50 Am. Dec. 770-775, where the principal case is commented upon as a leading authority; but the preponderance of authority found to be in favor of exemplary damages in such cases. The principal case is cited to the point that one liable to criminal prosecution for an offense is not liable to vindictive damages in a civil action for the same offense, in *Struble v. Nodwist*, 11 Ind. 64; *Buller v. Mercer*, 14 Id. 479; *Nossaman v. Rickert*, 18 Id. 351; *Humphries v. Johnson*, 20 Id. 193; *Stewart v. Maddox*, 63 Id. 56; and see *Nay v. Byers*, 13 Id. 412. And in *Koerner v. Oberly*, 56 Id. 286, 287, it was cited and relied upon to this effect, notwithstanding a statute authorized exemplary damages for such a tort. *Brown v. Swineford*, 44 Wis. 288, holds, contrary to the principal case, that the awarding of exemplary damages in case of a tort criminally punishable is not in violation of the constitutional provision that no person shall be twice put in jeopardy for the same offense. When, however, the defendant is sued for a tort that is not the subject of criminal jurisdiction,

the jury may give punitive damages whenever the elements of fraud, malice, gross negligence, or oppression mingle in the transaction. The principal case is cited to this point in *Guard v. Risk*, 11 Ind. 159; *Millison v. Hoch*, 17 Id. 223; *Sangster v. Prather*, 34 Id. 506; *Moore v. Crooe*, 43 Id. 34; *Meyer v. Bohlring*, 44 Id. 239.

WEALTH OF DEFENDANT, ADMISSIBILITY OF, IN ESTIMATING COMPENSATORY DAMAGES: See *Meyers v. Malcolm*, 41 Am. Dec. 744; *Grable v. Margrave*, 38 Id. 88, and cases cited in the note.

PEACE OF MIND AND INDIVIDUAL HAPPINESS, CONSIDERATION OF, IN ESTIMATING DAMAGES in trespass for assault and battery. The principal case is cited to the point that in assessing damages in actions for bodily injuries, the jury may consider the mental suffering and the loss of peace of mind and individual happiness occasioned by the injury, in *Cox v. Vanderbleed*, 21 Ind. 164; *Morely v. Dunbar*, 24 Wis. 189. In *Kepler v. Ayer*, 48 Id. 500, it is said that neither the principal case nor *Cox v. Vanderbleed*, *supra*, warrant an instruction that, in estimating damages, the jury may consider injury to reputation or character in case of an assault and battery, and there is no authority to this effect. And the court, in *Wright v. Compton*, 53 Id. 342, citing the principal case, says: "Imaginary suffering and fanciful anxiety of mind would not be ground for damages; but suffering and anxiety of mind caused by corporal injuries may be considered by the jury in estimating the amount of damages." The wounded feelings of a parent are not to be considered in suing for an assault upon his child: *Cowden v. Wright*, 35 Am. Dec. 633, and note citing prior cases.

REFUSAL OF INSTRUCTION VIRTUALLY GIVEN IN OTHER INSTRUCTIONS NO GROUND FOR REVERSAL: See *Mutual Safety Ins. Co. v. Cohen*, 43 Am. Dec. 241; *James v. Fulcro*, 55 Id. 743. The principal case is cited to this point in *Ewing v. Gray*, 12 Ind. 70. So of a refusal when the appellant is not injured thereby: *Union Bank v. Planters' Bank*, 31 Id. 113.

RULES OF COURT AS TO INSTRUCTIONS.—Where requested instructions have not been furnished to opposite counsel, according to rule of court, it is not error to refuse them: *Haines v. Stauffer*, 53 Am. Dec. 493.

OBJECTIONS TO INSTRUCTIONS MUST BE TIMELY: See *Anderson v. Hill*, 51 Am. Dec. 130.

GILLENWATER v. MADISON AND INDIANAPOLIS RAILROAD COMPANY.

[6 INDIANA, 339.]

CAREFUL SELECTION OF SERVANTS WITH REFERENCE TO SKILL AND COMPETENCE by a railroad company, and the occurrence of a negligent act without its sanction, will not relieve it from liability for injury suffered by a passenger from such negligent act.

COMMON CARRIERS OF PASSENGERS ENGAGE NOT ONLY FOR COMPETENT SKILL of their employees, but for its faithful and continued application. **NEGLIGENT ACT OR OMISSION OF AGENT OR SERVANT IS, AS TO PUBLIC, EMPLOYER'S ACT**, whether the employer be a natural or an artificial person.

COMMON CARRIERS OF PASSENGERS ARE LIABLE FOR UTMOST CARE OF VERY CAUTIOUS PERSONS.

RAILROAD COMPANIES ARE NOT DISTINGUISHED FROM STAGE COMPANIES in the degree of diligence required and the extent of liability incurred.

PUBLIC POLICY DEMANDS THAT LAW SHOULD BE APPLIED AS RIGIDLY TO RAILROAD COMPANIES as to any other species of passenger carriers.

FACT THAT PERSON TRAVELING ON RAILROAD PAID NO FARE makes no difference as to the liability of the company for the negligence of their servants.

CARPENTER EMPLOYED BY RAILROAD COMPANY IN BUILDING BRIDGE IS NOT FELLOW-SERVANT of those employed in the management of the company's train, while traveling on such train by direction of the company in order to assist at another place in loading bridge timbers; and if he is injured during the journey by the negligence of such employees, the company is liable to him as to a passenger and stranger.

ONE IS NOT FELLOW-SERVANT WHO HAS NO PARTICIPATION IN DUTIES the neglect of which contributed to the injury complained of, but whose duties belong to a distinct department; and for such injury the employer will be liable as to a stranger.

APPEAL from the Jefferson circuit court. The opinion states the case.

S. O. Stevens, for the appellant.

J. G. Marshall and W. M. Dunn, for the appellees.

By Court, STUART, J. Trespass for injuries received on board the defendants' cars. After setting out sundry introductory matters, the plaintiff alleges that in May, 1851, the railroad company employed him to frame and build a bridge on their road across Sugar creek; that while engaged in the work, the company directed him to proceed on their cars to Greenwood, and assist in loading timbers for the bridge; that while thus on their cars as directed, the defendants so carelessly managed and ran the same that they were thereby thrown off the track down a bank, by means of which his right hand was fractured and permanently injured, so as forever to disable him from pursuing his business of house-carpenter, etc. The damages are laid at ten thousand dollars.

The company filed five pleas. The first was the general issue. The second and fourth pleas are in substance the same, admitting the plaintiff's injury, and that it was done on their cars as alleged by the carelessness of the servants of the company having charge of the train; but that said servants (conductor and engineer) were competent and skillful, etc., and that the negligence, etc., were wholly unauthorized by and entirely without the leave, sanction, or consent of the defendant. The fourth plea contains an additional averment, that at the time when, etc.,

the plaintiff was also the servant of the company. The third and fifth pleas are in substance the same as the second, with the additional averment that the company had used reasonable diligence in the selection of its said servants. General demurrer to each of the special pleas overruled, and judgment on demurrer for the company. The sufficiency of these pleas to bar the plaintiff's action is the only question presented.

The position assumed in the second, third, and fifth pleas is tacitly abandoned in the argument. That the negligent act was done without the sanction of the company, or that their servants were carefully selected with reference to their competence, did not, either singly or collectively, constitute a bar to the action. It is in vain that the person employed is skillful if he neglect to use that skill. Public carriers of passengers not only engage for the competent skill of their employees, but for its faithful and continued application: Story on Agency, sec. 452; 1 Bla. Com. 432, note; *Stokes v. Saltonstall*, 13 Pet. 181. The servants of a corporation are no more and no less than the servants of natural persons. Whatsoever is negligently done or omitted is, as to the public, the employer's act. Whether the employer be a natural or artificial person can make no difference. For servants and agents are but the means employed, and what they do the mode of action of the employer for the time being. It would be dangerous in the extreme to apply one rule to corporations and another to individuals. As to passenger carriers by stage, the law is well settled: they are liable for the utmost care of very cautious persons: *Barker v. Havens*, 17 Johns. 234 [8 Am. Dec. 303]; *Stokes v. Saltonstall*, *supra*. Railroad companies are not to be distinguished from stage-coach proprietors in the degree of diligence required and the extent of liability incurred. "If even disobedience of a servant could be set up by a railroad company as a defense, when charged with negligence," the remedy of the injured party would in most cases be illusive and the danger to the public enhanced. The disobedience of orders of the servant intrusted is the *ipsa negligentia* which produces the mischief: *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468. The same considerations of public policy demand that the law should be applied as rigidly to railroad companies as to any other species of passenger carriers. Nor does it make any difference as to the liability of the company for the negligence of their servants that Gillenwater was traveling on the road at the time paying no fare. So was Derby in the case above cited: *Philadelphia etc. R. R. Co. v. Derby*, *supra*.

The demurrers to the second, third, and fifth pleas were well taken, and should have been sustained.

The whole case, then, turns on the additional averment in the fourth plea. That averment is, that the persons by whose negligence the injury was produced were the fellow-servants of the plaintiff, engaged in the same general employment, and it is therefore contended that he had no recourse on the common employer. In support of this position, Angell on Carriers, 563, and some late decisions not yet officially reported, are cited.

To properly appreciate the doctrines advanced by text-writers, it is often necessary to go back to the authorities on which they rely. And this is more especially advisable if the questions are new or the authorities conflicting. As the question raised is new in this state, and of vast importance in itself, it will be safer to go back at once to the leading cases. Those chiefly relied upon by Angell are *Priestley v. Fowler*, 3 Mee. & W. 1; *Farwell v. Boston & Worcester R. R. Corp.*, 4 Met. 49 [38 Am. Dec. 339]; *Murray v. South Carolina R. R. Co.*, 1 McMull. 385 [36 Am. Dec. 268].

The facts in *Priestley v. Fowler*, *supra*, were these: Fowler directed Priestley, his servant, to accompany and assist A., another of Fowler's servants, in a van conducted by A., and containing goods carried for hire. The van was overloaded and broke down, causing serious injury to the plaintiff. The ground of recovery set up by Priestley was the want of proper care in loading the van. The English court of exchequer held that there was no right of action, "because," in the language of the court, "of the inconvenience and absurdity which would flow from such a principle." One of the examples of its absurdity put by the court is that a master would be liable to his servant for the negligence of a co-servant, the chamber-maid, if she put him into a damp bed.

Whatever may be thought of the argument or the illustration, the case at bar is so clearly distinguishable from that as scarcely to need analysis. Priestley and his co-servant, the conductor of the van, were intimately associated in the business intrusted to them by the common employer. Priestley must have been aware of the capacity of the van; indeed, the presumption seems to be that he had assisted in overloading it—at least to the extent of riding in it. And the doctrine growing out of the facts of the case is, that the servant can not maintain an action against his employer for an injury which his own negli-

gence, together with that of his co-servants, had directly contributed to produce.

On the contrary, Gillenwater and those in charge of the cars had no duty to perform common to both, except, perhaps, the loading, and as incident thereto the unloading, of the timber. And it is not claimed that either the loading or unloading had anything to do in producing the accident. It is charged distinctly on the one side, and admitted on the other, that it was the careless running of the cars which caused the injury. In that act the plaintiff did not participate. During the passage to and from Greenwood and Sugar creek, Gillenwater had no control either of the cars or freight—no duty relating to them to perform. As to the duties belonging to the delinquent engineer and conductor, he was not in a position from which it could be implied that he contributed to the result. So that admitting the doctrine of *Priestley v. Fowler*, *supra*, to the extent to which the facts before the court warranted the decision, it does not apply to the present case.

In *Farwell v. Boston & Worcester R. R. Corp.*, *supra*, the facts were that Farwell was employed by the company as engineer on the passenger train. Whitcomb, another servant of the company, being in their employment as a switch-tender, and well known to the plaintiff as faithful and trustworthy, carelessly left a switch in a wrong position as Farwell's train was passing; whereby the cars were run off the track, and Farwell received the injury complained of. The court held that he had no right of action against the company. It was called "an action of new impression, which of itself was held to be a strong argument against it." Much reliance was also placed on *Priestley v. Fowler*, *supra*. The additional reasons on which the court proceeded were, that the servant contracts with reference to the risks of the employment; that he accordingly receives a compensation in wages for those risks; and that it would be contrary to public policy to permit a recovery the tendency of which would be to produce carelessness among servants and agents, to the danger of the public.

So clearly is the case at bar distinguished from the Farwell case, that we are not called upon either to approve or dissent from the doctrine there held. The business of house-carpenter, even as applied to the specific case of building a railroad bridge, is an employment under the company too remote to be embraced within the rule laid down in that case. To constitute the parties co-servants of the company, it was held essential that the

object to be accomplished should be one and the same, the employer the same, and that the persons employed should derive their authority and compensation from the same source. When all these elements concur, it is, says the court, "extremely difficult to distinguish what constitutes one department and what a different department of duty. It would vary with the circumstances of each case." It is thus clearly admitted that where the duties do in fact belong to different departments, a distinction should be made.

Between the switch-tender and the engineer of the company the connection was close and immediate. The object to be accomplished by both was the same. Their duties necessarily connected themselves together as parts of a whole. The passing of the cars in a given direction was the instant result flowing from their joint action.

Not so with the plaintiff in this case. His business of house-carpenter, as applied to the erection of a railroad bridge, did not even remotely link him with the careless management of that particular train. He had no participation in the duties the neglect of which contributed to the injury complained of. Though in some sense a servant of the company, he was not a co-servant of the engineer and conductor, within the meaning of the Farwell case. He clearly "belonged to a distinct department of duty." As to the company, therefore, on the particular occasion, Gillenwater stood clothed with all the rights of passenger and stranger.

If the bridge-builder of the company be regarded as a co-servant of the engineer within the meaning of the Priestley and Farwell cases, the principle becomes alike vicious and absurd, by the very extent of its application. Every person in the service of the company is brought within its range. Even the position of the legal adviser of the railroad is included. He, too, is in some measure the company's servant. He derives his compensation and authority from the same source as the engineer, conductor, and bridge-builder. Like them, though in a fainter degree, he contributes to the ultimate objects of the company. Had he been on the train by the side of Gillenwater, and injured by the same negligence, in a suit against the company he would have been summarily dismissed by the same argument. He would be told that his action was one of new impression, that he contracted with reference to the risks of the employment, and reserved a compensation in fees with an eye to these risks. He would, therefore, be denied redress, be-

cause he was a *quasi* co-servant of the careless engineer. It would be difficult to imagine upon what principles, either of justice or public policy, such ruling could be supported. For the basis of implied contract and increased compensation, with reference to such risks, on the part of the carpenter and legal adviser, is wholly visionary.

But when it is held that the legal adviser, the carpenter, and all such *quasi* servants of the company are not co-servants within the meaning of the Farwell case, because their several duties belong to different departments, a result is attained, clear, just, and of easy application.

Had Gillenwater received the injury from the negligence of a fellow-carpenter in the same employment, while erecting the bridge or loading the timbers, a question would then have been presented within the range of the Farwell case. It would then have devolved upon us to decide between the conflicting authority of the courts of Massachusetts and Ohio: *Farwell v. Boston & Worcester R. R. Corp.*, *supra*; *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415. As it is, we do not feel called upon to intimate any opinion either way.

If we had any doubt as to the soundness of the distinction we have made, the cautious concluding language of the Massachusetts court would remove it and strengthen our position. The ruling is thus qualified: "Considering it as a nice question, we would add a caution as to any hasty application of the rule to cases not clearly within the same principle. Each case may be varied and modified by circumstances not appearing in this. We are far from intending to deny that there are implied warranties arising out of the relation of master and servant."

So that even in the opinion of the learned judge who gave the new doctrine its chief importance, it is to be cautiously applied and strictly limited to cases within the same principle. This is the usual judicial language in relation to some legal heresy, of such long standing that the mischief is believed to be less to follow than to overrule it. It is thus cautiously added that the principle should not be carried beyond the adjudicated cases. But it is rather an ominous introduction to a question admitted to be one of new impression. It strongly implies a suspicion of the correctness of the principle sought to be established.

Since then, however (1842), the courts of New York have followed the same lead: *Brown v. Maxwell*, 6 Hill, 592 [44 Am. Dec. 71]; *Coon v. Syracuse etc. R. R. Co.*, 5 N. Y. 492. The supreme court of Massachusetts, as late as 1849, reviewed their ruling in

the Farwell case, and adhered to their former decision: *Hayes v. Western R. R. Co.*, 3 Cush. 270.

More recently, however, the doctrine of *Farwell v. Boston & Worcester R. R. Corp.*, and *Murray v. South Carolina R. R. Co.*, *supra*, was reviewed and expressly repudiated by the supreme court of Ohio: *Little Miami R. R. Co. v. Stevens*, *supra*; *Dixon v. Rankin*, 1 Am. R. R. Cas. 567, and note, is a weighty argument to the same effect.

The leading case, *Priestley v. Fowler*, *supra*, was decided by the English court of exchequer in 1837. No authorities are there cited. But the court expressly say they are at liberty to decide the question upon general principles, looking to the consequences of a decision the one way or the other. The cases which go upon the opposite doctrine also profess to settle the question upon principle chiefly. So that a question of such recent date, upon which respectable courts differ so widely, can not be regarded as settled. As already observed, the case at bar is so clearly distinguished from any of the cases cited on either side of this vexed question, that we are not called upon to intimate an opinion either way; leaving ourselves open to examine it on its merits, whenever it is directly presented in the record. It is sufficient that Gillenwater was at the time a passenger. The company are, therefore, liable for the injury received. Their guaranty to the public is that their servants are persons of competent skill, and that they will use due diligence in its application. In a somewhat similar case, where one of the stockholders of the railroad company was on the cars, traveling gratuitously by invitation of the president, and was injured by a collision, the company were held liable. Grier, J., adds, "that any relaxation of the law affecting railroad companies as passenger carriers would be highly detrimental to the public safety:" *Philadelphia etc. R. R. Co. v. Derby*, *supra*.

The court below, therefore, erred in overruling the demurrer to the fourth plea.

The judgment is reversed, with costs. Cause remanded, etc.

LIABILITY OF MASTER TO SERVANT FOR INJURIES RESULTING FROM NEGLIGENCE OF FELLOW-SERVANT: See *Hubgh v. N. O. & C. R. R. Co.*, 54 Am. Dec. 585; *Shields v. Yonge*, 60 Id. 698. A master is not liable to a servant for the negligence of a fellow-servant, although the latter is a foreman: *Brown v. Maxwell*, 41 Id. 771, and see the prior cases on this subject collected in the note 773. The cases in Indiana citing the principal case throw doubt upon the distinction therein maintained in the case where the employees are not engaged in the same department. This distinction was recognized in *Fitzpatrick v. N. A. etc. R. R. Co.*, 7 Ind. 436; but in *Columbus etc.*

R'y Co. v. Arnold, 31 Id. 182, it is said that the exception to the general rule of the non-liability of the employer for injuries to a servant resulting from the negligence of a fellow-servant, recognized in the principal case and in *Fitzpatrick v. N. A. etc. R. R. Co.*, 7 Id. 436, that is, that he is liable when the respective duties of the two servants are not common or in the same department, is not recognized in any of the subsequent Indiana cases, which hold, it is said, that the employer is liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking. In *Slattery's Adm'r v. Toledo etc. R'y Co.*, 23 Id. 83, it is held that a brakeman and one whose business and duty it is to attend a switch are engaged in the same general undertaking, the court remarking that whatever doubt was thrown upon this matter by the principal case and *Fitzpatrick v. N. A. etc. R. R. Co.*, 7 Id. 436, was entirely removed by the later cases in this state upon the subject. In *Gormley v. Ohio etc. R'y Co.*, 72 Id. 32, 33, the principal case was cited by counsel for the plaintiff as showing at least a conflict of authority in Indiana, and thus furnishing grounds for a decision in his favor. The plaintiff was a laborer on the track of the railroad company, and while on a hand-car was injured by a collision with a freight train through the negligence of the engineer, who together with the fireman was drunk at the time of the collision. The court, however, held that the track laborer and the employees engaged in the management of the freight train were engaged in the same general employment, and were consequently fellow-servants. In *Malone v. Western etc. Co.*, 5 Biss. 317, the principal case is cited to the point of employer's liability when the servants are not in the same department, but that case held that this distinction was not the law in Illinois. But the case of *Chamberlain v. Mil. & Miss. R. R. Co.*, 11 Wis. 250, cites the principal case, and the Ohio cases, *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415; *Railroad Company v. Keary*, 3 Ohio St. 201; but on principle repudiates the doctrine of both, and holds that the employer is liable to a servant in any case for injuries resulting from the negligence of a fellow-servant, whether engaged in the same business or not, or whether there be an equality or relative superiority and inferiority or not between the two servants. In *Indianapolis etc. R. R. Co. v. Love*, 10 Ind. 557, the principal case is cited to the point that the proposition that an employee can never recover of his employer for injuries received in such employment is too broad, for there are many cases where such actions have been maintained.

LIABILITY OF COMMON CARRIER FOR INJURIES TO PASSENGERS: See *Laing v. Colder*, 49 Am. Dec. 533, and cases cited in the note 538. See extensive note to *Ingall v. Bills*, 43 Id. 355-367. The principal case is cited to the point that passenger carriers are required to exercise the highest degree of care to secure the safety of passengers, and are responsible for the slightest neglect, in *Sherlock v. Alleng*, 44 Ind. 201; *Thayer v. St. Louis etc. R. R. Co.*, 22 Id. 29.

PAYMENT OF FARE AS AFFECTING PASSENGER CARRIER'S LIABILITY. The principal case is cited to the point that the fact that a passenger has paid no fare, or that the company is carrying him gratuitously, makes no difference in the company's liability, in *Ohio etc. R'y Co. v. Selby*, 47 Ind. 492; *Ohio etc. R'y Co. v. Muhling*, 30 Ill. 23. The case of *Moss v. Johnson*, 22 Id. 641, held that one who voluntarily placed himself on a car to go to his work on the road, and not at the request of the company, can not recover as a passenger for injuries received, the principal case being thus distinguished. Upon the payment of fare to the carrier and its sufficiency, see *Peters v. Rylands*, 59 Am. Dec. 746.

BOWEN v. JOHNSON.

[6 INDIANA, 110.]

CONVEYANCE BY TESTATOR OF ALL LANDS OWNED BY HIM AT TIME OF MAKING HIS WILL operates as a revocation of the will, and those after acquired will not pass by the will.

INDIANA STATUTE THAT EVERY DEVISE OF ALL TESTATOR'S REAL ESTATE shall pass all the real estate he may be entitled to devise at his death, does not apply to a residuary clause in a will where particular pieces of property are devised to particular devisees, but only to cases where the will purports to devise all the property equally or in proportions, to all the devisees named in it.

APPEAL from the Fountain circuit court. The opinion states the case.

J. A. Wright, E. W. McGaughey, and A. A. Hammond, for the plaintiff.

W. P. Bryant and A. L. Roache, for the defendant.

By Court, PERKINS, J. This was an application by a part of the heirs of John Johnson, deceased, against his remaining heirs for partition of the real estate of which he died seised. The facts of the case are these: On the twenty-eighth of December, 1830, said John Johnson made his will, by which he devised to John H. Johnson, his grandson, the north half of lot 126 in the town of Lafayette; and all the rest and residue of his estate real to William H. Johnson and John W. Johnson. Afterwards, and prior to 1836, said John Johnson sold all the real estate he possessed at the time of making said will, and in October, 1836, with money derived from said sale, purchased other lands, being those of which partition was sought by the present application. Said Johnson departed this life on the twentieth May, 1847, never having altered said will.

William H. and John W. Johnson claim the whole of the lands of which said John Johnson died seised, under the residuary clause in the will, and hence resist the partition of them among his heirs generally.

By the English law, the conveyance of all the land owned by the testator at the time of making his will would have operated as a revocation of it, and those after acquired would not, by that law, have passed by the will set up in this proceeding. We have, however, the following statutory provision, which, it is claimed, governs this case, and gives the after-acquired lands of the deceased Johnson to the residuary devisees. It is on page 485 of the revised statutes of 1843, and is as follows: "Sec. 2.

Every devise that shall be made by a testator in express terms of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death."

We do not think this section applicable to the case before us. We think it applies only to cases where the will purports to devise all the property equally, or in proportions, to all the devisees named in it; and not to cases where particular pieces of property are devised to particular devisees with a residuary clause. We think that this construction will best promote justice, and is not inconsistent with the words of the statute.

Such being the case, the lands in question in this suit should be partitioned among the heirs according to the rules of descent.

The decree is reversed, with costs. Cause remanded, etc.

AFTER-ACQUIRED LANDS, WHEN PASS BY WILL: See *Doe ex dem. Wynne v. Wynne*, 57 Am. Dec. 139, and prior cases cited in the note 144.

CONVEYANCE OF LAND DEVISED AS REVOCATION OF WILL: In *Cooper's Estate*, 45 Am. Dec. 673, where a testator, prior to his death, sold so great a part of his realty as to render it impossible to carry out the provisions of the will, the sale amounted to a revocation of the will, except so far as the appointment of executors was concerned, whose accounts would be settled in the same manner as if the testator had died intestate.

CASES
IN THE
SUPREME COURT
OF
IOWA.

RUSSELL v. RUSSELL.

[4 G. GREENE, 26.]

HUSBAND'S REAL ESTATE CAN NOT BE SET OFF TO WIFE IN FEE SIMPLE for the purpose of giving her alimony. The court will but give the wife a lien upon the real estate for the amount of alimony decreed, or will set off a portion of it to her for life, if the husband desires her to be allowed a definite part of his property in preference to a periodical claim upon him.

ALIMONY WILL BE DECREED WITH DUE CONSIDERATION of the available means of the husband, and the condition of the parties.

APPLICATION in equity for a divorce and for maintenance. The opinion states the facts.

P. Smith and B. M. Samuels, for the appellant.

L. Clark, for the appellee.

By Court, WILLIAMS, C. J. Application by petition for a divorce from the bonds of matrimony, and for maintenance, filed by Polly Russell against Isaac Russell, and heard at the October term, 1853, of the district for Dubuque county. The petition is in the usual form. After setting forth the marriage and cohabitation as husband and wife for about thirty years, and that their children had all attained to mature age, excepting one, then about eighteen years old, the petitioner assigns as the reasons why she should be divorced and be allowed maintenance, that she has always, since their marriage, conducted herself with propriety, and with affection and good faith as the wife of the defendant; that although at the time of their marriage the defendant was temperate, he had for many years been so addicted to the use of intoxicating liquor that he had become

an habitual drunkard; that he had become abusive and violent in his treatment of her, inasmuch that her happiness was destroyed and life endangered by living with him as his wife. She also avers that by her care and industry she had aided in the maintenance of the family and the acquirement of the property which is possessed and owned by the said Isaac, her husband. The petition sets forth, in considerable detail, the fact of intemperance and abuse of which she complains, and concludes with a prayer for a divorce from the bonds of matrimony, and a suitable maintenance out of his estate, of which a description is set forth in the petition.

The respondent appeared and filed his answer, denying the allegations of intemperance and abuse on his part. He then proceeds, after averring the due performance of all the marital duties on his part, to charge upon her violence of temper and habitual abuse of him, so that if ever he had in any way abused her, it was to defend himself when assailed by her.

The petition, answer, and evidence in the case, all taken together, present a long life scene of family discord and strife, commencing in Ohio, at the earliest period of the recollection of their oldest child, who is a witness in the case, of mature age, and carried on *crescendo* until the parties end in Iowa by being docketed in court. The witnesses who testify in the case, with one or two exceptions, are the children of the parties. The evidence fully sustains both the petition and the answer.

The court below decreed the divorce, as prayed for, from the bonds of matrimony, on the ground "that the parties could not live together in peace and happiness, and that their welfare required a separation. The court, then, being advised of the extent and value of the property of the parties, and the said Isaac Russell desiring that the said Polly be allowed a definite part of said property permanently, in preference to a periodical claim on him, decreed that the said Polly Russell have the following land in fee simple, to wit, twenty-two acres off the north part of so much of the east half of the south-west quarter of section 31, township 88, range 3 east of the fifth principal meridian, as lies east of the traveled road between Dubuque and Andrew, and to be set off so as to include the dwelling-house and the spring on said tract; but that the said Isaac have the privilege of access to the water, and the privilege of using the same; and also the privilege of using the pasture jointly with her, by putting two horses, two colts, two cows, and two calves in the same; also the north-east quarter of the south-east quar-

ter of section 25, in township 87 north, of range 2 east of the fifth principal meridian; that this decree stand in lieu of a deed of the same from the said Isaac to the said Polly; and further, that the debts of the said Isaac which were owing by him on the first day of the present term, and the costs of this suit, be paid out of the personal property of said Isaac, and the remainder of same be equally divided between plaintiff and defendant; and it was further ordered that Jonathan Higgins be and he is appointed a commissioner to set off the land," etc.

From this decree of maintenance the respondent, Isaac Russell, has appealed to this court. Three objections are urged to the decree of the district court: 1. The alimony allowed to the complainant by the district court is unreasonable, in consideration of the estate possessed by the appellant; 2. The district court allowed and decreed to the complainant an estate in fee simple in the lands of defendant which were decreed to her, whereas a life estate only should have been allowed to her as maintenance; 3. The decree is against law and equity.

There being no question raised here as to that part of the decree which dissolves the marriage contract of the parties, we will leave that as fixed by the district court, and proceed to the consideration of the decree of alimony.

The prayer of the petition is for a divorce from the bonds of matrimony, and also for alimony. Having decreed the divorce as sought, the court also set off to the petitioner a part of the respondent's real estate in fee simple. This we think should not be done. It was not necessary to her maintenance that the title to the estate of the respondent, or any part of it, should be transferred from him to her. The courts in such cases may incumber the real estate of the husband, by creating a lien on it for the maintenance of the wife when divorced, to secure it against his default by refusing or neglecting to pay the alimony decreed; but the rights of realty are held in too much regard to be disturbed by a procedure so summary. The estate as to inheritance would thereby be diverted from its legitimate direction. The only duty which the court had to perform was that of decreeing alimony for the support of the petitioner during her life out of the estate of her husband; this to be done with due consideration of the available means of which he was possessed, and of her condition in life: *Lawrence v. Lawrence*, 3 Paige, 267. Alimony is an allowance for maintenance of the wife. It is not to be understood as involving a distribution of the estate by force of law: Bouv. Law. Dict., tit. Alimony, 2.

It is a reasonable charge for maintenance of the wife which the law will enforce against the husband, when he refuses to support her, or when she is separated from him by his default. It will be enforced against the husband so long as he refuses to support her, or the separation continues; but will cease upon reconciliation and reunion. If the law should be so enforced as upon a prayer for alimony to distribute in fee simple the real estate of the husband between him and the wife, it might tend to promote litigation of this kind, and render the proceedings under the code for divorce not only an easy mode of shaking off the bonds of matrimony, but an ingenious and fashionable way of acquiring title to real estate, and changing the inheritance thereof. We think that in every view of the case it was going too far for the court to divest the husband of the fee-simple title to any portion of his land, and transfer it to the wife, for the purpose of giving her alimony. It is only a support of the wife for life: *Wallingford v. Wallingford*, 6 Har. & J. 485-488; *Equity Dig.*, tit. Alimony; *Jeans v. Jeans*, 2 Harr. (Del.) 142; *Clark v. Clark*, 6 Watts & S. 85. We find no authority in a case of this kind for transferring the real estate of the husband in fee simple to the wife, independent of the consent of the husband, by the act of a court. The most that will be done judicially is to give the wife a lien on the real estate of the husband for the amount of alimony decreed. This principle is held in *Frakes v. Brown*, 2 Blackf. 295; *Questel v. Questel*, Wright, 492.

In reviewing this case upon the question of alimony, we have endeavored by proper means to ascertain the condition of the parties, the amount and value of the property possessed by the respondent, which may be available in adjusting the question before us, so as to afford the parties a support, and at least some comfort in separation, of which there was no hope while living together with their habits. The decree of the district court is set aside, and the following will be entered as the decree of this court in the case, viz.: That the bonds existing between said Isaac Russell and Polly Russell be dissolved; and this court having considered the matter of the maintenance of the said Polly Russell, and the court being advised of the extent of the property of the parties, and the said Isaac Russell desiring that the said Polly Russell be allowed a definite part of said property in preference to a periodical claim on the said Isaac Russell, it is therefore considered, ordered, and decreed by this court that the said Polly Russell continue to hold, in her own right, the north-east quarter of the north-east quarter of section 1, in town-

ship 87 north, of range 2 east, being the said land entered in her own name. And it is further ordered and decreed by the court that the said Polly Russell have the following-described land during her natural life, to wit, twenty-two acres off of the north part of so much of the east half of the south-west quarter of section 31, township 88 north, of range 3 east of the fifth principal meridian, as lies east of the traveled road between Dubuque and Andrew, and to be set off so as to include the dwelling-house and the spring on said tract; but that the said Isaac Russell shall have the privilege of access to the water and using the same, and the privilege of using the pasture jointly with her by putting two horses and two colts, two cows and two calves, in the same; and that the said Polly Russell have the following-described land during her natural life, to wit, the north-east quarter of the south-east quarter of section 25, in township 87 north, of range 3 east of the fifth principal meridian; and that this decree stand in lieu of a deed of the same from the said Isaac to the said Polly.

And it is further decreed and ordered by the court that said Polly Russell have one half of the household and kitchen furniture. And it is further ordered and decreed by the court that the debts of said Isaac Russell which were owing by him on the first day of the October term of the district court of Dubuque county, in the year 1853, and the costs of this suit, together with the sum of thirty-five dollars which is hereby allowed Lincoln Clark, esq., as his fee for his services in attending to this suit for the said Polly Russell, be paid out of the personal property (except the household and kitchen furniture) of the said Isaac Russell, and the remainder of the same be divided equally between the said Isaac Russell and the said Polly Russell.

And it is further ordered that Jonathan Higgins be and he is hereby appointed a commissioner to set off said twenty-two acres and to put said Polly in possession of the same, and to ascertain such debts and costs; and when the said debts and costs are ascertained, to sell enough of the personal property (household and kitchen furniture excepted) to pay the same as they become due, and then to divide the remainder equally between the said Isaac and the said Polly, giving to the respective parties such property as he may deem most suitable for them. And it is further ordered that the said Jonathan Higgins make report of his doings thereon and file the same in the office of the clerk of this court.

Decision reversed.

VESTING OF HUSBAND'S REAL ESTATE IN FEE IN WIFE AS ALIMONY.—The principal case was referred to in *Ross v. Ross*, 78 Ill. 404, on the proposition that the mode of allowance of alimony in vesting the fee of real estate in the wife was objectionable; while in *Zuver v. Zuver*, 36 Iowa, 196, the following observation is made: "It has been determined by this court that it is not proper to give to the wife as alimony a part of the husband's real estate in fee: *Russell v. Russell*, 4 G. Greene, 26. But this ruling was disregarded, and a part of the lands of the husband given in fee to the wife for alimony, in *Jolly v. Jolly*, 1 Iowa, 9. The power to do so was grounded in part on the language of the statute above quoted, which was section 1485 of the code of 1851. And this ruling was affirmed substantially in the opinion of the court, delivered by Wright, C. J., in the case of *O'Hagan v. O'Hagan*, 4 Id. 509. And it was also adhered to in *Inskip v. Inskip*, 5 Id. 204." The language of the statute here mentioned is as follows: "When a divorce is decreed, the court may make such order in relation to the children and property of the parties, and the maintenance of the wife, as shall be right and proper." The principal case was not cited in *Jolly v. Jolly*, *O'Hagan v. O'Hagan*, and *Inskip v. Inskip*, above referred to.

ALIMONY DECREEED WITH DUE WEIGHT TO RANK OF PARTIES AND CONDITION OF HUSBAND: *McGee v. McGee*, 52 Am. Dec. 407; see also *Fischli v. Fischli*, 12 Id. 251.

FOSS v. ISETT.

[4 G. GREENE, 76.]

WRIT OF ATTACHMENT MUST BE UNDER SEAL OF COURT.

SEAL TO WRIT OF ATTACHMENT CAN NOT BE SUPPLIED BY AMENDMENT.

MOTIONS to quash proceedings in attachment and to amend the writ. The opinion states the facts.

S. Whicher and J. Buller, for the appellant.

J. Scott Richman, for the appellee.

By Court, KINNEY, J. Isett sued Foss in attachment. On the first appearance of the defendant he moved to quash the proceedings in attachment, for the reason, among others, that the paper purporting to be a writ was not under seal. Thereupon the plaintiff moved the court to amend, which was granted, and the motion of defendant overruled. This was error. Before the property of the defendant could be seized, it was indispensable that the plaintiff should obtain a writ. A paper issued by the clerk in the form of a writ is no writ, unless it has impressed upon it the seal of the court from whence it issues. Without this seal, it is no more for the purpose of a writ than blank paper. Could it be amended? Not at all; for there is nothing to amend. It lacks the essential ingredient of a writ, and is not amendable.

It is the seal—other things being right—which makes it a writ, gives it force, efficacy, and life. The property which had been seized upon this void paper could not be held in custody upon a writ issued after it was attached, which would be the case if the seal could be subsequently affixed.

The numerous authorities cited by the counsel for appellee are not applicable to the question presented by this record. Neither are the provisions of the code, secs. 1758, 1759, broad enough to cover the case. This was not properly an amendment which was proposed. It was the creation of a writ. This could be done, but not so as to operate retrospectively upon any prior proceedings. With the seal, it became for the first time a writ, and the party to make it available should proceed upon it *de novo*.

Judgment upon the attachment reversed; but as the attachment is merely auxiliary to the main suit, the judgment against the defendant will not be disturbed.

WANT OF SEAL TO WRIT OF ATTACHMENT.—The following observation was made in *Magoon v. Gillett*, 54 Iowa, 55: "In *Foss v. Isett*, 4 G. Greene, 76, it was said that a writ of attachment issued without the seal of the court had no more force and efficacy than a piece of blank paper, and that it was void and could not be amended. This case was followed in *Shaffer v. Sundwall*, 33 Iowa, 579, 583. In the subsequent case of *Murdough v. McPherrin*, 49 Id. 479, it was held that a writ which issued from the district court, to which the seal of the circuit court had been attached, could be amended by placing thereon the seal of the court whence it issued. It was urged in that case that a writ without the seal of the proper court was void and could not be amended, but it was held otherwise. The same point was made in *Lowenstein v. Monroe*, 52 Id. 231, where the causes for the attachment had been verified by an attorney." The principal case was distinguished in *Murdough v. McPherrin*, *supra*, on the ground that it was made under the code of 1851, in which there was no provision authorizing any of the proceedings in attachment to be amended, and strict construction of the attachment law was then the rule; and this case was the authority for the decision of *Lowenstein v. Monroe*, *supra*. As to the amendment of writs of attachment in general, see the note to *Barber v. Swan*, *post*, p. 124.

NEALLY v. WILHELM.

[4 G. GREENE, 240.]

VENDEES ARE LIABLE FOR VALUE OF COW UPON DELIVERY, where they directed her to be delivered at their slaughter-house, and agreed to pay as much for her as though they had previously seen her, and she was accordingly delivered, but the vendees, not finding her as good as expected, ordered her to be turned out, whereby she was lost. The delivery and sale are unconditional, and the price is conditional; but even if the sale were on condition, the vendees would be liable as bailees.

ACTION for the price of a cow. The facts are stated in the opinion.

Browning and Tracy, for the appellant.

L. D. Stockton, for the appellees.

By Court, GREENE, J. This suit was commenced before a justice of the peace, by M. W. Neally, against Wilhelm & Ramge for the price of a cow. On final trial in the district court, judgment was rendered in favor of defendants.

It is urged that this decision is erroneous, and that appellant should recover the value of the cow. The evidence in the case shows that John Wolverton, as Neally's agent, made an arrangement with Wilhelm & Ramge to sell them the cow in question; that they first agreed to go out and see the cow, but did not; that they afterwards told the agent to deliver the cow to them; that they would give just as much for the cow as if they went out to see her; that they directed the agent to deliver the cow at the slaughter-house, and if neither of them was there, one of the hands would take charge of her; that the cow was delivered accordingly at the slaughter-house, to one of the hands, and secured in the yard, and the agent departed. Soon after, Wilhelm came to the slaughter-house, and after inquiring about the cow, directed his man to turn her out, on the ground that she would not make good beef. The cow was accordingly turned out, and was never afterwards heard of. Neally's witness swears that the cow was in good order for beef. The man who received her swears that she was not. The evidence shows that the cow was worth about fourteen dollars. The question to be decided is, Which of the parties should suffer the loss of the cow?

The agreement with Neally's agent was unconditional. He was to deliver the cow to defendants, or their man, at their slaughter-house, and they would pay as much for her as though they had previously seen her. The cow was delivered accordingly into their possession, and thereupon they became liable to Neally for the value of the cow.

But it is claimed that the cow was not fit for beef, and that therefore they were under no obligation to take her. The evidence in relation to the condition of the cow is equally balanced. The price was dependent upon the condition of the cow; the sale was not. The delivery and sale were unconditional and the price conditional. If the cow was not as good as recommended, they could abate the price accordingly.

After their unconditional direction to the agent to deliver the

cow, and after he had gone to the expense and trouble to bring her a distance of ten miles, it was their duty to take the cow and fix a price upon her. From the moment they took possession of her, either in person or by their agent, they became liable for her value. This liability would attach to them even if the sale had been conditional. They authorized the delivery of the cow into their possession. If she was not what they contracted for, they should have notified Neally's agent, or should have returned her to his possession. By their own consent and direction they became bailees, and as such are liable for the loss resulting from such gross negligence.

Judgment reversed.

SALES, WHEN CONDITIONAL: See *Lane v. Borland*, 31 Am. Dec. 33, and note collecting prior cases; *Dewey v. Erie Borough*, 53 Id. 533; *Bryant v. Crosby*, 58 Id. 767.

FURGISON v. STATE.

[4 G. GREENE, 302.]

FACTS ESTABLISHED BY BAIL BOND NEED NOT BE SPECIFICALLY AVERRED IN PETITION in a suit on the bond, where the bond is made a part of the petition.

PRESUMPTIONS OF LAW NEED NOT BE AVERRED OR PROVED.

OBLIGORS OF BAIL BOND, BY MAKING IT, ADMIT FACTS AND CIRCUMSTANCES WHICH RENDERED IT NECESSARY; and those facts and circumstances need not be averred in order to sustain an action on the bond. It will be presumed that the officer had jurisdiction to take the bond.

PETITION for *scire facias*. The facts are stated in the opinion.

J. D. Templin, for the appellant.

D. C. Cloud, for the state.

By Court, GREENE, J. This proceeding was commenced on the relation of John Parrott, as school fund commissioner of Johnson county, against Alfred Furgison and John M. Bay, on a recognizance bond for the non-appearance of said Furgison to the charge of larceny. A petition for *scire facias* was filed under the code. The petition shows that October 27, 1852, said Bay and Furgison executed a bond in the penal sum of three hundred and fifty dollars for the appearance of Furgison at the next term of the district court to answer the charge of larceny. March 23, 1853, an indictment was found in due form against Furgison for the offense. Furgison failed to appear at the March term, 1853, agreeably to the conditions of the bond, and

it was thereupon ordered by the court that the recognizance be forfeited, by reason of which the relator claimed the penal sum therein named for the school fund of the state. These facts are set forth in the petition with sufficient detail and clearness.

To this petition Bay demurred, on the ground that the petition does not aver that the bond was accepted by a competent officer, that Furgison was not admitted to bail or discharged from actual custody on taking bail by a competent court, that the magistrate did not certify his decision, and that said bail was not justified by affidavit. The demurrer was overruled, and this decision is assigned for error.

We think the court ruled correctly. True, the matters referred to in the causes of demurrer are not specifically averred in the petition, but so far as they are material, they are established by the bond itself, which is made a part of the petition. The petition and bond sufficiently show the admission and taking of bail. It is not necessary that the petition should aver that the magistrate certified his decision, or that the bail justified by affidavit. These are presumptions of law, and therefore need not be averred or proved. The bond itself shows that it was taken by an officer who could admit to bail in allailable cases: Code, sec. 3216; and that it was a case in which bail might legally be taken.

The petition shows a substantial cause of action. It states all the material facts necessary to enable the state to recover upon the bond. The execution of the bond and the failure to perform its conditions create the liability of defendants. By making the bond, they admit the facts and circumstances which rendered the bond necessary. It is not at any rate necessary to aver those facts and circumstances in order to sustain an action upon the bond. It will be presumed that the facts in the case gave the officer jurisdiction to take the bond.

In New York it has been repeatedly decided that a declaration upon such a recognizance or bond need not aver the existence of the particular facts which prove that the officer had authority to take it: *People v. Kane*, 4 Denio, 530, 544; *People v. Mills*, 5 Barb. 511; *Champlain v. People*, 2 N. Y. 82.

Judgment affirmed.

OBLIGORS CAN NOT DENY VALIDITY OF BOND: *Stephens v. Crawford*, 44 Am. Dec. 630; *Haggart v. Morgan*, 55 Id. 350; *Portis v. Parker*, 58 Id. 95.

DECLARATION NEED NOT AVER SPECIAL FACTS SHOWING OFFICER'S AUTHORITY TO TAKE RECOGNIZANCE in the particular case where the proceeding upon a recognizance is by declaration instead of *scire facias*: *United States v. George*, 3 Dill. 436, referring to the principal case.

HEICHEW v. HAMILTON.

[4 G. GREENE, 317.]

CONTRACT IS BROKEN BY OCCASIONALLY KEEPING TRAVELERS FOR PAY, although the defendant does not hold himself out to the world as a tavern-keeper, and make a regular business of keeping tavern, where he sold the plaintiff land for a tavern-stand, and as a part consideration agreed to quit the business in favor of the plaintiff as soon as the plaintiff was prepared to keep tavern.

RECORD OF FORMER RECOVERY UPON SAME CONTRACT HAS EFFECT WHEN PLEADED BY WAY OF ESTOPPEL, by the plaintiff, to prevent the defendant from denying that the plaintiff could recover according to the conditions of the contract.

SPECIAL DAMAGES ARE NOT REQUIRED TO BE SHOWN BY PLAINTIFF in order that he may recover upon a contract, when he has proved a breach thereof; he is entitled to at least nominal damages.

ACTION upon a contract. The facts are stated in the opinion.

Smith, McKinlay, and Poor, for the appellant.

Clark and Bissell, for the appellee.

By Court, HALL, J. This case was originally commenced before a justice of the peace, and appealed to the district court. The suit was brought upon a contract, by which the defendant sold the plaintiff a tract of land for the purpose of a tavern-stand, and in the sale, as a part consideration, agreed that as soon as the plaintiff had erected suitable buildings, and was prepared to keep tavern, that the defendant, who had previously been engaged in that business, would quit the business in favor of plaintiff. The defendant denied the contract; and also the breach of contract; and also that plaintiff was prepared to entertain the traveling public. The plaintiff interposed to defendant's answer, by way of estoppel, a judgment in plaintiff's favor against the defendant in the district court of Dubuque county, in a suit brought upon the same contract: See *Heichew v. Hamilton*, 3 G. Greene, 596.

Upon the trial below, the court instructed the jury "that before the plaintiff could recover, he must prove special damages; that having declared upon a special contract, the plaintiff must prove the special contract as set forth; that before the plaintiff could recover, the plaintiff must prove that the defendant kept a tavern; and that occasionally keeping travelers for pay does not constitute tavern-keeping; that if the jury believed that there was any contract, and that such contract was that defendant should quit tavern-keeping when plaintiff was prepared to

keep tavern, the plaintiff must prove that he was prepared to keep tavern before he can recover damages for defendant's tavern-keeping." The plaintiff below took exceptions to these instructions to the jury, and assign their errors thereon.

In the instructions given by the court, the idea is clearly advanced to the jury that, to constitute a breach of the contract, nothing short of the defendant's holding himself out to the world as a tavern-keeper, and making a regular and notorious business of keeping tavern, would be sufficient to constitute a breach. In this the court went too far. There certainly can be a point where the contract would be broken, short of an open and shameless public breach and defiance of his clear obligation. There was a purpose and an object which the parties had in view when they entered into the contract, and the defendant was bound to act in good faith and carry out that object and purpose. To entertain a friend or a stranger who could go no farther; or persons whom the plaintiff could not accommodate, to exercise all the benevolence and charity of a private housekeeper, would be no breach of this contract; but he can not evade its spirit and requirements by evasive restrictions and limitations in the manner that he serves and entertains the traveling public. He must act in good faith; he must quit the business, not half quit and half not.

The true rule is one that common honesty will instantly see, define, and apply. The defendant could not entertain any part of the traveling public for the mere purpose of receiving the compensation that he might receive without violating this contract. He must have been influenced by some other motive than mere pay, or he acted in bad faith towards the plaintiff.

The record of the former recovery was pleaded by plaintiff by way of estoppel, and had the effect upon the record to estop the defendant from denying every fact in issue between the parties, except the breach of the contract and the amount of damages. The plaintiff had established the fact that he was prepared to keep tavern on the first trial, or he could not have recovered. That fact once established is presumed to continue until its contrary is shown. The instructions of the court that the plaintiff must prove that he was prepared to keep tavern was erroneous. When the plaintiff had proved a breach of the contract he was entitled to at least nominal damages, and it was not required of him to prove special damages. In cases of this kind it is difficult to fix upon a rule by which damages can be satisfactorily ascertained. It is not expected that a plaintiff

can prove a precise sum abstracted from his profits by a violation on the part of a defendant, but the jury should be careful to find sufficient damages to admonish the defendant that "honesty is the best policy."

Judgment reversed.

STIPULATION IN CONTRACT IN QUESTION IN PRINCIPAL CASE, to the effect that the plaintiff would discontinue tavern-keeping, was previously held valid, and not an illegal restraint upon trade, in *Heichew v. Hamilton*, 3 G. Greene, 596; and this case and the principal case are referred to in *Smalley v. Greene*, 52 Iowa, 243, on the proposition that a contract not to engage in the practice of law in a particular town was valid and enforceable.

FORMER RECOVERY AS EVIDENCE OF PLAINTIFF'S RIGHT in another action for a subsequent injury growing out of the same obstruction: See *Haller v. Pine*, 44 Am. Dec. 762.

BARBER v. SWAN.

[4 G. GREENE, 362.]

WRIT OF ATTACHMENT SHOULD SHOW PRIMA FACIE COMPLIANCE WITH CODE, sufficient to confer authority upon the clerk to issue it; and if materially defective in this respect, it may with propriety be quashed.

WRIT OF ATTACHMENT CAN NOT BE AMENDED when it is so materially defective as to be devoid of the essential requirements to give it validity and force.

MOTION to quash writ of attachment. The facts are stated in the opinion.

William Penn Clarke, for the appellant.

J. D. Templin, for the appellee.

By Court, GREENE, J. This suit was commenced by Horace H. Barber against Charles J. Swan. A writ of attachment was issued. On motion the writ was quashed, and the court refused plaintiff's application to amend. This ruling of the court is assigned for error.

The paper in this case called a writ of attachment could not easily be recognized as such. It contains but few of the material requisites of such a writ. It does not state any action pending for the recovery of money, nor give the names of the parties to the suit. It does not state the grounds which authorized the court to issue the writ, nor does it even give the name of the plaintiff to the proceeding. It does not show that the indispensable conditions of the code had been performed, before the process could be legally issued; and does not therefore confer authority upon an officer to attach property. Such a writ

should show *prima facie* a compliance with the code, sufficient to confer authority upon the clerk to issue the writ. If materially defective, as in this case, it may with propriety be quashed.

But it is claimed that the plaintiff below asked leave to amend the writ. If there was not sufficient validity in the writ to authorize the attachment of property, an amendment of the writ could not relate back to the levy, so as to make the attachment good. But a process so deficient as the writ in this case—so devoid of the essential requirements to give it vitality and force—could not well be amended under any statute of jeofails. There is no section in the code that can justify such a complete reformation of an invalid writ, and it may well be questioned whether any section authorizes any amendment of a notice, writ, or process. Sections 1755–1759 give ample power to the courts to amend; but strictly considered, those sections can only be deemed applicable to pleadings. Under the rigor of the common law, amendments are not permitted, and we have now in Iowa no statute of jeofails but the five sections of the code referred to. There is, then, no authority for the broad and unsafe system of amendments claimed for this writ.

Judgment affirmed.

AMENDMENT OF WRITS OF ATTACHMENT AND OF PAPERS ON WHICH THEY ARE BASED.—The extent to which amendments are allowed of writs of attachment, affidavits, and bonds thereon, and even declarations or complaints in attachment suits, practically depends upon statutes which are varied in their nature, and often controlled by other statutory provisions relating to amendments in general. It would be useless to classify these statutes in this note; but their language will be given when necessary to explain differences in judicial opinion, and to show upon what particular rulings are based.

AMENDMENT OF DECLARATIONS OR COMPLAINTS IN ATTACHMENT.—Defects in the form of declaring may obviously be cured by amendment, and neither subsequently attaching creditors nor bail can take advantage thereof: *Ball v. Clafin*, 5 Pick. 303; *Miller v. Clark*, 8 Id. 412; *Wood v. Denny*, 7 Gray, 540; and see *Irvin v. Howard*, 37 Ga. 18; *Lowry v. Cady*, 24 Am. Dec. 623; *Austin v. Town of Burlington*, 34 Vt. 506. So an amendment changing the form of the action merely, or adding a new count for the same, will not dissolve the attachment as to intervenors: *Mendes v. Freiters*, 16 Nev. 388. And an amendment of a petition by setting out copies of the assignment of the note and account on which the suit was brought is not such an amendment as presents a new cause of action, nor such a departure from the case first made as will warrant the dissolution of the attachment: *McCurn v. Rivers*, 7 Iowa, 404. Where, however, a new count to the declaration is filed, for a different cause of action from that upon which suit is brought, the attachment will be dissolved. Thus in *Willis v. Crooker*, 1 Pick. 203, the controversy was between two creditors, each of whom had attached and levied upon the same land, each claiming to have made the first attachment. It

appeared that the writ in the plaintiff's action against the debtor contained originally two counts, the first upon a promissory note for one hundred and seventy-one dollars and eighty-two cents, the second for two thousand dollars for money had and received. While the action was pending, the plaintiff added three counts, the first for three hundred and twenty-two dollars, the balance of an account annexed, the second for ninety-six dollars on a promissory note, and the third for five hundred dollars, also on a promissory note; and the court held that the first attachment was thereby dissolved. A like ruling was made in a subsequent case by the same court, where the declaration contained a count for money had and received, and one for goods sold and delivered, and the plaintiff, in the progress of the action, under leave to amend, filed nine new counts on notes, checks, for money lent, etc., the court saying: "The claim or cause of action, for the security of which a creditor obtains his lien by attachment, should be clearly indicated in the writ and declaration. The declaration should set forth clearly the cause or causes of action to be secured by the attachment. And it would be a manifest injustice to a subsequently attaching creditor to permit the prior attachor to amend, by the introduction of claims which were not originally set forth and relied upon in the declaration; for he has a vested interest in the surplus. The rights of the attaching creditors should be ascertained as they existed and were disclosed by the writ and declaration at the time when they made their attachments." See, in this connection, *Freeman v. Crouch*, 112 Mass. 180, decided under a subsequent statute. But where a party declared for seven hundred dollars for money had and received, and afterwards, at the term at which the writ was made returnable, amended his declaration by agreement with the defendant, by inserting a count for one thousand five hundred dollars for money had and received, and as a substitute for the count for seven hundred dollars, but finally took judgment embracing no greater sum, the amendment was held to furnish no ground for holding the attachment dissolved as to subsequent attaching creditors: *Laighton v. Lord*, 29 N. H. 237.

Certain other defects in form in declarations and petitions in attachment have also been held amendable. Thus where the petition did not state that the debt was due, the defect may be remedied by amendment, and there is no occasion for the issuance of a new writ of attachment: *Wadsworth v. Cheney*, 13 Iowa, 576; and amendments which do not state any new causes for attachment, but merely make the original more specific, are allowable: *Gourley v. Carmody*, 23 Id. 212. In Iowa, where a petition in attachment is required to be verified, if this is not done, or the verification is defective, the defect, being one of form, is amendable under the code: *Shafer v. Sundwall*, 33 Id. 579; *Lowenstein v. Monroe*, 52 Id. 231. In *Hathaway v. Davis*, 33 Cal. 161, it is held that if the complaint is defective merely, and can be made good by amendment, the plaintiff should be allowed to amend pending the motion to dissolve the attachment for that reason; but if the complaint is incurable, the attachment must be dissolved. A declaration in attachment may be amended by changing the venue: *Perry v. Mulligan*, 58 Ga. 479; or, it is held, by correcting a misjoinder of defendants: *Starr v. Mayer*, 60 Id. 546; or in an action between two partnerships, by inserting the individual names of the partners composing the two firms: *Sims v. Jacobson*, 51 Ala. 186. Or where an action is begun by attachment sued out by the equitable owner of a chose in action, and the declaration is erroneously filed in his name, it may be amended under the Mississippi revised code, providing that "the court shall allow all amendments to be made to any pleading or proceeding at any time

before verdict, so as to bring the merits of the controversy between the parties fairly to trial," by putting upon the record the party in whom is the legal title, and this will not necessitate a change in the affidavit or bond: *Tully v. Herrin*, 44 Miss. 626. The amendment of one of two counts of a declaration inserted in the writ does not discharge a surety on a bond, given to dissolve the attachment in the action, from liability for the amount sued for in the count not affected by the amendment: *Warren v. Lord*, 131 Mass. 560.

AMENDMENT OF WRITS OF ATTACHMENT.—Many clerical defects in writs of attachment have been held to be capable of being remedied by amendment; and in the absence of statutes expressly authorizing defects in form to be corrected, the courts would seem to have the power of making the amendments under the general control which they have over their process. Thus if an attachment is levied by the proper officer, any mistake in directing it is plainly amendable: *Warren v. Purtell*, 63 Ga. 428; *Blair v. Miller*, 42 Ala. 308. A writ which does not run in the name of "the people of the state," as required by the constitution of Nebraska, is curable by amendment: *Livingston v. Coe*, 4 Neb. 379. And an attachment returnable to the "inferior court" is amendable by inserting the word "county" instead of "inferior:" *Covington v. Cothrans*, 35 Ga. 156. So where, in issuing an attachment, a justice of the peace neglects to add "J. P." to his signature, the letters may be added on motion, after proving that such officer was duly authorized to issue attachments that he signed in his official capacity, and had omitted the words of his office accidentally: *Dickson v. Thurmond*, 57 Id. 153. And where a writ of attachment was dated the twenty-second of September, but professed to be founded on a warrant dated September 23d, and was in fact issued on the latter day, it was held to be not only competent, but the duty of the court to order it amended: *McCoy v. Boyle*, 10 Md. 391. A mistake of the time when the court is held was decided to be amendable where the attachment was sued out as auxiliary to a suit commenced in the ordinary mode: *Scott v. Macy*, 3 Ala. 250. And where the warrant of attachment was not signed by the attorney, the defect was held to be clearly amendable: *Kissam v. Marshall*, 10 Abb. Pr. 424. A manifest clerical error in the amount stated in the writ may be corrected under section 3242, of the code of Iowa, revision of 1860, providing that "the attachment law shall be liberally construed, and the plaintiff, before or during trial, shall be permitted to amend any defect of form in the affidavit, bond, attachment, or other proceeding; and no attachment shall be dismissed for any defect in or want of bond, if the plaintiff, his agent or attorney, will at once substitute a sufficient bond," etc.: *Gourley v. Carmody*, 23 Iowa, 212. But in *Putnam v. Hall*, 3 Pick. 445, it is held that the rights of a subsequently attaching creditor will not be affected by the amendment of a mistake in the amount in the first attaching creditor's writ, though appearing manifestly on the face of the writ to have been occasioned by a mere slip of the pen. A writ may be amended by correcting the plaintiffs' names from Wright and Brown to Wight and Brown, and as amended has precedence over junior writs levied prior to the amendment: *Wright v. Hale*, 2 Cush. 486; S. C., 48 Am. Dec. 677. But on the other hand, it is held that an attachment to enforce a lien for wages is lost by an amendment changing the christian name of the plaintiff from "Edward" to "Edmund:" *Flood v. Randall*, 72 Me. 429.

A seal to a writ of attachment, however, in the absence of a statutory provision broad enough to allow it, being essential to the validity of the writ, and without which there is no writ, can not be supplied by amendment: *Foss*

v. *Isett*, 4 G. Greene, 76; S. C., *ante*, p. 117; and this decision was followed in the subsequent case of *Shaffer v. Sundwall*, 33 Iowa, 579, where it was held that a writ issued from the circuit court, having the seal of the district court impressed upon it, was invalid, and the defect could not be cured by amendment; but section 3021 of the present Iowa code, in the chapter relating to attachments, which provides that "this chapter shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the petition, affidavit, bond, writ, or other proceeding; and no attachment shall be quashed, dismissed, or the property attached released, if the defect in any of the proceedings has or can be amended so as to show that a legal cause for the attachment existed at the time it was issued," etc., is held to be much broader than section 3242 of the revision given above; and therefore, where a writ of attachment is issued under the seal of one court, while the action is pending in another, it is competent to amend the writ by attaching the proper seal: *Murdough v. McPherrin*, 49 Id. 479. Section 173 of the old New York code, which provided that "the court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case," etc., is likewise considered broad enough to allow a seal, wanting to a writ of attachment issued out of the marine court, to be supplied by amendment: *Talcott v. Rosenberg*, 8 Abb. Pr., N. S., 287. In Mississippi, if a party plaintiff in the declaration be omitted from the writ and affidavit, the omission may be supplied by amendment: *Shaw v. Brown*, 42 Miss. 309; but in Maine an attachment is held to be dissolved by amending the writ by inserting a co-plaintiff: *Moulton v. Chapin*, 28 Me. 505; and where partnership property was attached upon a writ containing the names of three only out of four surviving partners, and the next day the name of the fourth was inserted, and a new attachment made upon the same property, but in the mean time another creditor had attached the property upon a writ against the four partners, it was held that the first attachment was vacated as against the second attaching creditor: *Denny v. Ward*, 3 Pick. 199. So it is held in Connecticut that the statute of amendments, providing that "the several courts of law and equity in this state, in any action hereafter brought, may at any time permit the parties respectively to amend any defect, mistake, or informality in the writ, declarations, pleadings, or other parts of the record, in civil causes pending before them," does not authorize an amendment which makes a new ground of action against a new party. Therefore, a writ against the copartnership of H. & R. can not be amended by erasing the name of R., and making it a writ against H. in his individual capacity; and if such amendment is permitted, it annuls the lien of the attachment: *Peck v. Sill*, 3 Conn. 157; but where a writ in favor of A. and B., and D. as executor of C., brought after the death of C., on a note payable to A., B., and C., against the maker, was served on his real estate, and after the return of the writ it was amended by erasing D.'s name, and leaving it in favor of A. and B. as survivors of the payees, the amendment was held allowable, and the lien created by the attachment not dissolved thereby. *Johnson v. Huntington*, 13 Id. 47; and under section 2990 of the Alabama revised code, where an attachment is sued out by a partnership against a partnership, and the names of the individual partners are nowhere stated, the affidavit, bond, and attachment may be amended so as to set out their names: *Sims v. Jacobson*, 51 Ala. 186. In Michigan, also, a writ and affidavit in

favor of the firm of "Evans & Walker," otherwise identifying the parties, is amendable by inserting their christian names: *Barber v. Smith*, 41 Mich. 138. A count by way of amendment can not be filed to a writ which has no count; it would be making a new writ, which does not come within the rule of amendments: *Brigham v. Este*, 2 Pick. 420, 425. Under section 3021 of the Iowa code, above given, a writ of attachment may be amended after levy: *Atkins v. Womeldorf*, 53 Iowa, 150.

AMENDMENT OF AFFIDAVITS ON ATTACHMENT.—Unless the amendment of affidavits on attachment is expressly authorized by law, it is held that they are not amendable: *Drake on Attachments*, secs. 87, 113; *Brown v. McCluskey*, 26 Ga. 577; *Cohen v. Manco*, 28 Id. 27; *Slaughter v. Bevans*, 1 Pinn. 348; *Marz v. Abramson*, 53 Tex. 264; although the reason for the ruling does not clearly appear from the authorities. Certain general statutory provisions, however, are considered as empowering such amendments to be made. This is the case with the Kentucky civil code, section 161, which enacts that "the court may at any time, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding," etc.: *Allen v. Brown*, 4 Metc. 342; and with the like section found in the New York code, section 173, quoted above: *Furman v. Walter*, 13 How. Pr. 350, 359. Where amendments of affidavits are permitted, defects in form or clerical mistakes may of course be corrected. Thus an affidavit wanting in none of the legal requisites except that of being made before the clerk of the court is amendable under section 28 of the Illinois attachment act, by filing a new affidavit: *Campbell v. Whetstone*, 3 Scam. 361; and the objection that an affidavit was sworn to before a commissioner in another state, but that no certificate of the secretary of state had been obtained as required by statute, may be obviated by amendment: *Lawton v. Kiel*, 51 Barb. 30; S. C., 34 How. Pr. 465; so where the word "not" was omitted by oversight in stating, as the cause for which it was prayed the attachment might issue, that "the defendant had property, goods, etc., not exempt from execution," which he refused to give either in payment or as security for the plaintiff's debt, it was held that the refusal of the court to permit the affidavit to be amended and the order quashing the attachment were erroneous: *Bunn v. Pritchard*, 6 Iowa, 56; and an affidavit which states that the defendants "are or will be justly indebted," etc., is defective in form only, and therefore amendable under the Alabama code of 1876, section 3315, by striking out the words "or will be:" *Tommey v. Gamble*, 66 Ala. 469. A justice may properly allow an affidavit to be amended so as to show that the affiant was the agent or attorney of the plaintiff in the writ: *Paulhaus v. Leber*, 54 Id. 91; so an affidavit for an attachment upon a crop for rent may be amended by inserting the omitted fact, existing when it was made, that the plaintiff "was absent from the county:" *Nolen v. Royston*, 36 Ark. 561. Where the affidavit was signed "Paul Ruthe," while the proceedings were carried on in the name of "Paul Ruthe," as plaintiff, it is such a variance that may be corrected at any time, and if the names are *idem sonans*, no amendment is necessary: *Ruthe v. Green Bay etc. R. R.*, 37 Wis. 344. And where an attachment is brought in aid of a suit at law, but is docketed separately, there is no error in allowing an amendment of the affidavit, showing the attachment to be in aid of such suit: *Roberts v. Dunn*, 71 Ill. 46. An affidavit lacking a venue may be amended: *Struthers v. McDowell*, 5 Neb. 491.

The statutes generally provide that affidavits defective in form only may be amended; but certain provisions, some of which are quoted above, are sufficiently broad to permit an amendment in matter of substance: See *Henderson v. Drace*, 30 Mo. 358; *Brown v. Hawkins*, 65 N. C. 645; *Graves v. Cole*,

1 G. Greene, 405; *Langworthy v. Waters*, 11 Iowa, 432. Under section 2562 (section 3315, code of 1876) of the Alabama code, which is substantially the same as section 3242 of the Iowa code, revision of 1860, *supra*, there is a distinction between defective affidavits and defective bonds, the latter only being amendable for defects other than those of form, and therefore the averment required of the affidavit that the writ "is not sued out for the purpose of vexing or harassing the defendant," being matter of substance, can not be supplied by amendment: *Hall v. Brazelton*, 40 Ala. 406; S. C., 48 Id. 359. And a like provision found in the Tennessee code, section 3477, is also held not to authorize defects in the substance of affidavits to be amended; as where the affidavit is neither signed nor certified: *Watt v. Carnes*, 4 Heisk. 532; or no sufficient ground for its issuance is stated: *Lillard v. Carter*, 7 Id. 604; but see *Maples v. Tunis*, 11 Humph. 108; S. C., 53 Am. Dec. 779; but the fact, however, that the clerk failed to attest that the affidavit had been sworn to is not fatal, although his failure to sign the writ renders it void and incurable by amendment: *Wiley v. Bennett*, 9 Baxt. 581. In New York, also, an affidavit which wholly omits to state the grounds of the cause of action can not be remedied by amendment, there being a defect in jurisdiction: *Zeregal v. Benoit*, 33 How. Pr. 129; S. C., 7 Robt. 199; see *Maples v. Tunis*, *supra*. The law of Arkansas reads: "The affidavit or grounds of attachment may be amended so as to embrace any grounds of attachment that may exist up to and until final judgment upon the same. If the amendment embrace grounds existing at the time of the commencement of said proceeding, and is sustained upon such grounds, the lien created by the suing out or levying of the original attachment shall be held good," etc.: Gantt's Dig., sec. 394, c. 11. Under this section, and certain general provisions, it is held that an affidavit for attachment, made possible in certain cases by section 4101, Digest, by a landlord who has a lien on the crop of his tenant for rent, may be amended in the circuit court, on appeal from the justice's court, by inserting "that the defendant had removed a part of the property from the premises without the consent of the plaintiff:" *Rogers v. Cooper*, 33 Ark. 406; but on the other hand, in Alabama, under similar laws giving a landlord the right to attach his tenant's crop for rent, it is held that the affidavit is fatally defective if it does not allege that the removal of the crops from the rented premises was without the landlord's consent: *Shield v. Dothard*, 59 Ala. 595; and also a failure of the affidavit to state that the parties are landlord and tenant, and that the indebtedness was for rent and advances, can not be remedied by amendment: *Staggers v. Washington*, 56 Id. 225. Sections 23 and 27 of the Maryland code, relating to amendments, and the misjoinder and non-joinder of defendants, do not authorize the court to strike out the name of one of the defendants in the affidavit of the plaintiff, or in the warrant of the justice, in proceedings by attachment against non-resident debtors: *Halley v. Jackson*, 48 Md. 254.

AMENDMENT OF BONDS ON ATTACHMENT.—As in the case of defective writs, there is no power in a court except as conferred by law to allow an amendment of an insufficient bond: Drake on Attachments, sec. 146; *Roulhac v. Rigby*, 7 Fla. 336; but this authority is given in a number of the states; and the statutes in relation to the amendment of attachment proceedings are either more liberally construed in the case of bonds, or they expressly provide that an attachment shall not be dismissed for any defect in or want of a bond, if a sufficient bond is substituted. Thus under a statute which enacts that "the plaintiff before or during the trial should be permitted to amend any defects of form in the original papers," a defective bond may be amended by

the substitution of a new and perfect bond: *Lovry v. Stone*, 7 Port. 483; see also *Kissam v. Marshall*, 10 Abb. Pr. 424; and see *Van Arsdale v. Krum*, 9 Mo. 393, decided under a broader statute; and that there was no distinction between a void and a defective bond, and in either case it was the duty of the court to permit the plaintiff to substitute a sufficient bond: *Jackson v. Stanley*, 2 Ala. 326; so a defect in the bond is not a sufficient cause for quashing the proceedings, unless an opportunity is given to the plaintiff to execute a perfect bond, and he declined doing so: Drake on Attachments, sec. 147; *Lovry v. Stone*, 7 Port. 483; *Planters' and Merchants' Bank v. Andrews*, 8 Id. 404; *Alford v. Johnson*, 9 Id. 320; *Lowe v. Derrick*, Id. 415; *Scott v. Macy*, 3 Ala. 250; *Tevie v. Hughes*, 10 Mo. 380; *Wood v. Squires*, 28 Id. 528; *Beardslee v. Morgan*, 29 Id. 471; *Henderson v. Drace*, 30 Id. 358; *Jasper Co. v. Chenault*, 38 Id. 357; *McDonald v. Fist*, 53 Id. 343; *Cheever v. Lane*, 9 Iowa, 193; *Holmes v. Budd*, 11 Id. 186; *Gourley v. Carmody*, 23 Id. 212; *Lee v. Vail*, 2 Scam. 473; *Smith v. Joiner*, 27 Ga. 65; *Oliver v. Wilson*, 28 Id. 642; *Irvin v. Howard*, 37 Id. 18; *Long v. Hood*, 46 Id. 225; *Sutherland v. Underwriters' Agency*, 53 Id. 442. But the application to amend must contemplate the removal of all the objections to the bond, or the refusal to allow an amendment will not be error: Drake on Attachments, sec. 148; *Hunter v. Ladd*, 1 Scam. 551. "When a plaintiff has obtained leave to file an amended bond, and has done so, it is substituted for that originally given, and has the effect of sustaining the attachment from the commencement of the action, and is so to be treated as the defendant's security from that time:" Drake on Attachments, sec. 148 a; *Branch of State Bank v. Morris*, 13 Iowa, 136; *McCraw v. Welch*, 2 Col. 284.

WALLACE v. CITY OF MUSCATINE.

[4 G. GREENE, 373.]

MUNICIPAL CORPORATION IS LIABLE ON SAME PRINCIPAL AS INDIVIDUAL CITIZEN for acts of non-feasance or negligence of its agents in the construction of its various improvements, in the absence of an express statute to the contrary.

MUNICIPAL CORPORATION IS LIABLE FOR DAMAGES OCCASIONED BY OVERFLOW OF WATER upon private property, through the improper and negligent manner in which it executes its powers and duties in constructing culverts, drains, and gutters.

ACTION to recover damages. The opinion states the facts.

J. Scott Richman, for the appellants.

J. Butler and S. Whicher, for the appellee.

By Court, **HALL, J.** The plaintiffs in this case brought their action against the city of Muscatine to recover damages sustained by the plaintiffs, occasioned by the improper and unskillful construction of certain culverts, drains, and gutters, made by the city, by which the water was turned and flowed upon the plaintiffs' premises, situate in said city; and also that the city, in constructing their works, had left them in an unfinished

state, and in such a careless and negligent condition, that a large quantity of water was made to overflow the premises of the plaintiffs, occasioning damage, etc. To this petition the defendant filed a demurrer, which was sustained by the court below; and judgment was rendered against the plaintiffs. The sustaining of the demurrer is assigned for error.

The power and authority of the city of Muscatine to make the improvements that are alleged to have produced the injury complained of is not denied; and the only question presented for our decision is as to the liability of the city for damages occasioned from the improper and negligent manner in which they executed their powers and duties in making those improvements. It has been contended that a corporation such as this is governed by a different principle from that applied to individual citizens, and that it can not be made liable for acts of non-feasance or negligence of its agents in the construction of its various improvements. We can not assent to this doctrine, as being sustained either by reason or authority.

That the legislature can create a corporation, and exempt it from duties or obligations which are denied the natural citizen, may perhaps be true; but unless such privileges are expressly conferred, no court ought to give them, by construction or implication. The tendency of legislation and the decisions of courts is to maintain equality of rights, whether the interests and duties are exercised by a number of persons associated into a corporation or by private persons. The true principle should be to make the party liable who had the authority to act, and who authorized the act that occasioned the damage; especially when the damage is consequential. The necessity that the city authorities should have the power to grade the streets, provide drains, gutters, culverts, and such improvements as the public convenience required, so far as these matters are concerned, can not be denied, and their authority over such matters should be complete. The interest of the public in the streets and alleys, although it is only an averment, is as perfect as that of a natural person in his fee-simple title, and their right to enjoy and appropriate them to the specific purpose should not be infringed upon by the real or supposed convenience or relative interest of any one.

The case of *Creal v. City of Keokuk*, 4 G. Greene, 47, recognized this doctrine, although the opinion in that case does not, perhaps, as thoroughly keep in view the rights of the public to appropriate what is clearly admitted to belong to them as it does

that of the individual citizen. It will be difficult to establish, upon any principle of universal application, a distinction between the rights of one and the rights of many. Why, if the individual citizen has the unlimited right to use his own property in such a manner as may suit his convenience and wishes, without fear of damage from any source, provided he uses proper caution not to directly damage his neighbor—why a public corporation can not in the same manner appropriate their property, and subject it to their convenience and use, without being subject to exactions and damages from those who are discommoded or damaged by such legal use of public property, will most certainly be difficult to reconcile upon any general principle.

The negligent or unskillful manner of using or appropriating the property, whereby damage is produced, is to all intents the same to the injured party, whether occasioned by the acts of a private citizen or a public corporation, and the law protects him equally against both. There can be no difference in principle between the "taking of private property for public use" and the demolition and damage produced to his property by overflowing it with water. This would not be in the use of their own property, but a destruction of the property of others.

The cases cited by counsel for appellants, we think, are clear upon this point: *Bailey v. Mayor etc. of New York*, 3 Hill (N. Y.), 532 [38 Am. Dec. 669]; *Mayor etc. of New York v. Furze*, Id. 612; *Mayor etc. of New York v. Bailey*, 2 Denio, 434; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463 [53 Am. Dec. 316]; *Ross v. City of Madison*, 1 Ind. 281 [48 Am. Dec. 361].

The decision of the court below will be reversed, and the cause remanded to the district court for further proceedings.

Judgment reversed.

MUNICIPAL CORPORATIONS, LIABILITY FOR NEGLIGENCE: See *City of Madison v. Ross*, 54 Am. Dec. 481, and note referring to other cases in this series; *Lloyd v. Mayor etc. of New York*, 55 Id. 347, and notes; *City of Buffalo v. Holloway*, 57 Id. 550; *Hutson v. Mayor etc. of New York*, 59 Id. 528. A municipal corporation is liable for the negligence of its agents in the construction of public improvements, upon the same principle and under the same circumstances as a private citizen: *Cotes v. City of Davenport*, 9 Iowa, 235. Thus if, in making changes in the natural surface of streets, a city is negligent in construction, so that the adjacent lots are injured thereby, the city is liable for such injury: *Hendershot v. City of Ottumwa*, 46 Id. 659. And this doctrine of liability of municipal corporations for the negligent construction and repairs of streets is applicable to the question of the liability of road supervisors, at least so far as to determine that they are not exempt on account of the quasi judicial nature of their duties and powers: *McCord v. High*, 24 Id. 346. The principal case was cited to the propositions laid down by the foregoing Iowa cases.

CORIELL v. HAM.

[4 G. GREENE, 455.]

ADJOURNMENT OF EXECUTION SALE WILL NOT HAVE EFFECT TO INVALIDATE IT, when the adjournment was made by public proclamation, the agent of the execution defendant was present and had notice of it, and the postponement was occasioned by the agent's failure to pay the amount he had bid upon the property.

PURCHASER AT ADJOURNED EXECUTION SALE WILL NOT BE CHARGED WITH NOTICE OF IRREGULARITIES, from the mere fact that he was present at the first sale and had notice of the adjourned sale.

EXECUTION LAW IN FORCE AT TIME OF CONTRACT ENTERS INTO AND BECOMES PART OF IT, so far as it affects the obligation; but so far as it is merely remedial, it may be modified or changed at any time.

SUBSTANTIAL RIGHTS OF PARTIES CAN NOT BE CHANGED OR IMPAIRED BY SUBSEQUENT LAWS, but the remedial directions for enforcing those rights may be changed.

OBVIOUS POLICY OF LAW IS TO PROTECT JUDICIAL SALES, in the absence of fraud.

PETITION to set aside an execution sale and cancel a sheriff's deed. The facts are stated in the opinion.

Smith, McKinlay, and Poor, for the appellants.

H. A. Wiltse and J. Burt, for the appellee.

By Court, GREENE, J. The petition in this case was filed by Charlotte Coriell and W. W. Coriell against Matthias Ham, and prays that the execution sale be set aside and the sheriff's deed to certain lots in the city of Dubuque be canceled. It appears that November 16, 1842, J. V. Berry obtained judgment against W. W. Coriell; that execution was issued June 27, 1844, and the lots in question were levied upon, and advertised to be sold on the seventeenth of August following; that the lots were bid off by John C. Coriell, the brother and agent of defendant, who failed to pay the amount of his bid, and in consequence the sale was postponed until the twenty-fourth of that month, when M. Ham became the purchaser.

The case, as submitted to the court below, was decided against the plaintiffs, and their petition was dismissed. To this decision several objections are urged by counsel for appellants.

1. It is objected that the sheriff was not authorized to make the sale on the twenty-fourth of August, as he had previously advertised the sale for the seventeenth of that month. It appears by the deposition of the sheriff that he "proclaimed the postponement of the sale." The sale was then postponed from the seventeenth to the twenty-fourth of the month. As the ad-

jourment was proclaimed by the sheriff, and as the execution defendant's agent was present and had notice of it, and as the postponement was occasioned by his failure to pay the amount he had bid upon the property, he should not after so long an interval be permitted to take advantage of that derangement in the sale. If there had been no postponement of the sale, and if the delay had not been occasioned by the agent of the execution defendant, we should regard this irregularity as having a more serious effect upon the validity of the sale. There is great propriety and frequently obvious necessity for adjourning such sales from time to time; and when it is done by public proclamation, and with notice to the parties in interest, as in this case, it should not have the effect to invalidate the sale.

In *Burd v. Dansdale*, 2 Binn. 80, it was held that a sheriff's sale of lands, even after the return day of the writ of *venditioni exponas*, is not void, if after advertised before, and continued by adjournment. So in *Luther v. McMichael*, 6 Humph. 298.

The case of *Givan v. Doe*, 5 Blackf. 260, is referred to by appellant with great confidence. In some particulars that case resembles this, but in others it is vastly different. In that case, a sheriff sold the land to B., who failed to pay the purchase money. Three days after, *at the request of C.*, and *without having adjourned the sale*, and without advertising it again, the sheriff re-exposed the property to sale, and sold it to C., *who had notice of the fact, and was a party to the irregularities*; and it was held that there were in the *circumstances of the case those ingredients of fraud which vitiate the sale*. We have italicized the facts and peculiar features of that case, which show it to be materially different from this. In this case there was an adjournment. The sale was not at the request of the purchaser, and he was in no way a party to the irregularities. Nor were there in this case any ingredients of fraud which could invalidate the sale.

2. It is not pretended that there was fraud or collusion on the part of the purchaser, but it is objected to the decision below that he had notice of the irregularities. Indeed, the plaintiffs show so much confidence in Ham that they made him their witness, and it seems by his testimony that he was present at the first sale, and from that circumstance it is claimed that he had notice of the irregularity. By this same testimony it seems that Ham had given Coriell "six years to redeem in, and had requested him to redeem at ten per cent interest on the money

he had paid out; that Coriell had refused to do so, saying that he could do better with his money." This testimony shows that Ham attended the first sale, and had notice of the adjourned sale, but it shows the very reverse of fraud or collusion. It shows that Ham's purchase was in good faith, and in full confidence of regularity. From the mere fact that he was present at the first sale, and had notice of the adjourned sale, it does not follow that he is to be charged with notice of irregularities which were not known to him, and which are not even now made patent.

3. It is objected that the deed was prematurely given; that the judgment was rendered November 18, 1842, when the act of February 17, 1842, subjecting real and personal estate to execution, was in force; that the execution law enters into and becomes a part of the contract; that under that act the sheriff was only authorized to give a certificate to the purchaser, which would entitle him to a deed in fifteen months if the property was not redeemed; and that as this deed was given immediately after the sale under the law in force, at the date of the sale it was unauthorized and void.

We think this objection is without sufficient foundation. Although appellants are correct in assuming that the execution law in force at the time of the contract enters into and becomes a part of it, still it must be borne in mind that that doctrine is only applicable to such portions of the execution law as affect the obligation of contracts. So far as execution laws are merely remedial, they may be modified and changed at any time. The method of enforcing a liability may be changed, but the liability itself can not be impaired. If the law of a contract requires payment in cash, a subsequent law can not constitutionally direct that payment may be made in property at two-thirds valuation. If the law of the contract stipulates that payment may be enforced by a sale of property within a given time after judgment, a subsequent law can not change that contract by extending the time; but the new law may change the manner in which such obligations and liabilities are to be enforced.

The substantial rights of parties under a contract can not be changed or impaired by subsequent laws, but the remedial directions to the officers of the law for enforcing those rights may be changed.

The execution law of February 17, 1842, was repealed February 16, 1843, and the valuation law of 1843 adopted. So far as the provisions of that valuation law were remedial, and so far as

they did not impair the obligation of contracts, they were applicable to the execution under which the property in question was sold. Accordingly, the sheriff had power to deliver the deed to the purchaser as soon as the purchase money was paid. We can discover nothing in the sale or in the deed that impaired the rights of either party under the contract and judgment. The valuation and unconstitutional portion of the act of 1843 was not followed in this sale. Indeed, the whole proceeding under the execution appears to have been in substantial harmony with the execution law of the contract, until the deed was delivered to the purchaser, and in that the sheriff acted under the law in force at the date of the deed.

It is alleged that the execution defendant had, under the law of the contract, a right to redeem the property. That right is not changed by the sheriff's deed to the purchaser. The defendant could have redeemed the property from the deed, just as effectually as from a certificate. If this had been done, the deed could have been canceled, or the purchaser would have redeeded the property. It appears by appellants' own evidence, that the appellee offered to let appellants redeem, for a period of six years after the sale, without requiring more than ten per cent interest; but they considered the money worth more to them than the property. Hence he can not now be justified in saying that he was wronged or defrauded by the sheriff's sale. So long as the property did not appreciate in value equal to ten per cent, the appellants acquiesced in the purchase; but after a great advance in its value—after a lapse of eight years—the bait becomes too tempting to resist, and all at once irregularities are discovered in the sale that were never thought of before. We think, under the circumstances and equities of this case, the appellants are barred by lapse of time, by their own deliberate laches, by having waived their legal rights to redeem, and by refusing appellee's generous offer to have them redeem. That lapse of time will cure more serious irregularities than those disclosed in this sale is shown by *Doe v. Rue*, 4 Blackf. 266; *Spafford v. Beach*, 2 Dougl. 150; see also *Stewart v. Marshall*, 4 G. Greene, 75.

It is generally conceded by the authorities that a *bona fide* purchaser at sheriff's sale, even if that purchaser be the execution plaintiff, is not affected by any irregularity or omission of the sheriff in advertising and conducting the sale. Such purchaser is protected by the presumption that the judgment of a competent court has been correctly rendered. and that the exe-

cution in the hands of the sheriff was regularly issued, and that he performed his duty according to law. In the several cases we have had before us, involving the validity of execution sales, under various objections, the authorities cited from other states have perhaps been sufficiently considered without again referring to them: *Humphrey v. Beeson*, 1 G. Greene, 199 [48 Am. Dec. 370]; *Hopping v. Burnam*, 2 Id. 39; *Corill v. Doolittle*, Id. 385; *Johnson v. Carson*, 3 Id. 449; *Sprott v. Reed*, Id. 489.

In the absence of fraud, it is the obvious policy of the law to protect judicial sales.

Judgment affirmed.

PURCHASER AT EXECUTION SALE, WHEN AFFECTED BY IRREGULARITIES IN GENERAL: See *Armstrong v. Jackson*, 12 Am. Dec. 225; *Cox v. Nelson*, 15 Id. 89; *Blight's Heirs v. Tobin*, 18 Id. 219; *Swiggart v. Harber*, 39 Id. 418; *Minor v. President etc. of Natchez*, 43 Id. 488; *Maddox v. Sullivan*, 44 Id. 234, and note; *Byers v. Fowler*, 54 Id. 271; *Casey v. Gregory*, 56 Id. 581, and note; *Draper v. Bryson*, 57 Id. 257; *Newton v. State Bank*, 58 Id. 363, and note.

REMEDIAL RETROSPECTIVE LEGISLATION IS CONSTITUTIONAL: *Baughen v. Nelson*, 52 Am. Dec. 694, and note collecting prior cases; *Wynne's Lessee v. Wynne*, 58 Id. 66; also *Griffin v. McKenzie*, 50 Id. 389, and note. A statute passed pertaining to the remedy, and in no manner impairing the obligation of a judgment obtained, nor depriving the plaintiff of his remedy, may have a retroactive effect: *Watts v. Everett*, 47 Iowa, 272, citing the principal case.

WILSON v. STRIPE.

[4 G. GREENE, 551.]

THAT PROPERTY ATTACHED IS EXEMPT FROM EXECUTION MAY BE SHOWN on motion to dissolve the attachment or to have the property released; but if the party fails to avail himself of such motion, it does not follow that his right to the property under the law is forfeited, or that he is estopped from recovering it in replevin.

ACTION OF REPLEVIN IS AUTHORIZED BY IOWA CODE TO RECOVER POSSESSION OF PERSONAL PROPERTY taken by legal process from the owner, when such property is exempt from seizure by such process; and the action may be brought at any time before the property is finally sold by virtue of the process, unless the same issue has been *res judicata* on motion.

JUDGMENT, UNTIL REVERSED, IS CONCLUSIVE OF EVERY ISSUE THAT WAS OR SHOULD HAVE BEEN TRIED under the pleadings, but is not conclusive of facts that were in no way in issue, nor admitted by the pleadings; therefore a judgment accompanied by an order of sale of property attached is not conclusive that the property is exempt from sale.

JUDGMENT IS NOT COLLATERALLY IMPAIRED when a sale of exempt property, under an accompanying order, is prevented by maintaining an action of replevin for the property. The judgment is independent of the order of sale, and the replevin proceeding merely affects the order.

JUDGMENT AND ORDER TO SELL PROPERTY ATTACHED IS NO BAR TO ACTION OF REPLEVIN for the property, on the ground that it is exempt from seizure and sale.

REPLEVIN. The facts are stated in the opinion.

Edwards and Turner, for the appellant.

J. Matthews, for the appellee.

By Court, GREENE, J. This was an action of replevin commenced by William C. Stripe against George B. Wilson as constable, to recover the possession of a horse which Wilson had taken on attachment against Stripe. The petition claimed to recover on the ground that the horse was exempt from execution. The cause was submitted to the court without a jury. On the trial, it appeared that the plaintiff was the head of a family, and that he had no other horse than the one taken in replevin. The court rendered judgment in favor of plaintiff; and decided that the plaintiff in replevin might have joined issue on the trial before the justice of the peace, and might have claimed there that the horse was exempt from execution or attachment, but that he was not bound to do so under the code; and by not doing so, he did not waive his right to claim the horse as exempt from attachment; that the judgment and proceeding in attachment before the justice of the peace is not a bar to this action of replevin. From this decision Wilson appealed, and contended that Stripe ought to have claimed the horse as exempt from execution, on the trial of the suit of *Tapping v. Stripe*, in which the horse was attached, and that as he failed to make the issue at that time, he was estopped from claiming him in any other way.

It appears that Tapping sued Stripe before a justice of the peace on a promissory note; that the horse in question was delivered to the constable on garnishee process, as the property of Stripe; that judgment was rendered against Stripe by default, and the horse was ordered to be sold. Although the proceeding is not expressly authorized by the code, still we agree with the court below that the defendant might have appeared before the justice for the purpose of showing that the property was exempt from the attachment. Where all the property attached is exempt, the fact might be shown on motion to dissolve the attachment, or on motion to have the exempted property released. But if the party fails to avail himself of such motion, it does not follow that his right to the property under

the law is forfeited, or that he is estopped from recovering it in an action of replevin.

The action of replevin is expressly authorized by the code, where the object is to recover the possession of personal property taken from the owner by legal process, and which was exempt from seizure by such process: Secs. 1994, 1995. The owner of such exempted property may avail himself of this remedy at any time before the property is finally sold by virtue of such process, unless the same issue had been *res judicata* on motion in reference to the attachment. No such motion was submitted and tried in the present case; consequently the proceeding by replevin was authorized.

But it is contended that the property attached was ordered to be sold to satisfy the judgment, and that such order and judgment are conclusive against Stripe. This proposition goes too far. Such a judgment, until reversed, is conclusive of every issue that was or should have been tried under the pleadings. It is conclusive of defendant's indebtedness to the plaintiff, but it is not conclusive of facts that were in no way in issue nor admitted by the pleadings. It is conclusive that the horse was ordered to be sold to satisfy the judgment, but it is not conclusive that the horse was not exempt from such sale, for that question was in no way involved by any issue before the court. Had a motion been made and tried to vacate or dissolve the attachment levy on the ground that the property was exempt, and if that issue had been decided, then the question might be regarded as *res judicata*, and might be pleaded in bar to this action.

The judgment in the district court in this action of replevin is claimed to be in conflict with the judgment in *Tapping v. Stripe* before the justice of the peace. It is claimed that the one is collaterally impeached and set aside by the other, in direct opposition to the uniform rulings of this court in reference to the conclusiveness of judgments when collaterally assailed. But we can see no such conflict between the two judgments. The judgment against Stripe before the justice of the peace is in no way impaired by the judgment in replevin. It possesses the same force, vitality, and conclusiveness since the replevin that it did before. True, the auxiliary proceeding in *rem* is affected by it, but that is no part of the judgment upon the merits. That judgment is perfect either with or without the attachment proceeding. It is also independent of the order of sale, and as complete without as it can be with that order.

Consequently, as the replevin proceeding merely affected the order of sale, it did not impair the judgment. It merely prevented an illegal sale of property to satisfy the judgment, but left the judgment just as effectual against property subject to execution as it was before the replevin suit was commenced.

We therefore conclude that the judgment and order to sell the property was not a bar to the action of replevin for the property which was exempt from seizure under the attachment.

Judgment affirmed.

REPLEVIN WHETHER LIES FOR PROPERTY WRONGFULLY TAKEN UNDER LEGAL PROCESS: See *Bruen v. Ogden*, 20 Am. Dec. 593, and cases in note; *Dunham v. Wyckoff*, Id. 695, and note discussing the question; *Smith v. Huntington*, 14 Id. 331; *Lathrop v. Cook*, 31 Id. 62. The principal case is cited in *Gimble v. Ackley*, 12 Iowa, 30, to the point that an action of replevin will lie in Iowa at the instance of a party whose property has been improperly seized by an officer.

JUDGMENTS, HOW FAR CONCLUSIVE: See *Mosby v. Wall*, 55 Am. Dec. 71; *Sheldon v. Carpenter*, Id. 301; *Lents v. Wallace*, Id. 569; *Parkhurst v. Sumner*, 56 Id. 94, and notes to these cases

FRINK v. COE.

[4 G. GREENE, 555.]

DECLARATION IS ADMISSIBLE AS PART OF RES GESTÆ, when made by the plaintiff at the time in reference to the injuries he had received from the overturning of a stage-coach.

DECLARATION MUST BE REGARDED AS PART OF RES GESTÆ, and may be shown to the jury along with the principal facts, if it is made at the time the act is done, and is calculated to explain the character, nature, or quality of the facts constituting the act and its effects, so as to unfold and harmonize them as parts of the same transaction.

PROPRIETORS OF STAGE-COACHES PLYING BETWEEN DIFFERENT PLACES, AND CARRYING PASSENGERS FOR HIRE, ARE RESPONSIBLE FOR all accidents and injuries happening to the persons of the passengers which could have been prevented by human care and foresight.

EXEMPLARY DAMAGES SHOULD BE GIVEN TO PASSENGER OF STAGE-COACH who has been injured in consequence of the gross negligence on the part of the proprietor of the coach, in the employment of a known drunken driver.

JURY IS JUSTIFIED IN GIVING EXEMPLARY DAMAGES, even where an intent or design to do the injury does not appear, where a stage proprietor or carrier is guilty of gross negligence.

TENDER ADMITS LIABILITY OR INDEBTEDNESS to the amount of the sum tendered.

ACTION for damages. The facts are stated in the opinion.

Smith, McKinlay, and Poor, for the appellants.

Cook and Dillon, and William G. Woodward, for the appellee.

By Court, GREENE, J. This action was commenced by John Coe against John Frink & Co., proprietors of stage-coaches running between Rock Island and Chicago, to recover damages for injuries sustained by the negligent and careless upsetting of defendants' coach, in which he had taken passage. The cause was submitted to a jury. Verdict in favor of plaintiff for the sum of two hundred and seventy dollars. Judgment accordingly. A motion made by defendants below for a new trial was overruled. Defendants appealed, and now urge reasons for reversing the judgment.

1. It is claimed that the court erred in permitting to be given in evidence the plaintiff's declaration, made at the time, in reference to the injuries he had received by the casualty. It appears that the court permitted the following question to be put and answered: "What did the plaintiff say at the time of the overturning of the coach as to the injury he received?" The answer to this question showed that the plaintiff said at the time of the injury that his hand was fast and mashed. To this interrogatory and answer we can see no objection. This declaration of the party was a part of the *res gestæ*. It was contemporaneous with the injury, and illustrated its character. It expressed the bodily feelings of the party, the location and nature of his suffering. Whether that declaration was real or feigned, the jury should determine from the other facts and circumstances of the case: 1 Greenl. Ev., secs. 102, 108.

In section 102, Professor Greenleaf, among other appropriate examples, speaks of the representation of a sick person as to the nature, symptoms, and effects of the malady under which he was laboring at the time, which may be received as original evidence as distinguished from hearsay. Upon the same principle should the declarations of a wounded man be received as to the nature and effects of the injury, especially where those declarations were made immediately after the calamity, and while his injured limb was fast under the coach. It would seem impossible to make declarations more strictly a part of the *res gestæ* than the words of the plaintiff in this case, uttered while his hand was still fast under the upturned coach which had produced the wound.

According to the authorities, if such a declaration was made at the time the act was done, and is calculated to explain the

character, nature, or quality of the facts constituting the act and its effects, so as to unfold and harmonize them as parts of the same transaction, then such a declaration must be regarded as a part of the *res gestæ*, and may always be shown to the jury along with the principal facts: *Enos v. Tuttle*, 3 Conn. 250; *Carter v. Buchannon*, 3 Ga. 513; *Blood v. Rideout*, 13 Met. 237; *Boyden v. Burke*, 14 How. 575; *In re Taylor*, 9 Paige, 611; 1 Greenl. Ev., sec. 108.

In an action by a bailor against the bailee for loss by his negligence, the declarations of the bailee, contemporaneous with the loss, are admissible in his favor to show the nature of the loss. Story on Bailments, sec. 339, cites *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Beardslee v. Richardson*, 11 Wend. 25 [25 Am. Dec. 596]; *Doorman v. Jenkins*, 2 Ad. & El. 80. So in a prosecution for a rape where the party injured is a witness, it is material to show that she made complaint of the injury while it was yet recent: 1 Greenl. Ev., sec. 102.

Although we consider such a declaration admissible, as tending to prove the issue, still it can not of itself be regarded as sufficient proof without some other corroborative evidence.

2. It is objected that the court erred in giving the following instruction, as requested by the plaintiff below: "That the proprietors of stage-coaches which ply between different places, and carry passengers for hire and compensation, are responsible for all accidents and injuries happening to the persons of the passengers which could have been prevented by human care and foresight."

This instruction contemplates a great degree of diligence, care, and foresight on the part of stage proprietors, but not more, we think, than sound public policy dictates, nor more than the authorities justify. It was held, in *Maury v. Talmadge*, 2 McLean, 157, that stage proprietors are bound to use the greatest care for the safety of passengers; that the least negligence by the drivers, or the want of skill, makes them liable. So in *McKinney v. Neil*, 1 Id. 540, it is decided that a stage proprietor is bound to furnish good coaches, gentle and well-broken horses, good harness, and a prudent, skillful driver, and is liable to any passenger who may receive any injury from any defect in these particulars, and is also liable for the smallest degree of negligence, carelessness, or want of skill in the driver. With horses gentle and well broken, with coaches and harness good and strong, with drivers sober, prudent, and skillful, a stage-coach line might be regarded as managed with

human care and foresight. With such an outfit, stage proprietors, in a level prairie country like Illinois and Iowa, would rarely if ever be called upon to pay damages for personal injuries to passengers. In *McKinney v. Neil*, *supra*, the upsetting of a stage-coach was held to be *prima facie* evidence of negligence. That doctrine is especially appropriate to a level prairie country, where nearly every accident may be traced to drunken or grossly careless drivers.

The instruction under consideration is quite as moderate towards stage proprietors as the authorities would justify. It appears to have been extracted almost literally from elementary works, as the settled doctrine of modern decisions: Story on Bailments, sec. 601; 2 Greenl. Ev., sec. 221; Angell on Carriers, secs. 536, 568, and notes.

3. Several errors are assigned and urged in reference to the true measure of damages. These may all be sufficiently comprised under one proposition, which was submitted by defendants below. They requested the court to instruct the jury that, no matter whether they believed the driver to be drunk or sober, the plaintiff is only entitled to the actual damage proved; and that he can not recover exemplary damages unless he proves the acts of the defendants to have been intentional and designed. This doctrine the court refused to submit to the jury as law. Upon this point we have some difficulty in arriving at a conclusion. If Professor Greenleaf's definition of damages is to be taken as the uniform test, applicable to all cases, then we should say that defendants submitted a correct proposition, which should have been given to the jury. Greenleaf declares that "damages are given as compensation, recompense, satisfaction to the plaintiff for the injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less." 2 Greenl. Ev., sec. 253. This doctrine in reference to damages can not be universal in its application. It is not appropriate to all cases and to all kinds of damages. It is not applicable to exemplary damages, nor to all cases where damages can not be ascertained by actual computation.

It would seem that Professor Greenleaf's extreme views as to damages are not justified by the authorities, and are well refuted by Sedgwick: See Am. Law. Rep., June, 1847; Sedgwick on Damages, 453-472; *Conard v. Pacific Ins. Co.*, 6 Pet. 262, 282; *Bell v. Cunningham*, 3 Id. 69; *Tracy v. Swartwout*, 10 Id. 80, 95; *Larned v. Buffinton*, 3 Mass. 546 [3 Am. Dec. 1851: *Leland v.*

Stone, 10 Id. 459; *Weld v. Bartlett*, Id. 470, 478; *Richards v. Farnham*, 13 Pick. 451; *Stone v. Codman*, 15 Id. 297; *Walker v. Smith*, 1 Wash. 152; *Tillotson v. Cheetham*, 3 Johns. 56 [3 Am. Dec. 459]; *Boston Mfg. Co. v. Fiske*, 2 Mason, 120; *Linsley v. Bushnell*, 15 Conn. 225 [38 Am. Dec. 79]; *Huntley v. Bacon*, Id. 267; *Phillips v. Lawrence*, 6 Watts & S. 150; *Donnell v. Jones*, 13 Ala. 490; *Nelson v. Morgan*, 2 Mart. 257 [5 Am. Dec. 729]; *Grable v. Margrave*, 3 Scam. 373; *Johnson v. Weedman*, 4 Id. 495; *McNamara v. King*, 2 Gilm. 432, 436.

In a case of gross negligence on the part of a stage proprietor, such as the employment of a known drunken driver, and where a passenger has been injured in consequence of such negligence, we think exemplary damages should be entertained. The term "exemplary damages," as contradistinguished from actual damages, does not appear to be an entire stranger to the law as shown by the authorities already cited.

If a stage proprietor or carrier is guilty of gross negligence, it amounts to that kind of gross misconduct which will justify a jury in giving exemplary damages, even where an "intent or design" to do the injury does not appear. The reason and necessity for this rule is becoming yearly more apparent. The consequences of such negligence on the part of carriers is becoming more and more appalling. The alarming increase of railroad, steamboat, and stage disasters, the frightful destruction of life and limbs and property, call loudly for a strict enforcement of the most exemplary rules in reference to common carriers. If a stage proprietor employs a driver known to be drunken and careless, a more severe measure of damage should be awarded to the injured party than in a case where some degree of care and diligence had been exercised by the proprietor. This principle appears to be favored in *McKinney v. Neil*, 1 McLean, 540. It was held that the passenger need show nothing more than that the injury was occasioned by the upsetting of the stage-coach, in order to sustain his action. It will then be incumbent on the defendant to show, by way of reducing the damages, or in bar of the action, the circumstances of the case. We conclude, then, that in refusing the instructions referred to under this head, the court did not err.

4. Appellants complain that the court refused to instruct the jury that the making of a tender is no confession or admission of any liability on their part. We think this objection is without any foundation in reason or authority. In 2 Greenl. Ev., sec. 600, it is declared that the plea of tender admits the exist-

ence and validity of the debt or duty: *Johnston v. Columbian Ins. Co.*, 7 Johns. 315; 2 Archb. Prac. 184; *Boyfield v. Porter*, 13 East, 202; *Le Grew v. Cooke*, 1 Bos. & P. 333; *Vaughan v. Barnes*, 2 Id. 392.

The court could not do otherwise than refuse the instruction asked by defendant, for it is not law; the very reverse of the proposition is true. A tender admits the liability or indebtedness to the amount of the sum tendered; so this court decided in *Johnson v. Triggs*, 4 G. Greene, 97.

Judgment affirmed.

DECLARATIONS OF PARTIES, WHEN ADMISSIBLE AS PART OF RES GESTÆ: See *Weimore v. Mell*, 59 Am. Dec. 607; *Gilbert v. Gilbert*, 58 Id. 268, and cases in the note thereto. In *Insurance Co. v. Mosley*, 8 Wall. 414, the principal case was cited by Clifford, J., dissenting, to the point that in order to render the declarations of parties and other attending circumstances admissible as a part of the *res gestæ*, they must be contemporaneous with the main fact under consideration, and to which they were intended to give character.

LIABILITY OF COMMON CARRIERS OF PASSENGERS IN GENERAL: See *Ingalls v. Bills*, 43 Am. Dec. 346, and note discussing the question; *Laing v. Colder*, 49 Id. 533. The principal case was cited, among others, in *Grand Rapids etc. R. R. v. Boyd*, 65 Ind. 534, to the points that a passenger takes all the risks of travel, according to the mode by which he travels, except such as are caused or increased by the negligence of the carrier without the fault of the passenger; and the negligence of the carrier includes his negligence in all the departments of his undertaking—the condition of the road, the character of the machinery, skill and conduct of the employees, etc.; and in *Bonce v. Dubuque Street R'y*, 53 Iowa, 279, in holding that common carriers of passengers are required to exercise more than ordinary care, it was cited to the point that in it the instruction “that the proprietors of stage-coaches * * * are responsible for all accidents and injuries happening to the persons of the passengers which could have been prevented by human care and foresight,” was approved; and it was said that it “is quite as moderate toward stage proprietors as the authorities would justify.” See also the principal case referred to in *Russ v. Steamboat War Eagle*, 14 Id. 371, on the care, prudence, and foresight required of common carriers of passengers.

LIABILITY OF STAGE PROPRIETORS FOR INJURIES TO PASSENGERS: See *Hollister v. Nowlen*, 32 Am. Dec. 455; *Ingalls v. Bills*, 43 Id. 346, and note; *Stockton v. Frey*, 45 Id. 138.

EXEMPLARY DAMAGES, ALLOWANCE OF: See *Austin v. Wilson*, 50 Am. Dec. 766; and note, where the question is considered; *Milburn v. Beach*, 55 Id. 91; *Fleet v. Hollenkemp*, 56 Id. 563. The principal case was cited in *Hendrickson v. Kingsbury*, 21 Iowa, 386, as denying the correctness of Professor Greenleaf's views on the doctrine of exemplary damages, and as expressing the opinion that under certain circumstances they may be entertained.

TENDER ADMITS LIABILITY TO EXTENT OF AMOUNT TENDERED: *Fisher v. Moore*, 19 Iowa, 86; *Phelps v. Kathron*, 30 Id. 231, both citing the principal case.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

HAWKINS v. COMMONWEALTH.

[14 B. MONROE, 395.]

DOORS OF HOUSE IN WHICH DEFENDANT DWELLS MAY LAWFULLY BE BROKEN OPEN BY OFFICER to effect his arrest; and another person obstructing the officer's entrance and search will make himself *particeps criminis*, although defendant was not then in the house.

RIGHT TO BREAK OUTER DOORS INCLUDES RIGHT TO BREAK INNER DOORS TO EFFECT ARREST. The officer having valid criminal process in his hands is no trespasser, though he fail to find defendant; and to obstruct him is unlawful.

OUTER DOOR OF DEFENDANT'S HOUSE CAN NOT, IN CIVIL CASES, BE BROKEN BY OFFICER TO EFFECT HIS ARREST, without previous demand for admittance and disclosure of purpose.

HOUSE IN WHICH DEFENDANT DWELLS, THOUGH OWNED AND ALSO INHABITED BY OTHERS AT TIME, may be lawfully entered and searched by an officer to effect defendant's arrest.

OFFICER CAN NOT BREAK HOUSE OF THIRD PERSON TO ARREST CRIMINAL NOT DWELLING THERE, unless such person is then actually in the house; but the owner may permit a peaceable entrance, and withdraw it at any time if the offender is not in the house, without unlawfully obstructing the officer.

ERROR to Estill circuit. The nature of the case will appear from the opinion.

Turner, for the plaintiffs.

Harlan, attorney general, for the commonwealth.

By Court, *HISE*, C. J. A sheriff or other officer authorized to execute criminal process may lawfully break open the door of the house wherein the person dwells, whose personal arrest is

directed by the writ, and enter and search the dwelling to find the offender; and if hindered or obstructed by other persons in his attempt to make such entrance and search, they would be guilty of the offense for which the defendants in this case have been indicted, although at the time of such attempted entry and search and obstruction the accused party may not have been in the dwelling, and though therefore such entry and search may not have been necessary to make the arrest.

The right to break open the outer door to make the entrance of course includes the right to break open the doors of the different rooms and chambers in the house to make a thorough search throughout the premises; and though the defendant in the process be not found, or shown to be in the place of his dwelling at the time, yet such entrance and search of the officer, having valid criminal process in his hands, would not therefore be unlawful, or make him a trespasser; but to obstruct the officer in such case would be unlawful, and the parties making the obstruction would subject themselves therefor to indictment and punishment according to law: 6 Bac. Abr., 1st Am. ed., 171.

It is true that with civil instead of criminal process in his hands, whether the state or a private person be the plaintiff in the writ, and though it authorize the arrest of the defendant, the sheriff can not break open the outer door of his dwelling without first having requested the door to be opened, and at the same time disclosing the purpose of his request; but the rule is different with regard to criminal or penal process, requiring the capture and arrest of the alleged offender. The fact that the house entered and searched is at the time the place of the dwelling of the defendant in the writ gives sufficient warrant to the sheriff, though it be not known to him certainly whether the offender be or not then in the house, or be found therein, and the law does not require that the officer should first signify his business and demand admission before entering and searching, for such disclosure of his purpose, and demand of entrance, would in many cases defeat the very object in view, by giving the offender notice of his danger and an opportunity of effecting his escape.

It is not necessary for the sheriff's justification that the dwelling-house entered and searched should be the property of the defendant; it is sufficient if it be a house, though belonging to and inhabited by another, in which the accused party dwelt at the time: See 6 Bac. Abr., *supra*; and also R. S., c. 91, art. 1, sec. 83, p. 617, by which it is provided that "in executing penal or

criminal process requiring an actual arrest, the sheriff or other officer may break open the outer or any other door of the dwelling, or any other house of the defendant." By the dwelling of the defendant is meant the house inhabited by him, the one in which he dwells, and though owned and also inhabited by another, or several others at the same time, it is nevertheless the dwelling of the defendant, or the house in which he dwells; and to assume that this law limited the officer's right to break, enter, and search, with penal and criminal process in his hands to be executed, to a house in which the criminal or offender exclusively dwelt, or which belonged to him alone, would be giving to the law a construction much too narrow and limited, because thereby criminals and offenders who owned not the house they inhabited, but dwelt in a house of another, and at the same time inhabited by others, would thus be furnished with more facilities for escape and more opportunities to avoid an arrest than others owning or exclusively inhabiting the dwelling which they occupied, which would be contrary to the policy of the law, and not in accordance with its spirit and purpose, to wit, the apprehension and punishment of all persons guilty of misdemeanors and felonies.

The first instruction to the jury which the circuit court gave at the instance of the prosecuting attorney, being in accordance with this view of the law, is not erroneous because it is unnecessarily qualified and restricted by the words "if they [sheriff and posse] had reason to believe he [the defendant in the writ] was in the said house;" the instruction would have been good without this qualification, which made it less favorable to the commonwealth than it might have been, and was not at all prejudicial to the parties indicted for obstructing the officer and those called to aid him in executing the criminal process then in his hands against James Smith. It is true that by the proof it appears that King and Smith both dwelt in the same house attempted to be searched, and though the house may have belonged to King, yet it was in the true sense of the law a dwelling, and as Smith with his family lived there, it was their dwelling for the time being, and the sheriff had a right, without notice to the inmates or demand for admission, to enter and search it to apprehend Smith. The third instruction given for the commonwealth is general in its terms, and not inconsistent with the law of the case.

The first instruction asked by the defendants was refused, and rightly, because by it the court was required to tell the

jury that the process in the sheriff's hands did not authorize him or his posse to search the house of King at all, which, if given, would have denied to the sheriff the right to enter and search King's house with valid criminal process against Smith, requiring his arrest, although Smith dwelt in that house; and might have been in the house at the time when the search was offered to be made.

The second instruction demanded by defendants to the indictment ought to have been, as it was, refused, because it denied the right of the sheriff to search the house of King, and in which Smith, the party to be arrested, dwelt, unless he was actually in the house at the time, which is not the law as understood and now ruled by this court.

But the circuit judge erred in giving the second instruction to the jury at the instance of the attorney for the state; by it the jury are in substance told that if the defendants in the lower court agreed and consented that the sheriff and his posse might search their dwelling-houses respectively (in neither of which did Smith reside), then the defendants should be found guilty, if from the proof they believed they afterward willfully obstructed them while making the search. This instruction can not be sustained, because it is not in accordance with the common law, or the law of this state above referred to: R. S. 617—which is believed to be in conformity with the former, and by which it is provided that the dwelling or any house of any other person may be broken open, entered, and searched by the sheriff only when and “if it be necessary to enable him to make the arrest.” So that a sheriff, even with criminal or penal process, requiring an actual arrest, can not break the outer and inner doors to enter and search the dwelling-houses of other persons, unless the person to be arrested be actually in the house at the time of the entrance, so as to create a necessity to make such entrance to effect the arrest; and even though the defendants may have resisted or obstructed the search of their house, after their consent had been given to it, and which they might withdraw at any time, it would not make them guilty of unlawfully obstructing the execution of the process held by the sheriff, unless the offender Smith was in the house at the time the search therein was obstructed, for except in such case the sheriff might not lawfully enter and search their houses without their consent, nor continue that search, if permitted, any longer than until such consent should be withdrawn; and unless the criminal was in the house, the dweller therein

would have the right to require the sheriff to discontinue his search and to leave the premises. And inasmuch as a portion of the evidence has direct reference to the obstructions offered by the defendants to the sheriff and his *posse*, in their own dwelling-houses, when the offender Smith was not therein, but elsewhere according to the proof; and inasmuch as the said second instruction may have misled the jury, the judgment is reversed and cause remanded for a new trial, in conformity with the principles of this opinion.

MAXIM THAT "EVERY MAN'S HOUSE IS HIS CASTLE" applies to arrests in civil but not in criminal actions: *Barnard v. Bartlett*, 57 Am. Dec. 123, and note referring to prior cases in this series.

WHAT MAY BE LAWFULLY DONE IN EFFECTING ARREST—TREATMENT OF SUBJECT.—It is assumed that the person making the arrest is clothed with full power and authority to effect it; so the questions of duty and authority, either of private persons or officers, to make arrests will not be considered, except by an occasional reference to illustrate the topic of consideration. This will also avoid the innumerable questions arising under an almost infinite variety of circumstances connected with abuse of power by one making the arrest, with his justification after it is made, or with the effect of resistance to an unlawful arrest.

DEFINITION OF ARREST.—An arrest is the taking, seizing, or detaining the person of another, touching, or putting hands upon him in the execution of process, or any act indicating an intention to arrest: *United States v. Benner*, Baldw. 239. It signifies a restraint of the person—a restriction of the right of locomotion: *Hart v. Flynn*, 8 Dana, 191; the apprehension or detaining of the person in order to be forthcoming to answer an alleged or suspected crime: *County of Montgomery v. Robinson*, 85 Ill. 176; or the apprehension of a person, by virtue of lawful authority, to answer the demands against him in a civil action: *Gentry v. Griffith*, 27 Tex. 462. The word "arrest" is more properly used in civil cases, and "apprehension" in criminal: *County of Montgomery v. Robinson*, 85 Ill. 176. As to what is an arrest, see also *Bissell v. Gold*, 19 Am. Dec. 480, and extended note thereto.

WHAT CONSTITUTES ARREST.—1. *Where Party does not Submit.*—The tendency of the decisions on this subject is to the effect that the most unequivocal arrest is made by the corporal seizing or touching of the defendant's body, the literal "tapping on the shoulder." There must be something by way of physical restraint, though it is enough if the party arresting touch the other, "even with the end of his finger." And there is no doubt that it is better in all cases to touch the prisoner's person in order to complete the arrest: *Genner v. Sparkes*, 1 Salk. 79; S. C., 6 Mod. 173; *Whithead v. Keyes*, 3 Allen, 495; *Legrand v. Bedinger*, 4 B. Mon. 540; *Lawson v. Buzine*, 3 Harr. (Del.) 416; 1 Ch. Crim. L. 48; 2 Bla. Com. 287; *Bissell v. Gold*, 19 Am. Dec. 486, and note discussing the same. Mere spoken words will not constitute an arrest: *Genner v. Sparkes*, 1 Salk. 79; S. C., 6 Mod. 173; and if an officer fails to make an arrest when he might and ought to do so, he will be liable in an action for negligence in not doing it: *Whithead v. Keyes*, 3 Allen, 495. The true principle of arrest seems to be that the arresting party must have either an actual or moral control of defendant's person. The actual

control is realized in law by touching the body; but the moral restraint may be represented by the submission of the party to be arrested. See next subdivision. It is immaterial how slight the touch may be, it will constitute a legal arrest: *Genner v. Sparkes*, 1 Salk. 79; *Sandon v. Jervis*, 4 Jur., N. S., 737; S. C., 15 Id. 860; *Huntington v. Blaisdell*, 2 N. H. 317; *Whithead v. Keyes*, 3 Allen, 495; and it is not necessary that the appropriate physical action be performed by the officer himself; it may be done by another person, if the officer be near at hand and directs the act: *Blatch v. Archer*, 1 Cwmp. 63. It is not every touching of person, however, that will constitute an arrest. It must be a touching with such an intent. "As, for instance, an officer has a *ca. sa.* against a defendant, whom he meets in company, and goes up and shakes hands with him, without apprising him that he has such a precept—this would not amount to an arrest, unless so intended and understood by the parties. So if the officer meets the defendant in a public company or on the highway, and notifies him of his having the precept, and directs him to meet him at some particular place, this might be an arrest or not, as the parties intended." *Jones v. Jones*, 13 Ired. L. 448. But it must not be understood that an arrest can not be made in all cases without touching the person, for if a bailiff come into a room and tell the defendant that he arrests him, and locks the door, it is an arrest, for he is in the custody of the officer: *Williams v. Jones*, Cas. temp. Hardw. 301. And where one personates an officer, and induces defendant to go with him under the belief that he has been legally arrested, it has been held to be a technical arrest, and will make the arresting party responsible in damages: *Wood v. Lane*, 6 Car. & P. 774. If an officer or other person says to one about to be apprehended, "I arrest you," and the party submits and goes along with the one arresting him, it will be a good arrest; but not so if the submission is simulated, and defendant, abusing the confidence of the officer, flees before actual contact. Thus a sheriff, declaring his purpose to arrest, was answered: "Wait for me outside, and I will come to you." This the person did not do, but escaped, and it was held to be no arrest: *Russen v. Lucas*, 1 Id. 153. A party may even submit and go with an officer, who has a warrant authorizing an arrest, but it will be no arrest if the officer does not touch defendant's person, and uses his warrant no further than as a mere summons: *Arrowsmith v. Le Mesurier*, 2 Bos. & P. 211; *Baldwin v. Murphy*, 82 Ill. 485. So mere notice of process sent by a messenger will not constitute an arrest, although defendant attended at the appointed time and place and gave bail: *Berry v. Adamson*, 6 Barn. & Cress. 528. Neither will instructions to arrest a defendant if he shall attempt to get away, and hold him under surveillance pending a negotiation for a settlement, amount to an arrest, although the officers had a warrant under which an actual arrest might have been made at any time: *Hender v. Robins*, 1 Har. & W. 204.

2. *Where Party Submits.*—An arrest will be valid without physical contact, if the defendant acquiesces and goes with the officer in good faith: *Russen v. Lucas*, 1 Car. & P. 153; *Horne v. Batty*, Bull. N. P. 62; *Bissell v. Gold*, 1 Wend. 215; S. C., 19 Am. Dec. 480, and extended note thereto; *Huntington v. Blaisdell*, 2 N. H. 318; *Courtney v. Dozier*, 20 Ga. 369; *Huntington v. Schultz*, Harp. 453; S. C., 18 Am. Dec. 660; *Strout v. Gooch*, 8 Me. 127; *Jones v. Jones*, 13 Ired. L. 448; *Emery v. Chesley*, 18 N. H. 198; *Hart v. Flynn*, 8 Dana, 190; *Field v. Ireland*, 21 Ala. 240; *United States v. Benner*, Baldw. 239; *Hawkins v. Young*, 2 Dev. & B. 527; S. C., 31 Am. Dec. 426; *Butler v. Washburn*, 25 N. H. 251; *Pike v. Hanson*, 9 Id. 491; *George v. Radford*, 3 Car. & P. 464; S. C., Moo. & M. 244; and no manual touching of the

body or actual force is necessary in such a case. It is sufficient if the party be within the power of the officer, and submits to the arrest. See *Mowry v. Chase*, 100 Mass. 79, and cases above cited. This doctrine, in the United States, has been carried to extreme limits. Thus, Mrs. Pike declined to pay a tax, and said she would not do so unless arrested. The officer effected the arrest by bare words, telling Mrs. P. that he arrested her, but not laying hands upon her. She paid the tax, and brought suit for assault and false imprisonment. The tax was held to be illegal, and the words of the constable to constitute an arrest and imprisonment, for which damages were awarded to plaintiff: *Pike v. Hanson*, 9 N. H. 491. A *bona fide* submission may be evidenced by words, or by the execution of bail bonds or other similar instruments, and is an adequate substitute for personal contact. So words of arrest by the officer, accepted by the defendant, or not immediately resisted by protest or flight, or otherwise, will constitute an arrest that will bind alike officer, plaintiff, and defendant. Thus, an officer went with defendant to his house, and told him that he had a writ for his arrest, and received a bail bond: held to be a legal arrest, although there was no corporal seizure: *Reynolds v. Matthews*, 2 Jur. 989; *Emery v. Chesley*, 18 N. H. 198. Two policemen went to the prisoner's house, met him in the yard, and asked him to come into the parlor. On going in, they said the subinspector of police wanted to see him. The prisoner asked what he wanted. They said he would tell himself when he came. He asked: "Am I to consider myself under arrest?" They said he might. They did not, however, tell him there was a warrant for his arrest. One of the policemen then went away, and the other remained in the room with the prisoner. The prisoner asked if he might go into the next room for his dinner. The policeman said "No," but that he might have his dinner brought in there. Shortly after this, Subinspector Gardiner came in. He held the warrant in his hand, and said to the prisoner that this was a warrant for his arrest. He did not read it, nor touch the prisoner. The prisoner said, "Is my name in it?" and came forward as though to look at the warrant, turned the key in the door, and leaped out of the window. He was not arrested until nearly one year and a half afterwards, but the arrest by the policemen was pronounced good, subject to the production of the warrant, and that on Gardiner's arrival with the warrant the arrest was complete and perfect; and this, although Gardiner admitted on cross-examination that the movements of the prisoner and his conversation were not of a nature to imply submission, but merely a desire to gain time: *Regina v. Nugent*, 11 Cox C. C. 67. So where the officer notified defendants that he had a warrant for them, and they submitted to the arrest, and were accompanied home by the officer, where he remained with them all night, and went with them before the magistrate the next day, it was held to be an arrest, although defendants were not actually deprived of their liberty or personally guarded by the officer or *posse*: *Courtroy v. Dozier*, 20 Ga. 369. On surrender of prisoner, the officer may appoint a third person to be his keeper, and it will be sufficient evidence of arrest: *Strout v. Gooch*, 8 Me. 127. "I submit to your authority" are words expressive of submission: *Jones v. Jones*, 13 Ired. L. 448; *Haskins v. Young*, 2 Dev. & B. 527; S. C., 31 Am. Dec. 426. Acts may also express it; thus, "if the bailiff, who has a process against one, says to him when he is on horseback, or in a coach, 'You are my prisoner; I have a writ against you,' upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process; but if instead of going with the bailiff he had gone or fled from him, it could be no arrest unless the plaintiff laid hold of him."

Genner v. Sparkes, 1 Salk. 79, and note referring to *Horner v. Battyn*, Bull. N. P. 62; *Berry v. Adamson*, 6 Barn. & Cress. 528. The conflict between English and American authorities as to what constitutes an arrest is more apparent than real. This is fully shown by Potter, J., in *Searls v. Viets*, 2 N. Y. 224. See also same case for facts which constitute an arrest.

THERE MUST BE NO RESORT TO FRAUD IN EFFECTING ARREST—JURISDICTION.—The warrant must be executed within the jurisdiction of the justice who issued or backed it: 1 Ch. Crim. L. 49; and if the process be executed out of the jurisdiction of the court from which it issues, the killing of the officer attempting to enforce its execution will be only manslaughter in the party resisting: *Id.*; 1 East P. C. 314; Whart. on Hom., sec. 236. Stratagem may doubtless sometimes be used to effect an arrest: *Rex v. Backhouse*, Loft, 62; but the law will not permit either officers or other persons to use tricks, fraud, or misrepresentation to entice a person into a particular jurisdiction to effect his arrest. Courts will not only discountenance any attempt to bring a party within their jurisdiction by fraud and misrepresentation, but where, by a false statement or fraudulent pretense, a party is brought within the jurisdiction, and there served with process, the service will be set aside: *Carpenter v. Spooner*, 2 Sandf. 717; *Arnold v. Fourtellot*, 13 Pick. 172; *Goupil v. Simonson*, 3 Abb. Pr. 474; *Seaver v. Robinson*, 3 Duer, 622; S. C., 2 Abb. Pr. 554.

RELATIVE POWER AND DUTY OF PRIVATE PERSONS AND OFFICERS TO EFFECT ARRESTS—ASSISTANCE.—An officer in effecting an arrest may not only demand the assistance of citizens in general, but may, if the warrant can not otherwise be executed, engage the assistance of the military: 1 Ch. Crim. L. 49; *Burdett v. Colman*, 14 East, 163. The sheriff in executing meane process may, but is not compelled to, raise the *posse comitatus*: *May v. Proby*, Cro. Jac. 419; but with respect to writs of execution, he not only has a right, but is bound at his peril to take with him sufficient aid to enable him to perform the commands of the writ: *Bell v. North*, 4 Litt. 133; 8 Bac. Abr., tit. Sheriff, N. "The chief difference," says Hawkins, "between the power and duty of a constable and a private person in respect of arrests seems to be this, that the former has the greater authority to demand the assistance of others, and is liable to the severer fine for any neglect of this kind, and has no sure way to discharge himself of the arrest of any person apprehended by him for felony without bringing him before a justice of peace in order to be examined; whereas a private person, having made such an arrest, needs only to deliver his prisoner into the hands of the constable:" 2 Hawk. P. C., c. 13, sec. 7. It makes no difference whether the officer is acting with or without warrant, he may, in making the original arrest or in effecting a recapture, call upon by-standers for help if he deems it necessary, or even command the aid of all persons in his precinct: *Regina v. Phelps*, Car. & M. 180; *Burdett v. Colman*, 14 East, 163; *Mitchell v. State*, 12 Ark. 50; *Coyles v. Hurtin*, 10 Johns. 85; *State v. Shaw*, 3 Ired. L. 20. A refusal to assist the officer is indictable: *Coyles v. Hurtin*, 10 Johns. 85; *State v. Deniston*, 6 Blackf. 277; *Regina v. Brown*, Car. & M. 314; *State v. Hailey*, 2 Strobb. 73; *Comfort v. Commonwealth*, 5 Whart. 437; 1 East P. C. 80; provided he is acting by lawful authority: *State v. Shaw*, 3 Ired. L. 20; if he is not, his command will be a justification to one acting as assistant and with knowledge of his official character: *Reed v. Rice*, 2 J. J. Marsh. 44; *McMahan v. Green*, 34 Vt. 69; *Forriest v. Leavitt*, 52 N. H. 481; *Schaw v. Dietrichs*, 1 Wil. Sup. Ct. 153. Persons assisting one who assumes to act by special authority in arresting a party, but who is not a known public officer,

should know whether such authority exists, for if it does not, they will not be protected: *Dietrich v. Schaw*, 43 Ind. 175; *Mitchell v. State*, 12 Ark. 50. In making a lawful arrest, an officer may take into custody any person obstructing him in his duties or encouraging the party to resist, but must not unnecessarily beat the offending party: *Levy v. Edwards*, 1 Car. & P. 40; *Anonymous*, 1 East P. C. 305; *Coyle v. Hurtin*, 10 Johns. 85; *McMahan v. Green*, 34 Vt. 69; *Roddy v. Finnegan*, 43 Md. 490; *White v. Edmunds*, Peake, 89. A private person assisting in an arrest must be in some sense under the officer's command and presence. There is no arbitrary rule governing this matter and showing just how far apart they may be. The officer, though absent from the particular place occupied by his assistants, is to be deemed constructively present, if his absence furthers the common design. It is impossible for an officer, with the power of a county at his command, to be actually present in every place where power might be wanting, and "the law is not so unreasonable as to require the officer to be an eye or ear witness of what passes, and to render all his authority null and void except when he is so present." The officer's absence may be for the purpose of procuring more assistance, and where he has thus left persons behind to guard a house in which the parties to be arrested were assembled, they can not lawfully, during his temporary absence, permit them to escape: *Coyle v. Hurtin*, 10 Johns. 85; *Commonwealth v. Field*, 13 Mass. 321. The officer's calling in assistance must be distinguished from his attempt to act through the agency of a third person. Thus a constable, having a warrant of arrest, can not effect an arrest by giving the warrant to his son and having him execute it, while the father is in sight a quarter of a mile away: *Rex v. Patience*, 7 Car. & P. 775. A writing must constitute a deputy's authority to do a particular act, and the arrest on a bench-warrant directed to the sheriff, of a person indicted and under recognizance to appear, by one having the sheriff's verbal authority only, is illegal, and will not discharge the recognizance: *People v. Moore*, 2 Dougl. 1.

BREAKING OPEN DOORS TO EFFECT ARREST.—1. *In Execution of Civil Process.*—The rule is that every man's house is his castle; and in such cases his dwelling-house is a protection from arrest not only to the occupant, but to his children, domestic servants, and permanent lodgers and boarders, so long as the outer door or window is so closed that the officer must forcibly open the same to gain admittance. Even a common latch will serve to close the outer door or window, and the officer must not force it open to effect the arrest of one of them on civil process. This immunity, however, does not extend to strangers and visitors in the dwelling-house: *Oystead v. Shed*, 13 Mass. 520; S. C., 7 Am. Dec. 172; *Curtis v. Hubbard*, 4 Hill, 437; *Cook's Case*, Cro. Car. 537; *Bell v. Clapp*, 10 Johns. 263; *State v. Smith*, 1 N. H. 346; *Snydacker v. Brosse*, 51 Ill. 360; *Semayne's Case*, 5 Co. 91 a; *Isley v. Nichols*, 12 Pick. 270; *Curtis v. Hubbard*, 1 Hill (N. Y.), 336; S. C., 4 Id. 437; see the principal case. But the castle-door will not protect the owner against an officer of the law where the latter has previously touched the defendant by way of arrest; for he may then break into the house in order to complete the arrest and carry off his prisoner: *Sandon v. Jervis*, 4 Jur., N. S., 737; S. C., 5 Id. 860; and in such a case he may also break into the house of another person in which the prisoner has taken refuge, to accomplish the same purpose, because "the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house:" *Semayne's Case*, 5 Co. 91 a; *Johnson v. Leigh*, 6 Taunt. 246; *Cooke v. Birt*, 5 Id. 765; but it must be remembered that the officer thus acts at his peril, and is re-

sponsible in damages for mistake, wantonness, or abuse of authority, according to the circumstances of the case: *Johnson v. Leigh*, 6 Id. 246; *Morrish v. Murrey*, 13 Mee. & W. 52. This privilege is confined to the breach of windows and of outer doors, constructed for the security of the house against persons from without, who might endeavor to break in; but there is no objection to an officer's breaking into any building not a dwelling-house or appurtenant to it to make an arrest: *Penton v. Brown*, 1 Keb. 698; *Haggerty v. Wilber*, 16 Johns. 288; S. C., 8 Am. Dec. 321; *Fullerton v. Mack*, 2 Aik. 415; *Burton v. Wilkinson*, 18 Vt. 186. If the officer has obtained entrance into a dwelling-house through the outer door, he may then, in either civil or criminal cases, break open any inner door, closet, chest, or other inclosure, and arrest any person within the dwelling, without any demand being made for admittance: *Lloyd v. Sandilands*, 8 Taunt. 250; *Rex v. Bird*, 2 Show. 87; *Smith v. Butler*, Comb. 326; *Rutcliffe v. Burton*, 3 Bos. & P. 223, 229; *Lee v. Gansel*, 1 Cowp. 1; *Semayne's Case*, 5 Co. 91 a; *Haggerty v. Wilber*, 16 Johns. 287; S. C., 8 Am. Dec. 321; *Hubbard v. Mace*, 17 Johns. 127; *State v. Thackam*, 1 Bay, 358. As to notice and demand, see "Disclosure of Purpose and Demand for Admittance," *infra*. The cases just cited also show that a sheriff can not justify breaking even the inner doors of the house of a stranger merely upon suspicion that a defendant is there, for in this case his justification depends upon his finding or not finding the defendant; and in the other case it does not so depend, because defendant's own house is the most probable place to find him: *Johnson v. Leigh*, 6 Taunt. 246; *Cooke v. Birt*, 5 Id. 765.

2. *In Execution of Criminal Process.*—The officer may break open the outer as well as inner doors of a dwelling-house, in the night as well as in the day-time, after demand of admittance and refusal, to arrest the owner; because the outer door even is not proof against the "king's keys," for an officer holding a warrant for any criminal offense, and because no man can have a castle against the king: 2 Hawk. P. C., c. 14, secs. 1-9; *Semayne's Case*, 5 Co. 91 a; *State v. Smith*, 1 N. H. 346; *Bell v. Clapp*, 10 Johns. 263; *Commonwealth v. Reynolds*, 120 Mass. 190; *State v. Shaw*, 1 Root, 134; *Kelsey v. Wright*, Id. 83; *Lee v. Gansel*, 1 Cowp. 1; *Williams v. Spencer*, 5 Johns. 352; *Fitch v. Loveland*, Kirby, 386; and it is immaterial whether it be the owner's house or the house of a stranger, except that in the latter case the officer is justified only when he actually finds the party he seeks in the house at the time: 2 Hale P. C. 117. This right to break doors to effect an arrest "extends to every sort of indictable wrong, where the arresting party is acting under a lawful warrant; and to all lawful arrests for past offenses, whether by officers or private individuals:" 1 Bish. Cr. Pr., sec. 196, 197. Bishop also names other instances to which it extends, and cites numerous authorities: Id. And as to the materiality of the warrant, Mr. Bishop deems it only reasonable that the doctrine applicable to lawful arrests with warrant should also apply to arrests without warrant; "for they are made just as much in behalf of the state and in its cause as are the others—the question of warrant or no warrant pertaining to form, not substance; and the arrest in either case being by authority of law, on behalf of the public:" Id. And the more reasonable doctrine concerning arrests upon suspicion of felony is that the doors may be broken open, with or without warrant, if the party, upon demand, refuse to open them: 1 Hale P. C. 583; 2 Id. 117; 1 Bish. Cr. Pr., sec. 196, note 6.

3. *Explanation of Breaking Doors—Dwelling-house.*—To prevent an entrance against the consent of the occupant into a dwelling-house to arrest,

upon civil process, any person other than a stranger or visitor therein, it is sufficient if the outer door be closed. Merely opening it, then, is in legal contemplation a breaking. What would be a breaking of the outer door in burglary is equally a breaking by the sheriff. Lifting a latch is in law just as much a breaking as the forcing of a door bolted with iron: *Ratcliffe v. Burton*, 3 Bos. & P. 223; *Lee v. Gansel*, 1 Cowp. 15; *Seymour v. Gresham*, Cro. Eliz. 908; *Penton v. Brown*, 1 Keb. 698; *Curtis v. Hubbard*, 1 Hill (N. Y.), 337; S. C., 4 Id. 437; *Bisop v. White*, Cro. Eliz. 759; *Haggerty v. Wilber*, 16 Johns. 288; *Buckenham v. Francis*, 11 Moore, 40; *Walker v. Fox*, 2 Dana, 404; Dalton on Sheriff, 350; *Boggs v. Van Dyke*, 3 Harr. (Del.) 288. A sheriff entering a house in such a way as to cost a burglar his life, to execute civil process, is a trespasser. Stratagem may sometimes be lawfully employed by an officer not entitled to break outer doors, to gain admission: *Rez v. Backhouse*, Loft, 61; but to procure one inside, by some false pretense, to open the door, and then, without permission, to rush in with violence, is a breaking on the part of the person entering: *Parke v. Evans*, Hob. 62 a; *Waterhouse v. Saltmarsh*, Id. 263 a. For definition of dwelling house, see Bishop on Statutory Crimes, secs. 279-283; *Fitch v. Loveland*, Kirby, 386; *Williams v. Spencer*, 5 Johns. 352.

4. *Disclosure of Purpose and Demand for Admittance—Inner and Outer Doors.*—An officer can not lawfully break either an inner door or an outer door, where the latter is lawful, until he has disclosed to the inmates of the house his purpose to arrest some one inside, and demanded admittance. Otherwise it would be impossible for one to know what the object of the person breaking open the door might be, and the owner has a right to consider it an aggression on his private property, which may be resisted to the utmost: *Lanock v. Brown*, 2 Barn. & Ald. 592; *Waterhouse v. Saltmarsh*, Hob. 263 a; *Ratcliffe v. Burton*, 3 Bos. & P. 220; *Lloyd v. Sandilands*, 2 Moore, 207; *Semayne's Case*, 5 Co. 91 a; *Burdett v. Abbott*, 14 East, 1, 163; *State v. Shaw*, 1 Root, 134; *Kelsy v. Wright*, Id. 83; *Commonwealth v. Reynolds*, 120 Mass. 190; *Bell v. Clapp*, 10 Johns. 263; *State v. Smith*, 1 N. H. 346. An entry, authority, or license given by a party will not make the officer a trespasser: *Six Carpenters' Case*, 8 Co. 146 a; but officers who have been peaceably admitted into a house have no right to remain there, in case the prisoner is not found, to await his return; and if they do so tarry for several hours for that purpose, they are trespassers *ab initio*: *Howard v. Gossett*, 1 Car. & M. 380. After notifying the owner of a dwelling-house that he has a criminal warrant against a person therein, and demanding and being refused admission, the sheriff has the right to enter even the outer door of the house by force, for the purpose of serving the warrant, and he can not be treated as a trespasser merely because he has failed to notify the owner of the house who the person sought to be arrested is, no inquiry having been made in relation thereto, even though the person sought for is not in fact there: *Commonwealth v. Irwin*, 1 Allen, 587; *Commonwealth v. Reynolds*, 120 Mass. 190; *Barnard v. Bartlett*, 10 Cush. 501. This seems to be the better view, although Chitty says: "It is at the peril of the officer that the party against whom he has obtained the warrant be found there; for otherwise he will be a trespasser:" 1 Ch. Crim. L. 58; citing 2 Hale P. C. 117; *Semayne's Case*, 5 Co. 91 a; *Johnson v. Leigh*, 1 Marsh. 565; S. C., 6 Taunt. 246. This qualification seems to have also the further American support of the principal case. If an arrest has been made, and the person arrested escapes and takes refuge in his dwelling-house, the officer may break into the house in pursuit of him, without making known his business, demanding admission,

and receiving refusal: *Allen v. Martin*, 10 Wend. 300; *Oystead v. Shed*, 13 Mass. 520; S. C., 7 Am. Dec. 172; *Genner v. Sparkes*, 6 Mod. 173; S. C., 1 Salk. 79. And the offender can not find refuge in the castle of a third person, for an officer in immediate pursuit of one who has committed a crime in his presence, or for the purpose of perfecting an arrest, may, after the usual demand, break open the door: See cases just cited, and 2 Hawk. P. C., c. 14, sec. 8; *Commonwealth v. Reynolds*, 120 Mass. 190; *Bell v. Clapp*, 10 Johns. 263; *State v. Shaw*, 1 Root, 134; *Keley v. Wright*, Id. 83; *State v. Smith*, 1 N. H. 346. The principal case also supports this doctrine. If, however, the officer has no reasonable ground for believing the defendant to be secreted in the house or room which he desires to enter, he should always make a demand for admittance: *Ratcliffe v. Burton*, 3 Bos. & P. 228; *Semayne's Case*, 5 Co. 91 a; *Lee v. Gansel*, 1 Cowp. 1; *Haggerty v. Wilber*, 16 Johns. 287; S. C., 8 Am. Dec. 321; *Hubbard v. Mace*, 17 Johns. 127. In conclusion, it may be said that whatever doubts there may be in English law as to the necessity of a demand in case of felony, a previous demand is undoubtedly necessary in case of a misdemeanor: *Lannock v. Brown*, 2 Barn. & Ald. 593; *McLennon v. Richardson*, 15 Gray, 74. As to what are inner doors, see *Lee v. Gansel*, 1 Cowp. 1; *Williams v. Spencer*, 5 Johns. 352; *Fitch v. Loveland*, Kirby, 386. As to what are outward doors or windows, see *Fost*. 320.

PURPOSE TO ARREST SHOULD BE DISCLOSED, not only in trying to effect an arrest in a dwelling-house, but in all other cases; and this general rule applies to private persons as well as officers. The object of making an arrest must be communicated, or at least it must be inferable from the circumstances, or otherwise known or suspected: *Mackalley's Case*, 9 Co. 65 a; *State v. Bryant*, 65 N. C. 327; *Brooks v. Commonwealth*, 61 Pa. St. 352. We are now speaking of the rule as applicable to cases where the party submits to the arrest, and not where he makes resistance before the officer has time to give the information. The particulars of authority need not always be given, and it is sometimes proper to lay hands on a party before a word is spoken; but either before or at the moment of arrest, the officer ought to say enough to show a party that he is not dealing with a trespasser, but with a minister of justice: *Bellows v. Shannon*, 2 Hill (N. Y.), 86; *Countess of Rutland's Case*, 6 Co. 55 a; *Mackalley's Case*, 9 Id. 69 a; *Commonwealth v. Field*, 13 Mass. 321; *Arnold v. Steeves*, 10 Wend. 516; *Fost*. 310, 311; *Russell on Crimes*, 451-514. The surroundings of the particular case may render plain the purpose to arrest; and if they do, resistance to the arrest will be as illegal as if the same were stated in words: *Rex v. Davis*, 7 Car. & P. 785; *Rex v. Howarth*, 1 Moo. C. C. 207; and see *Rex v. Payne*, Id. 378; *Pew's Case*, Cro. Cas. 193; *Cook's Case*, Id. 537; *State v. Garrett*, 1 Winst. L. 144; *John v. State*, 40 Tenn. 127, 147. When the party resists and interrupts the officer before he can speak all his words, and the officer is mortally wounded by him and dies, the party can not take advantage of his own wrong, and such a killing is murder: *Mackalley's Case*, 9 Co. 69.

NOTICE OF OFFICIAL CHARACTER.—An officer making an arrest with a warrant should give some notification of his authority as such officer; and if he be appointed and qualified, and authorized by a warrant to arrest, he gives sufficient notice of his authority to do so by reading the warrant of arrest: *State v. Green*, 66 Mo. 631; wearing the accustomed badge of office is also a sufficient notice of the official capacity, even in the case of a fresh incumbent: *Yates v. People*, 32 N. Y. 509; and see *Commonwealth v. Tobin*, 106 Mass. 426; and possibly, if he was elected by the people, that may be deemed a sufficient notice: 1 Bish. Cr. Pr., sec. 191. A known officer is not

understood to be one known to the party who is to be arrested; but if he be so commonly known, it is sufficient: *Mackalley's Case*, 9 Co. 69 b. It has been ruled in England that an officer gives sufficient notice of what he is when he says to the party, "I arrest you in the king's name;" and in such a case the party, at his peril, ought to obey him, though he knows him not to be an officer, and that the party is bound to obey, though from the darkness he can not see the officer: *Id.* 69; see *Russell on Crimes*, 839, 840. And it has been held that a known officer may, without a warrant, where he is informed that a felony has just been committed, arrest the person charged, without disclosing the charge to him, and when in reality there was nothing to justify the arrest: *Rex v. Woolmer*, 1 Moo. C. C. 334; see *Rex v. Gordon*, 1 East P. C. 315, 352. Where one is committing a felony, he may be arrested by an officer without being informed of the charge: *Wolf v. State*, 19 Ohio St. 248; so where one just having committed a felony is attempting to escape: *People v. Pool*, 27 Cal. 572. Notice is not necessary in such cases, because the criminal must know the reason why he is apprehended: *Rex v. Payne*, 1 Moo. C. C. 378. Notice may be inferentially shown, and a small matter will amount to due notification: *Rex v. Gordon*, 1 East P. C. 315, 316, 318, 352. In cases of homicide, the law will sometimes presume that the party killing had due notice of an officer's intention to arrest, especially if it be in the day-time: 1 Hale P. C. 361; *Fost.* 311; see 2 Bish. Cr. L., sec. 654.

SHOWING WARRANT UPON DEMAND.—1. *In Case of Private Persons and Unknown Officers.*—All private persons, and officers not sworn and commonly known, to whom warrants are directed, must show them, if demanded, in effecting an arrest. This universal rule is unquestioned: *Arnold v. Steeves*, 10 Wend. 515; *Commonwealth v. Field*, 13 Mass. 321; *United States v. Jailer*, 2 Abb. 265, 275; *State v. Curtis*, 1 Hayw. 471; *Frost v. Thomas*, 24 Wend. 418. And a special deputy is bound, upon demand, to show his warrant, or the arrest is illegal: *Frost v. Thomas*, 24 Wend. 418; *State v. Kirby*, 2 Ired. L. 201; *Arnold v. Steeves*, 10 Wend. 515; *Burton v. Wilkinson*, 18 Vt. 186. As to arrests by private persons without warrant, see extended note to *Eanes v. State*, 44 Am. Dec. 293.

2. *In Case of Sworn and Known Officers*, there seems to be some difference of opinion. There is no doubt that if such an officer acts out of his own district, he must show his warrant on demand made: *State v. Kirby*, 2 Ired. L. 201; *State v. Curtis*, 1 Hayw. 471; *Commonwealth v. Field*, 13 Mass. 321. But where officers are acting within their own precincts, Hawkins laid it down that they need not show their warrant to the party, notwithstanding a demand for the sight of it; yet he says they ought to acquaint the party with the substance of their warrants: 2 Hawk. P. C., c. 13, sec. 28; see 2 Hale P. C. 116; *Rex v. Allen*, 17 L. T., N. S., 222; *Rex v. Woolmer*, 1 Moo. C. C. 334; *Rex v. Gordon*, 1 East P. C. 315, 352. And this doctrine is not without American support: *Drennan v. People*, 10 Mich. 169; *State v. Townsend*, 5 Harr. (Del.) 487; *Arnold v. Steeves*, 10 Wend. 514; *Wolf v. State*, 19 Ohio St. 248; *State v. Garrett*, 1 Winst. L. 144; *Commonwealth v. Cooley*, 6 Gray, 350; *State v. Curtis*, 1 Hayw. 471. Lord Kenyon, however, in *Hall v. Roche*, 8 T. R. 188, observed that if this were established law, it would be a most dangerous doctrine, because, in case of resistance, the legality of the warrant would become material in cases of homicide. "I do not think," he says, "that a person is to take it for granted that another who says he has a warrant against him, without producing it, speaks truth. It is very important that, in all cases where an arrest is made by virtue of a warrant, the warrant, if demanded at least, should be produced." See also 1 Ch. Crim. L. 41.

"This reasoning," says Mr. Bishop, "would settle the question, if there had been any doubt, that a private person, or an officer not known to be such, must produce his warrant. But something ought to be allowed to official position; and if one known by me to be an officer tells me he has a warrant to arrest me, claiming that it is legal and in due form, as he necessarily does by the very act of attempting the arrest, I ought to yield to him sufficiently to furnish opportunity for calmly looking into the question. Hence, it has been considered that the arrest, the explanation, and the reading of the warrant when demanded 'are obviously successive steps. They can not all occur at the same instant of time.' And in the case of a known officer, 'the explanation must follow the arrest; and the exhibition and perusal of the warrant must come after the authority of the officer has been acknowledged and his power over his prisoner acquiesced in.'" 1 Bish. Cr. Pr., sec. 191, citing *Commonwealth v. Cooley*, 6 Gray, 350, 356, 357. This is supported by the language of a court in Delaware, "that with regard to a known public officer of the county, it was not necessary for him either to produce his warrant or state his character and authority before making the arrest. The arrest itself is the laying hands on the defendant; and it might be defeated by the ceremony of producing and explaining a paper before the arrest is made. It is quite time to produce the authority on the demand of the party arrested, and after the arrest. Every one is bound to know the character of an officer who is acting within his proper jurisdiction, and every citizen is bound to submit peaceably to such officer, until he can demand and investigate the cause of his arrest. If the officer have no proper warrant for the arrest, he is liable to the defendant who can suffer no wrong from submitting to the law; but if he resist before such investigation, and the officer have authority, he is indictable for obstructing such officer in the discharge of his duty;" *State v. Townsend*, 5 Harr. (Del.) 487. This, Mr. Bishop is inclined to believe, is the present American law on the subject, and he refers to the following cases: *Arnold v. Steeves*, 10 Wend. 514; *Kernan v. State*, 11 Ind. 471; *Drennan v. People*, 10 Mich. 169; *State v. Freeman*, 8 Iowa, 428; *Plasters v. State*, 1 Tex. App. 673; *State v. Garrett*, 1 Winst. L. 144. It will be observed that a legal arrest under a warrant can not be made by an officer without he has it with him. If one has been delivered to him, and he has left it at his office or elsewhere, yet he can not act; it must be in his immediate possession. *Gailliard v. Laxton*, 2 Best & S. 363; S. C., 9 Cox C. C. 127; *Regina v. Chapman*, 12 Id. 4; S. C., 2 Eng. Rep. 160. A due regard to the interests and rights of the party arrested would undoubtedly indicate that he should be permitted, by an inspection of the authority of the person who seeks to arrest him, to determine its validity and the course he should pursue. It is certainly the more prudent and advisable course for the officer to exhibit the writ under which he acts, at least when it is demanded. See *Mackalley's Case*, 9 Co. 69; *Hodges v. Marks*, Cro. Jac. 485; *Commonwealth v. Field*, 13 Mass. 321. As to arrest by officers without warrant, see extended note to *Eanes v. State*, 44 Am. Dec. 292; and note to *Roberts v. State*, 55 Id. 104.

TIME WHEN ARREST MAY BE MADE.—By the common law, judicial acts could not be done on Sunday, but ministerial acts, such as an arrest, might be lawfully executed on that day: *Mackalley's Case*, 9 Co. 68 a. This was changed by the statute of 29 Car. II., c. 7, sec. 6, prohibiting arrests on Sundays; but this statute excepted the cases of treasons, felonies, and breaches of the peace, so therefore an arrest in these cases may be made on that day: *Ledwith v. Catchpole*, Cald. 291; *King v. Myers*, 1 T. R. 265; *Anonymous*, Willes, 459; *Pearce v. Atwood*, 13 Mass. 324; *Commonwealth v. Eyre*,

1 Serg. & R. 351; *Wells v. Gurney*, 8 Barn. & Cress. 769; *Goddard v. Harris*, 5 Moo. & P. 122; S. C., 7 Bing. 320; see *Shaw v. Dodge*, 5 N. H. 462. Since the statute, an arrest on Sunday, in cases within the exceptions, has been treated in England as absolutely void, and not cured by any act, neglect, or waiver of the party interested: *Wilson v. Tucker*, 1 Salk. 78; *Taylor v. Philips*, 2 East, 166; *Morgan v. Johnson*, 1 H. Black. 628; 1 Russell on Crimes, 840; *Lyford v. Tyrrel*, 1 Anst. 85; *Wells v. Gurney*, 8 Barn. & Cress. 771; *Atkinson v. Jamison*, 5 T. R. 25; *Ex parte Eggington*, 18 Jur. 224; *Parker v. Moor*, 2 Salk. 626; S. C., 2 Ld. Raym. 1028; S. C., 6 Mod. 95; *Featherstonehaugh v. Atkinson*, Barnes, 373; *Rex v. Myers*, 1 T. R. 265; see also *Benninghoff v. Orrill*, 37 How. Pr. 235; *Cooper v. Adams*, 2 Blackf. 294; *Keith v. Tuttle*, 28 Me. 326; *Main v. McCarty*, 15 Ill. 441. This is largely a subject of statutory regulation, and it may be said that without the statutory prohibitions, an arrest may be made, with or without warrant, at any time of the day or night, or on any day, including Sunday: *State v. Smith*, 1 N. H. 346; *Bell v. Clapp*, 10 Johns. 263; *State v. Shaw*, 1 Root, 134; *State v. Brennan's Liquors*, 25 Conn. 278; 1 Russell on Crimes, 840; *Mackalley's Case*, 9 Co. 66 a; 1 Hale P. C. 457; 1 Hawk. P. C., c. 31, sec. 62.

UNNECESSARY VIOLENCE TO BE AVOIDED.—The amount of force which may be lawfully used in effecting an arrest is no more than is actually necessary to secure the arrest and safe custody of the accused: *State v. Mahon*, 3 Harr. (Del.) 568; *Levy v. Edwards*, 1 Car. & P. 40; *Giroux v. State*, 40 Tex. 97; *Rhodes v. King*, 52 Ala. 272. If he uses more force than the occasion calls for, he is guilty of an assault and battery: *Golden v. State*, 1 S. C. 292; *Beaverts v. State*, 4 Tex. App. 175. The officer can not drag the defendant about or strike him, unless these acts are rendered necessary by his resistance: *Kreger v. Osborn*, 7 Blackf. 74; yet he can not be made liable by the defendant except for wanton violence: *Wright v. Keith*, 24 Me. 158. But as to his liability for arresting the wrong person, see extended note to *Eanes v. State*, 44 Am. Dec. 291. Mr. Murfree, in his work on sheriffs, section 148, remarks "that there is prevalent, not only among officers of every grade, but throughout the community, an exaggerated idea of the powers in this respect which the law vouchsafes to its ministers. A sheriff, constable, or policeman, with a revolver, and a warrant charging a misdemeanor, is popularly supposed, to hold the keys of life and death, and as he frequently shares in the delusion, he abuses his powers with sometimes very tragical results. What the law does allow in the use of physical force is the very minimum by which the desired object can be attained. Whatever a rash or over-zealous officer may do in excess of this is without warrant of law:" Citing *State v. Mahon*, 3 Harr. (Del.) 568; *Kreger v. Osborn*, 7 Blackf. 74; *Wright v. Keith*, 24 Me. 158; *Harrison v. Hodgson*, 10 Barn. & Cress. 445. There may be cases in which a person may justify laying hands upon another in order to serve him with civil process: *Harrison v. Hodgson*, *supra*. A constable in preventing a breach of the peace may arrest any one who stands in the way with intent to prevent him from so doing, but the officer can not justify striking him: *Levy v. Edwards*, 1 Car. & P. 40. An officer must not be too hasty and violent in the exercise of his authority: *Imason v. Cope*, 5 Id. 193. Upon a trial for assault and battery, evidence that the prosecutor had committed petit larceny, and that the alleged assault and battery by the defendant consisted in arresting the prosecutor therefor, without process, and delivering him to a public officer, will constitute a complete defense: *People v. Adler*, 3 Park. Cr. 249. An officer is entitled to the possession of the warrant under which he acts, and if he deliver it to the party against whom it is issued, and he refuse to redeliver it,

the officer may use so much force as is necessary to get possession of it again, and no more: *Rex v. Milton*, Moo. & M. 107; S. C., *sub nom.*, *Rex v. Milton*, 3 Car. & P. 31. But even while committing a felony, a party should not be unnecessarily killed by another, and without any attempt to arrest him: *Regina v. Murphy*, 1 Craw. & D. 20; *Gardiner v. Thibodeau*, 14 La. Ann. 732; *Rex v. Scully*, 1 Car. & P. 319; *Halloway's Case*, W. Jones, 198; S. C., Cro. Car. 131.

KILLING TO EFFECT ARREST IN CIVIL SUIT.—No private person can of his own authority arrest in civil suits: 1 East P. C. 306; and it is said that "if the party against whom the process has issued fly from the officer endeavoring to arrest him, and he be killed by him in the pursuit, Lord Hale thinks it is murder;" probably intending to speak only "of the officer's intentionally killing the defendant in his flight, not being able to overtake him." But Mr. Justice Foster says: "It will be murder or manslaughter, as circumstances vary the case; for if the officer, in the heat of the pursuit, and merely in order to overtake the defendant, should trip up his heels or give him a stroke with an ordinary cudgel or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter. The blood was heated in the pursuit, and no signal mischief was intended. But if he made use of a deadly weapon, it will amount to murder. The mischievous, vindictive spirit determines the nature of the offense." The case of a defendant flying after an arrest actually made, or out of custody in execution for debt, seems also to be governed by the same rules as where the party flies to avoid an arrest. "But certainly," notwithstanding the case reported by Rolle to the contrary, "in case of resistance made, the person having authority to arrest may repel force with force, and need not give back; and if death unavoidably ensue in the struggle, he will be justified:" 1 East P. C. 306; 1 Hale P. C. 481; Fost. 271; *Calfield's Case*, 1 Roll. 189.

KILLING TO EFFECT ARREST OF ONE FLYING FROM MISDEMEANOR.—Particular attention must be called to the distinction between arrests for felonies and those for mere misdemeanors. Where one is committing a felony, and when an officer attempts to arrest him, runs away, the officer may, after calling upon him to stop, shoot at him to compel him to do so, if he will not stop; but the law confers no right to take such extreme measures in mere misdemeanors. "It is not lawful to kill the party accused if he fly from the arrest, though he can not be otherwise overtaken, and though there be a warrant to apprehend him; and generally speaking, it will be murder; but under circumstances it may amount only to manslaughter, if it appear that death was not intended. In some instances, however, of flight in cases of flagrant misdemeanors, such as the one before mentioned of a dangerous wound given, the same extremity may be resorted to if the party can not be otherwise overtaken; but this is founded upon a presumption that the offense may turn out to be a felony:" 1 East P. C. 302; and see 1 Hale P. C. 481; Fost. 271; Whart. on Hom., sec. 213; *Brady v. Price*, 19 Tex. 285; *Middleton v. Holmes*, 3 Port. 424; *Regina v. Dadson*, 2 Den. Cr. C. 35; *Duperrier v. Dauvergne*, 12 La. Ann. 664.

KILLING TO EFFECT ARREST OF ONE FLYING FROM FELONY.—"If a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavors for preventing an escape; and if in the pursuit the felon be killed, where he can not be otherwise taken, the homicide is justifiable. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him." And the necessity of such killing is a fact for the jury to determine: 1 East

P. C. 298; and see *Fost.* 271; 1 *Hale* P. C. 489; 1 *Hawk* P. C. 81 'The case of flight is different from resistance. If the warrant be for felony, flight is tantamount to resistance, and the flying felon may be justifiably killed if he can not be otherwise secured. In cases of misdemeanor, resistance will justify killing, though flight will not; for in such cases the law considers it better that the accused should escape than that a life should be taken.'" *Bushe*, C. J., in *Rez v. Finnerty*, 1 *Craw. & D.* 166, note. See *Mackalley's Case*, 9 *Co.* 65 b. An officer, however, employed to guard a copse, who fires at and wounds one for stealing wood therefrom, where there is no other way of bringing him to justice, can not justify his act if he did not know at the time that a felony was being committed by the wounded man: *Regina v. Daddon*, 2 *Den. Cr. C.* 35; *S. C.*, *Temp. & M.* 385; 1 *Eng. L. & Eq.* 566; 14 *Jur.* 1051. Where the party does not resist, but merely flies to avoid arrest, the officer must cautiously regulate his conduct. Still more so must a private person. He can not act without authority of law; and if he commits a homicide, he must not only show that a felony was actually committed, but that he avowed his object to arrest, that the felon refused to submit, and that the killing was necessary to effect it: *State v. Anderson*, 1 *Hill* (S. C.), 212; *State v. Rutherford*, 1 *Hawks*, 467; *United States v. Travers*, 2 *Wheel.* 510; *State v. Roane*, 2 *Dev.* 58; *Rez v. Howarth*, *Moo. C. C.* 207; *Rez v. Williams*, *Id.* 387. The law will extenuate a homicide committed in the prevention of a felony, though the slayer be but a private person: *State v. Roane*, 2 *Dev.* 58; *Oliver v. State*, 17 *Ala.* 587; *Dill v. State*, 25 *Id.* 15; because it is for the purpose of preventing crime, and not by way of punishment for it; but after it is committed, private persons must be governed by the law above announced.

KILLING WHERE RESISTANCE IS OFFERED IN EITHER FELONIES OR MISDEMEANORS.—An officer in the execution of his duty is justified in taking away life, if it be indispensably necessary, but not otherwise. If he have a warrant for any crime, from the highest to the lowest, whether a felony or a misdemeanor, and the party resist, and the officer have no means of making him amenable except by killing him, he is justified in so doing: *Bushe*, C. J., in *Rez v. Finnerty*, 1 *Craw. & D.* 167, note; 1 *East* P. C. 302; 2 *Hale* P. C. 117; *United States v. Jailer*, 2 *Abb.* 265; *State v. Green*, 66 *Mo.* 631; it makes no difference whether it is a civil or criminal suit: *Fost.* 321; and in felonies this extreme measure may be taken by private persons as well as officers, for the law makes every person an officer to apprehend a felon: 1 *Hale* P. C. 489; 1 *Hawk* P. C. 81, c. 10, sec. 11. In fact, all persons having authority to arrest, and using proper means for that purpose, may justify the killing of a resisting party; *Fost.* 270; 1 *East* P. C. 295; *State v. Garrett*, 1 *Winst. L.* 144; *State v. Mahon*, 3 *Harr.* (Del.) 568; *State v. Roane*, 2 *Dev.* 58; *Morton v. Bradley*, 30 *Ala.* 683; *Arthur v. Wells*, 2 *Mill Const.* 314; *United States v. Rice*, 1 *Hughes*, 560; *Brooks v. Commonwealth*, 61 *Pa. St.* 352; *Mesmer v. Commonwealth*, 26 *Gratt.* 976; *Golden v. State*, 1 *S. C.* 292; *State v. Anderson*, 1 *Hill* (S. C.), 327; *Clements v. State*, 50 *Ala.* 117. But if the killing were after the resistance ceased, or if the other party were not authorized to arrest, it would be manslaughter at least, if not murder: 1 *East* P. C. 297; *Fost.* 291; *Conraddy v. People*, 5 *Park. Cr.* 234; *Whart. on Hom.*, 213 a; and see *James v. State*, 44 *Tex.* 314; *Mitchell v. State*, 54 *Am. Dec.* 253.

KILLING TO PREVENT ESCAPE.—1. *In Felonies.*—If killing is justifiable in effecting the arrest of one for felony, it would seem to be equally so to prevent escape after an actual arrest, and so is the law, where such an extreme measure is necessary: 1 *East* P. C. 298; 1 *Hale* P. C. 489; *Fost.* 271; 2 *Hale* P. C. 75, 76, 91, 101, 102; 2 *Hawk* P. C., c. 12, sec. 1; and this rule is

not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it; for if in these cases fresh pursuit be made, and *a fortiori* if hue and cry be levied, all who join in aid of those who began the pursuit are under the same protection of the law: *Id.*

2. In *Misdemeanors*.—However, the law will not extenuate a homicide committed by an officer to prevent an escape after actual arrest. This must be distinguished from cases of resistance to arrest for misdemeanors, and, as in cases of flight from arrest for mere misdemeanors, the law places too high an estimate upon a man's life to permit an officer to kill him, while unresisting, simply to prevent an escape: *Caldwell v. State*, 41 Tex. 86; 1 Hale P. C. 481; *Fost.* 271; *Rex v. Tranter*, 1 Stra. 500; *Rex v. Finnerty*, 1 Craw. & D. 168, note; *State v. Rutherford*, 1 Hawks, 457; Wharton's Cr. L., secs. 404, 405; *Forster's Case*, 1 Lew. C. C. 187; 1 Russell on Crimes, 857; but if the party assault the officer with such violence that he has reasonable grounds for believing his life to be in danger, he may justify killing the party: 1 Russell on Crimes, 857; *State v. Anderson*, 1 Hill (S. C.), 327. An individual unlawfully arrested, however, is justified in escaping if he can: *State v. Ward*, 5 Harr. (Del.) 496; *Rex v. Curran*, 3 Car. & P. 397; and see *State v. Phinney*, 42 Me. 384; *Wood v. Kinman*, 5 Vt. 588; *State v. Oliver*, 2 Houst. 585; *Lewis v. State*, 40 Tenn. 128; but if the arrest be lawful, the officer, though consenting to the escape, is bound to retake the prisoner, for the public ought not to be deprived of any right by an escape, of whatever kind, from custody under criminal process: *Clark v. Cleveland*, 6 Hill, 344; *Arnold v. Steeves*, 10 Wend. 515; *Gano v. Hall*, 42 N. Y. 67; *Dickinson v. Brown*, 1 Esp. 218; S. C., Peake, 234; *Butt v. Jones*, 1 Gow N. P. 99; 1 Ch. Crim. L. 61; 2 Hawk. P. C., c. 19, sec. 12. But see *Doyle v. Russell*, 30 Barb. 300, disapproving *Clark v. Cleveland*, 6 Hill, 344. Statutes sometimes provide that "a prisoner under sentence of death or imprisonment in the penitentiary, or attempting to escape from the penitentiary, may be killed by the officer having legal control of him, if his escape can in no other way be prevented;" but this authority to kill to prevent escape does not authorize an officer to kill an escaped convict in trying to rearrest him: *Wright v. State*, 44 Tex. 645.

PERRY v. HENSLEY.

[14 B. MONROE, 474.]

LEVY UPON PROPERTY EXEMPT FROM EXECUTION, WITHOUT ASSENT OF DEFENDANT, IS INVALID.

DELIVERY BOND EXACTED BY LEGAL COERCION, FOR PROPERTY EXEMPT FROM EXECUTION, but levied upon without defendant's assent, is no recognition of the validity of the levy or waiver of defendant's right; it is void, and equity will relieve against it.

ERROR to Morgan circuit. The opinion states the case.

Farrow and Peters, for the plaintiffs.

Harlan, for the defendant.

By Court, SMYTHSON, J. The only question in this case is, Can a surety in a forthcoming or delivery bond apply to a court of

equity for relief, on the ground that the property on which the execution had been levied, and for the delivery of which the forthcoming bond had been executed, was the only work-beast that belonged to the defendant in the execution, who was a *bona fide* housekeeper at the time the execution issued and the levy was made?

As the property levied on was not subject to execution, unless the defendant waived his legal right to its exemption, of which there was no evidence, the plaintiffs in the execution have not sustained any injury by the failure of the defendant to deliver the property according to the stipulations in his bond. And as the levy was illegal, and the forthcoming bond was taken to carry into effect this illegal act, it would be inconsistent with every principle of justice and equity to permit the plaintiffs to avail themselves of a legal advantage thus improperly and illegally obtained, and compel the surety in the bond to pay the debt.

In opposition to the relief prayed for by the surety, it is argued that, as he entered into the bond voluntarily, and permitted a forfeiture of it to occur, by a failure to have the property delivered, whereby he became liable for the debt, he can not claim the aid of a court of equity to release him from his own voluntary undertaking; and that the execution of the bond was a virtual admission that the property was liable to execution.

This argument is evidently fallacious. Although the bond was entered into voluntarily by the obligors, yet the necessity for its execution was produced by an illegal act, and therefore its execution may with propriety be said to have been induced by legal coercion. Besides, as the property levied on was not subject to execution, the bond is not founded on any consideration either good or valuable. Its execution under the circumstances can not be regarded as an implied admission that the property was liable for the debt. If the horse had been delivered under the bond, the defendant in the execution might still have objected to the sale, and if a sale had been made, he might have sued the officer, and recovered the value of his horse. The existence of such a right demonstrates that the execution of the bond did not amount to an admission that the property levied on was liable to the execution; and as the defendant failed to deliver the property, he thereby virtually claimed its exemption from execution.

To enforce the forfeiture of this forthcoming bond would be unjust and unconscientious; consequently a perpetual injunction

tion against its enforcement should have been ordered by the court below.

Wherefore the judgment is reversed and cause remanded, that a judgment may be rendered in conformity with this opinion.

JARVIS v. DAVIS.

[14 B. MONROE, 529.]

ABSOLUTE BILL OF SALE OF PERSONAL PROPERTY, unless it be "followed and accompanied" by the possession of the purchaser, is void as to creditors of the vendor.

WHERE PARTIES TO ABSOLUTE BILL OF SALE OF PERSONAL PROPERTY RESIDE TOGETHER, an actual visible change of possession, such as might be understood and known in the neighborhood, is necessary to vest title in the vendee—there must be more than a mere formal or colorable delivery.

POSSESSION, WHEN SALE IS MADE, FOLLOWS TITLE, and as between the parties themselves, is presumed to be with vendee; but this presumption may be repelled by proof that the vendor still remained in the possession of the property, and that no change of possession, either actual or constructive, was made or intended to be made by the parties.

ACTUAL POSSESSION OF PROPERTY BY VENDOR AFTER SALE, LISTING IT FOR TAXATION, treating it as his own, and apparently owning it when he contracted debts, will repel the legal presumption that possession passed to the vendee by transfer of title.

APPEAL from the Louisville chancery court. The opinion states the facts.

Speed and Worthington, for the appellant.

Johnston and Lindsey, for the appellee.

By Court, **SIMPSON, J.** This petition in equity was filed by Jarvis against Davis and Mrs. Bell to attach some slaves in the possession of the latter, as the property of her co-defendant.

The plaintiff alleged in his petition that he held a note on the defendant Davis for upward of five hundred dollars, which was due and unpaid; that said defendant had removed from the state, and was absent therefrom; that Mrs. Bell, his mother-in-law, had in her possession some slaves which belonged to her co-defendant, and which had been placed in her hands by him for the fraudulent purpose of preventing his creditors from collecting their debts, and that she was about to remove with said slaves to the state of Missouri, where her son-in-law had gone.

The defendants denied that the slaves which were attached

belonged to Davis, and contended that they were the property of Mrs. Bell, purchased by her from her co-defendant, fairly and for a full consideration. The petition was dismissed by the chancellor, so far as it sought to subject the slaves to the payment of the plaintiff's debt, and from that judgment he has appealed.

The following facts are established by the testimony in the cause: Mrs. Bell had resided for many years with her son-in-law, Davis. She owned a negro woman, which was sold by him, and the money arising from the sale he appropriated to his own use. He afterward, in October, 1849, in payment of this debt, sold to her the negro woman in contest, and executed to her an unconditional bill of sale for the slave. Since that time the woman has had three children. At the time of the sale the slave was in possession of Davis, the vendor, and continued in his possession from that time until he removed to the state of Missouri, in March, 1853, a few days before this action was commenced. He listed the slave for taxation after the sale, paid the taxes, and in all other respects treated her as his own, until some time in the year 1852, when, an execution against him being in the hands of the sheriff, he disclaimed having any right or title to her. Mrs. Bell lived with him when the sale was made, and continued to reside with him until he started for Missouri, and then the slaves were left in her possession, to take with her when she followed him, which she intended to do in a short time.

The question that arises upon this state of facts is, whether the slaves are or are not liable for the plaintiff's demand against the vendor. The debt was contracted in June, 1851, after the sale was made.

The general doctrine is well established, that an absolute bill of sale of personal property, unless it be "followed and accompanied" by the possession of the purchaser, is void as to the creditors of the vendor.

This general rule, which, so far as it is applicable, is inflexible, has not been controverted in the argument; but it is contended that where the vendor and vendee reside together when the sale is made, then the title passes to the vendee, and the possession, by legal construction, accompanies the title, and no other change of the possession is necessary except that which in such a case is produced by the operation of the law.

As between the parties themselves, where they reside together, the possession, when a sale is made, follows the title, and is

presumed to be with the vendee; but this presumption may be repelled by proof that the vendor still remained in the possession of the property, and that no change of possession, either actual or constructive, was made or intended to be made by the parties.

But suppose this legal presumption not to be repelled, will the constructive delivery of the possession, produced by the transfer of the title, where no visible alteration in the actual possession accompanies the sale, relieve the purchase from the operation of the rule, and make it valid so far as the creditors of the vendor may be affected by it?

The doctrine of constructive fraud seems to be founded on two reasons: 1. That the retention of the possession by the former owner, after an absolute sale of the property to another, being inconsistent with the terms of the sale, is a badge of fraud and collusion; 2. That as the possession of personal property is evidence of ownership, the vendor by remaining in the possession of it continues to be the ostensible proprietor, and is thereby permitted to enjoy a delusive credit, which is calculated to deceive and injure those persons with whom he may deal. The last reason referred to seems to be the most important, and has led to those decisions in support of the rule by which it has been held that a mere momentary delivery of the possession to the vendee, who immediately returns it to the vendor, is insufficient to take the sale out of the operation of the rule: *Goldsbury v. May*, 1 Litt. 254. That there must be an actual visible change of the possession, and that the vendee, having acquired it under his purchase, must have enjoyed it so as to show that the delivery to him was not merely formal or colorable, before he can safely transfer it to the vendor: *Breckinridge v. Anderson*, 8 J. J. Marsh. 714.

In the case of *Laughlin v. Ferguson*, 6 Dana, 111, there was a union of the constructive possession with the title of the vendee, but as the vendor retained the possession under a contract of hiring, the sale was held to be fraudulent.

Now, where the parties reside together, does not the reason of the rule require that there should be an actual visible change of the possession, such as might be understood and known in the neighborhood? The vendor, having been the original owner of the property, continues, notwithstanding the sale to a vendee who resides in his family, the ostensible owner of it, unless such a change of possession be made as will apprise the public that it has been transferred to the vendee. The mischief is the

same where no such change is effected as it is where the vendee resides elsewhere. The public are liable to the same impositions. The vendor has the same delusive credit in both cases. And more opportunities and greater inducements for the perpetration of actual frauds are afforded where the vendee resides in the family of the vendor than if he resided at some other place. In accordance with these views, this court decided, in the case of *Waller v. Cralle*, 8 B. Mon. 11, that the condition of the parties at the time of the sale (the vendee residing with the vendor) did not take the case out of the operation of the rule, but that an actual change of possession was absolutely necessary to the validity of the sale so far as creditors were concerned, whenever the vendor was at the time of the sale in the possession of the property. That doctrine, upon reconsideration, we believe to be correct, and still adhere to it.

But in the present case, the legal presumption that the possession passed to the vendee by the transfer of the title is fully repelled by the testimony, and it is clearly and conclusively established that the vendor, after the sale, continued in the actual possession of the slaves, listed them for taxation, and treated them as his own, and was the apparent owner of them at the time he became indebted to the plaintiff. An attempt was made to prove that he was allowed to retain the possession of them as a compensation for boarding his mother-in-law; but the proof of that fact would not relieve the sale from the operation of the rule which renders it fraudulent as to the creditors of the vendor: *Laughlin v. Ferguson*, *supra*. Consequently the court should have subjected the slaves to the payment of the plaintiff's demand.

Wherefore the judgment is reversed, and cause remanded for a judgment in conformity with this opinion.

SALE OF PERSONAL PROPERTY UNACCOMPANIED BY CHANGE OF POSSESSION IS VOID AS TO CREDITORS OF VENDOR: *Richmond v. Crutsp*, 33 Am. Dec. 164; *Hudnall v. Teasdale*, 10 Id. 671; *Clark v. French*, 39 Id. 618; *Calhoun v. Lockwood*, 42 Id. 729; *Crouch v. Carrier*, 41 Id. 156; *McGee v. Campbell*, 32 Id. 783; *Mills v. Warner*, 47 Id. 711, and notes to each.

THAT VENDOR'S RETAINING POSSESSION OF GOODS AFTER SALE IS ONLY PRESUMPTIVE EVIDENCE OF FRAUD, which may be repelled by other testimony: *Briggs v. Parkman*, 37 Am. Dec. 89; *Jennings v. Carter*, 20 Id. 635; *Thornton v. Davenport*, 29 Id. 358; *Cocke v. Chapman*, 44 Id. 536; *Lewis v. Lou's Heirs*, 38 Id. 161, and notes to each.

NECESSITY FOR DELIVERY OF PERSONAL PROPERTY TO PASS TITLE: *Ford v. Sproule*, 12 Am. Dec. 439; *Peabody v. Carroll*, 13 Id. 305; *Fletcher v. Howard*, 16 Id. 686; *Morris v. Hyde*, 30 Id. 475; *French v. Hall*, 32 Id. 341;

Ludwig v. Fuller, 35 Id. 245; *Wilson v. Hooper*, 36 Id. 366; *Danley v. Rector*, 50 Id. 242, and notes thereto. But see *Costar v. Davies*, 46 Id. 311; *Hooban v. Bidwell*, 47 Id. 386; *Griffin v. Chubb*, 58 Id. 93; and that delivery of bill of sale vests title to property in purchaser, see *Begley v. Morgan*, 35 Id. 188; *Cocks v. Chapman*, 44 Id. 536.

YOUNG v. HARRIS.

[14 B. MONROE, 556.]

CONTRACT IS TO BE GOVERNED AND CONSTRUED BY *LEX LOCI CONTRACTUS*, unless another place is appointed for its performance.

INDORSEMENT OF NOTE IMPLIES TRANSFER, and if the indorsement is made in one place and delivery in another, the latter is the place of contract. Mere indorsement, without transfer, is no contract.

CONTRACT AND RESPONSIBILITY OF ONE WHO INDORSES ACCOMMODATION NOTE IN ONE STATE, but which is subsequently delivered to a person in another, is governed by the law of the latter state.

ACTION on a promissory note by John Young against H. C. Harris. The note was executed by J. A. Keene. Young was the assignee or indorsee, and Harris was Keene's immediate indorser. It was signed by Keene in Cincinnati, and made payable in the same place to J. M. Tipton. It remained in Keene's hands for the purpose of procuring good indorsers in Covington, Kentucky, and then to be delivered to Young in Cincinnati in lieu of a pre-existing debt. While in Keene's hands the note was indorsed in blank by Tipton and Harris at Covington, Kentucky, and was shortly afterwards delivered in Cincinnati to Young, who may be supposed to have resided there. It was admitted that such a note in Ohio was placed on the footing of a bill of exchange, and that timely presentation at the place of payment, and due notice of non-payment, were conditions on which the liability of the indorser *prima facie* depended; and Harris maintained that the laws of that state furnished the proper test of diligence, and that as such diligence had not been used, he was not liable. But Young depended upon the laws of Kentucky, and had prosecuted the maker to insolvency by suit, with sufficient diligence under such laws to authorize a recovery against the assignor. Judgment was rendered against the plaintiff, from which he appealed.

Mensies and Spillman, for the appellant.

J. W. Stevenson and H. C. Harris, for the appellee.

By Court, MARSHALL, C. J. The general principle determining the law by which a contract is to be construed and governed is,

that unless the place appointed for its performance be different from that at which it is made, it is to be governed by the law of the place where it is made, which in reference to this question is called the *lex loci contractus*. An indorsement is generally the evidence and consummation of a contract, by which the indorser passes to another person his right to the instrument and debt transferred, and incurs the liabilities incident to such a transfer. Hence the place where the indorsement is made, that is, the place where the party writes his name upon the back of the instrument, being generally the place of the contract of transfer, is, in the absence of proof to the contrary, presumed or assumed to be always the place of contract. And in applying the rule or principle above stated to the case of indorsements or assignments, it is generally, and unless particularity or specification be called for or intended it is perhaps always, said that the indorsement or assignment is to be governed or have its effect according to the law of the place where it was made. But we understood the rule thus expressed as being still an assertion of the principle that the *lex loci contractus* shall govern, and as therefore referring by the term "indorsement or assignment," not merely to the manual act of putting a name on a paper, but to the contract of transfer, which, though usually, is not always consummated by that act or simultaneous with it.

But suppose the payee of a note residing in Covington indorses it in blank at that place as soon as it is executed, but puts it in his pocket, and six months afterward, or at any other time, he goes over to Cincinnati and sells and delivers it to another person, who pays him the money for the transfer. The mere physical act of indorsement has been performed in Covington; but surely there is no contract, no transfer, nothing which can attach the law of Kentucky or any other law to the indorsement, so long as it remains in the pocket of him who made it, and while no other person has any interest in or right under it; and in fact, the word "indorsement," when used in reference to negotiable instruments (and *a fortiori* when used in expressing a rule relating to contracts), implies not only the physical act of writing a name, but also the transfer usually effected by that act.

Harris in fact never had any beneficial interest in the note. He indorsed it merely for the accommodation of the maker, who brought it to him, and in whose hands it remained until delivered to Young, as was doubtless originally intended, and as Harris probably knew was to be done. But whether he knew it or not, so long as the note remained in the hands of the maker there

was no contract arising from the indorsement and no responsibility. And there was neither contract nor responsibility on the part of Harris until some other person acquired a right in the note and its indorsements. It was only by the delivery to Young that such right was acquired; and it is only by that act that the indorsement of Harris, as a contract or source of responsibility, was consummated. If he knew that the note was to be delivered to Young in Cincinnati, in payment or renewal of a pre-existing debt, he knew that his own contract of indorsement would be thus consummated in Ohio. If he did not know this, but left it with Keene to do what he pleased with the note and indorsement, it was in fact delivered in Ohio, and he must abide by that delivery, which consummated his own contract and obligation, and placed them, as we think, under the law of Ohio. This conclusion, and the judgment of the circuit court, are fully sustained by the case of *Goddin v. Shipley*, 7 B. Mon. 575.

Wherefore the judgment is affirmed.

LEX LOCI CONTRACTUS GOVERNS RIGHTS AND LIABILITIES OF PARTIES TO CONTRACT: *Bradshaw v. Newman*, 12 Am. Dec. 149; *Miles v. Ogden*, 19 Id. 177; *Malpica v. McKown*, 20 Id. 279; *Chapman v. Robertson*, 31 Id. 284; *Buckner v. Watt*, 36 Id. 671; *Allhouse v. Ramsay*, 37 Id. 417; *Jordan v. Thornton*, 44 Id. 546; *Smith v. Blatchford*, 52 Id. 504; *May v. Breed*, 54 Id. 700; *Speed v. May*, 55 Id. 540, and notes thereto.

WRIGHT v. ARNOLD.

[14 B. MONROE, 633.]

FEME COVERT MAY SUE IN HER OWN NAME FOR SETTLEMENT.

WIFE'S RIGHT OF SURVIVORSHIP, BUT NOT HER EQUITY TO SETTLEMENT, will be destroyed by the husband's transfer of her choses in action that he has a right to reduce into immediate possession.

WIFE CAN NOT DEMAND SETTLEMENT IN EQUITY OF HER INTEREST IN HER FATHER'S ESTATE, to which the husband had an immediate right of possession, if she was present and made no objection to her husband's sale of it. Such conduct repels her equity against the purchaser.

WIFE'S RIGHT TO SETTLEMENT IS NOT PREJUDICED BY MORTGAGE OF HER REVERSIONARY INTEREST, executed by her and her husband, and to secure a pre-existing debt of the husband.

CONTRACTS OF GUARDIANS AND ADMINISTRATORS WITH WARDS AND DISTRIBUTEES ARE REGARDED WITH SUSPICION BY COURTS OF EQUITY; and an administrator's purchase of a distributee's interest, soon after his coming to full age, and for a grossly inadequate consideration, is fraudulent.

ERROR to Garrard circuit. Two of the distributees, John A. Herring and David A. Herring, each claimed a greater interest in the estate than they received, and prayed that the sales might be regarded as void for fraud on the part of Arnold. The other facts appear in the opinion.

A. A. Burton, for the plaintiffs.

G. S. Shanklin, for Arnold.

W. Clarke, for Tapp.

By Court, **SNYDER, J.** George Herring died, leaving an estate consisting almost exclusively of slaves. Arnold was appointed his administrator, and also the guardian of his children. These suits were brought against Arnold by three of the children, for their distributable part of the estate in his hands, as their guardian. To the suit brought in the name of Elizabeth Wright, the defense relied upon is, that her husband, with his knowledge and consent, sold her interest in the estate, in her presence, to Tapp, who afterward sold it to the defendant Arnold. Her right to bring the suit in her own name, without joining her husband as a co-complainant, is also controverted. The suit was brought by her to assert her equity to a settlement out of the estate in the defendant's hands. Her right to bring such a suit in her own name was settled in the case of *Moore v. Moore*, 14 B. Mon. 259.

The question arises, how far her interest in the fund is affected by the transfer made by her husband. The established doctrine seems to be that a transfer by the husband of the choses in action belonging to his wife, which he has a right to reduce into immediate possession, will deprive her of her right of survivorship, but not of her equity to a settlement.

Has she done any act which precludes her from coming into a court of chancery to assert this equity? We think the fact that she was present when the sale was made, and assented thereto, is clearly proved by the testimony. Now, although she could not, even by joining in the transfer with her husband, divest herself of any legal right which she had to the estate, it does not follow that she can not, by her conduct, place herself in such an attitude as to deprive her of the aid of a court of equity. When she presents herself as a complainant, asking the assistance of the chancellor, she occupied the same attitude that other complainants do. And the doctrine is well settled, that neither infancy nor coverture will constitute any excuse for conduct

which in other persons would, as it regards purchasers for a valuable consideration, be deemed unjust and fraudulent: *Davis v. Tingle*, 8 B. Mon. 543; 1 Story's Eq. Jur. 377. With her interest in the estate in the hands of the administrator, her husband purchased and paid for a tract of land on which they resided for two years. She consented to the sale for the purpose of getting a home. The land has been sold by her husband, and the title has passed from Tapp, so that the parties can not be placed in the condition they were before the contract was entered into.

Now, as the wife assented to the sale by her husband, and was present and did not assert any claim to the property, or controvert the right of her husband to dispose of it, she must be regarded as having induced the purchaser to make the contract, and under such circumstances it would be clearly inequitable to deprive him, at her instance, of the benefit of the purchase. It is not pretended that there was any fraud or imposition in the sale, or even that the price paid was inadequate. Unless, then, she can be allowed to set up her equity, with the same effect that she could if she had done no act to prejudice her claim or impair her right to the aid of a court of equity, she is not entitled to any relief; and if she is to be treated as other parties are who seek the assistance of the chancellor, it is evident that she can not obtain any relief in a court of equity.

The case of *Hord v. Hord*, 5 B. Mon. 81, is relied upon as establishing the doctrine that the consent of the wife to an assignment of her choses in action by her husband is not obligatory upon her. But that case differs from this in several material particulars. *Hord* and wife executed a mortgage on the reversionary interest of the wife in some slaves to which she was entitled after the death of her mother, for the purpose of securing a pre-existing debt of her husband. On a bill filed by the mortgagee to foreclose the mortgage, it was decided that the wife, by uniting with her husband in its execution, had not waived or impaired her equity to a settlement, and that the chancellor, under the circumstances, should not afford any aid to the mortgagee by subjecting the property to sale for his benefit.

Now that was a reversionary interest which was mortgaged—a chose in action that the husband could not reduce into possession—and consequently could not by his assignment of it defeat the wife's right of survivorship. In this case the husband

had a right to reduce to possession the interest which was sold, and by his assignment of it the wife's right of survivorship was completely divested.

Again: in the case referred to the mortgagee was seeking the aid of a court of equity, which, under the circumstances, was refused; but in this case, the wife comes into court seeking its aid, and occupies a different attitude than she did in the former case.

But the important distinction between the two cases is, that in one the mortgage was executed to secure a pre-existing debt of the husband, and the wife did not by her conduct induce the creditor to part with any of his estate; in the other the assignment was made in the presence of the wife, and with her sanction, and the purchaser was induced, as a consideration of the assignment thus made, to part with a valuable portion of his estate.

The mortgagee had nothing to rely upon to repel the equity of the wife. The only question was, whether the wife, by merely uniting with her husband in the mortgage, had waived or impaired her equity. It was a question as to the validity of a contract made by a married woman, and involved no question of fraud or injustice.

But in this case the purchaser relies upon the conduct of the wife at the time of the assignment as sufficient to repel the equity which she asserts. She stood by and permitted him to part with his property to her husband, with her assent and sanction. In conjunction with her husband, she enjoyed the use of that property for two or three years, and then consented that her husband might sell it. Should a court of equity, under such circumstances, afford her any relief against the assignee of her husband? Would it not be inequitable and unjust to do so? By her conduct she has precluded herself from asserting her equity to a settlement out of this estate, and the court below properly dismissed her petition.

This court decided at the present term, in the case of *Gilbert v. Carlan* [manuscript opinion, not reported], that the plaintiff, although a minor of eighteen years at the time a slave of which he was the owner was sold by his father, yet, as he was present at the sale, and knew that he was the owner of the slave and his father had no right to sell it, but did not apprise the purchaser of these facts, had thereby precluded himself from asserting his title against him.

Wherefore the judgment in this case is affirmed.

With respect to the claim of John A. Herring, we are not able to perceive any ground for setting aside the sale made by him to Arnold. He had been of age some two or three years before he made the sale. Part of the estate was then in litigation, the result of which was uncertain. The exact amount to which he would be entitled upon a settlement of the estate was unknown to Arnold, the administrator, as well as to him; besides, we are inclined to the opinion that the price paid to him amounted to his full share of the estate, and that if the sale were vacated he would not have a right to any more than he has already received. There is no reason, therefore, for disturbing the transfer made by him to the administrator.

Wherefore the judgment dismissing this petition is affirmed.

But the sale made by David A. Herring stands upon a different footing altogether. It was made by him within a very short time after he had attained the age of twenty-one. The consideration was grossly inadequate, and the administrator must have known at that time the amount of the estate to which each distributee was entitled. The defense relied upon, that David had sold his interest in the estate to his brother Isaac, who had brought a suit against the administrator, asserting the same claim that is set up in this suit, and that it was compromised and settled by them, is not sustained by any testimony. It seems to us, therefore, that David is entitled to relief. The transfer he made to Arnold must under the circumstances be deemed fraudulent. His interest in the estate at the time he sold to Arnold amounted to seven hundred dollars or upwards, and it was the duty of his guardian to have paid him the money, instead of trafficking with him for a transfer of his interest. Contracts with wards and distributees made under such circumstances are deemed fraudulent, and disregarded in a court of equity. He is therefore entitled to a decree for three hundred dollars, with interest thereon from the seventh of October, 1843, until paid, in addition to what he has heretofore been paid by the administrator.

Wherefore the judgment in this case is reversed and cause remanded, that a judgment may be rendered in conformity with this opinion.

MARRIED WOMAN'S SILENCE MAY PREJUDICE HER RIGHTS: *Bradley v. Snyder*, 58 Am. Dec. 564, and notes.

THAT COVERTURE IS NO EXCUSE IN EQUITY FOR FRAUD, see extended note to *Cravens v. Booth*, 58 Am. Dec. 112.

EFFECT OF TRANSFER OF WIFE'S CHOSES IN ACTION, and assignment of reversionary interest: See extended note to *Caplinger v. Sullivan*, 37 Am. Dec. 575.

RIGHT OF ADMINISTRATOR OR EXECUTOR TO PURCHASE AT SALE OF DECEDENT'S ESTATE: *Dwight v. Blackmar*, 57 Am. Dec. 130, and note 136; also *Bland v. Muncaster*, Id. 162; *Scott v. Freeland*, 45 Id. 310, and note 314, where cases are collected.

THE PRINCIPAL CASE IS CITED IN *Tobin v. Dixon*, 2 Met. 423, to the point that a sale and transfer for a valuable consideration of a wife's chose in action by the husband, and which is susceptible of being immediately reduced into possession by him, will defeat the wife's right of survivorship, if she should outlive her husband.

ROBINSON v. HUFFMAN.

[15 B. MONROE, 80.]

HUSBAND'S JUDGMENT CREDITOR CAN NOT SUBJECT TO HIS DEMAND IMPROVEMENTS ON WIFE'S LAND, paid for and made by the husband, where such improvements consist mainly of the repair of a house with materials furnished in the greater part by the wife's parents, and they were necessary to put the premises in habitable condition; there being no intentional wrong in which the wife may be presumed to have participated.

PETITION by a judgment creditor. The facts are stated in the opinion.

Burton, for the appellant.

Fox and Bell, for the appellee.

By Court, MARSHALL, C. J. In this case, Robinson, a judgment creditor of Huffman, with a return of no property on his execution, seeks to subject to his demand the value of improvements paid for by him, and made upon a small lot in the town of Stanford, on which the debtor, with his wife and family, resides. The prayer of the petition is resisted by the husband and wife, who allege that the improvements consist mainly of the repair of a log house, which had for a long time stood upon a lot conveyed to the wife by her parents in 1848, for which a great part of the lumber had been furnished from the land of her father. And although it appears from the evidence that the mechanics who did the work have been paid by him, and that he purchased and paid for materials to a small amount, and that the value of the lot has been enhanced by the improvement to the amount of four or five hundred dollars, it does not appear that the improvements were more than was necessary to put the house and lot in habitable and decent condition. The payments were partly

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made in his own medical bills, and altogether, as may be inferred, by the proceeds of his practice as a physician, which may be presumed to have been very limited. There is no evidence that he has any other house for his family but that which he has repaired on the land of his wife. Nor does it appear that he could furnish any other for a less sum than he has expended for repairs. His expenditures upon this subject have not been extravagant, nor such as furnish any ground for inferring the design or intentional purpose of thereby defrauding his creditors. He seems to have done little more in putting this house and lot in tenantable condition than was necessary to perform his obligation to support his wife and family. And to charge the wife's property with the expense for the benefit of creditors would seem to be little better than to make it liable for his expenditures in furnishing food and clothing for her and her children.

Besides, the repairs can not be separated from the building so repaired without rendering the premises uninhabitable, and turning the wife and children out of doors, and in fact out of her own house and lot. Nor could the materials and labor constituting the repairs be otherwise made available to a purchaser, except by introducing him as a co-tenant. We know of no equitable principle which would authorize the chancellor to grant the relief asked for, with the certainty of such results, and especially where there has been no intentional wrong, in which the wife, whose claim is as meritorious as any other, may be presumed to have participated.

The case of *Althey v. Knotts*, 6 B. Mon. 29, does not authorize the relief prayed for in such a case. That case, and the case of *Divine v. Steele*, 10 Id. 323, show with what caution and with what regard to the rights of the owner of the realty the power of subjecting the improvements placed upon it by a debtor having a temporary right is to be exercised by the chancellor. The case of *Feller v. Wilson*, 12 Id. 90, is a strong illustration of this regard for the rights of a wife owning the real estate by deed subsequent to the act of 1846, protecting the rights of married women, even where the improvements placed thereon by the husband are sought to be subjected by the mechanics themselves to payment of the debts of the husband incurred in placing them there. This case is stronger in favor of the wife. And as the land itself can not be sold for the debt of the husband, not having been charged with it by the written act of himself and wife, and as the improvements can not be sold without great injury to the wife, and as there is no actual fraud which may be

imputed to her, there is no equitable ground for the relief sought, and the petition was properly dismissed.

Wherefore the decree is affirmed.

THE PRINCIPAL CASE IS CITED in *Dick v. Hamilton*, Deady, 335, to the point that when an insolvent husband lives with his family on the property of the wife, it seems just and reasonable that he should be allowed, notwithstanding his creditors, to keep the same habitable and in repair; within reasonable limits, this ought to be regarded as a necessary and proper means of performing his obligations to support his wife and family; and in *In re Wyatt*, 2 Nat. Bank. Reg. 95, it is cited as seriously shaking if not overruling *Athey v. Knotts*, 6 B. Mon. 29, in which it was held that where an insolvent father appropriated money in the improvement of the lot of his infant son, with a view to its enjoyment during his minority, the property might be rented, and a portion of the rents equal to the value of the improvements, compared to the value of the lot and improvements, might be appropriated by the chancellor to the creditors of the father.

COLLINS v. CHAMP'S HEIRS.

[15 B. MONROE, 118.]

MONEY OR LAND IS CONSIDERED IN EQUITY AS THAT SPECIES OF PROPERTY into which it is directed to be converted, where money is directed to be employed in the purchase of land, or land is directed to be sold and converted into money, and this in whatever manner the direction is given.

MONEY ARISING FROM SALE OF INFANT'S REAL ESTATE IS TREATED AS REALTY in equity for the purposes of distribution, where the sale is made by the infant's guardian, under an order of court, with the object of re-investing the proceeds in other real estate.

ERROR IN CHARGING INTEREST ON FUNDS OF INFANT IN GUARDIAN'S HANDS WILL NOT BE NOTICED ON APPEAL, if no exception is made in the court below to the report of the auditor appointed to examine the guardian's accounts.

BILL by the heirs at law of Henry C. Champ for the distribution of his estate. William Collins, the guardian of Champ who was an infant, had filed a petition for the sale of the real estate of his ward, for the purpose of converting it into other more profitable lands, and a sale was accordingly decreed; but before the investment was made by the commissioner, and while the money was in his hands, Champ died, leaving a widow but no children. The chancellor treated the money as realty, and decreed a division of it as such between the widow and the heirs. An auditor was appointed to examine and report the state of the guardian's accounts, and in the report the guardian was charged with interest on the funds of his ward in his hands, but no exception was taken to the report in the court below.

T. P. Smith, for the appellants.

A. M. Brown and W. W. Alexander, for the appellees.

By Court, STILES, J. This is an agreed case, and the only question presented for our consideration is, whether the money arising from the sale of the land, in the hands of the commissioner in chancery, was properly deemed real estate for purposes of distribution.

The petition for the sale of the real estate was filed by the guardian of the infant, for the express purpose of converting the land then held by him into other real estate more advantageous to his ward. The decree directing the sale obviously contemplated a reinvestment of the proceeds in other lands, otherwise it would not have directed the commissioner and guardian to report to the court "an abstract of the title to the land proposed to be purchased." But before the investment was made by the commissioner, and whilst the money was in his hands subject to the control of the court, the infant, Henry C. Champ, died, leaving a widow but no children.

It is an established doctrine in courts of equity, that things shall be considered as done which ought to have been done, and no rule is better settled than that money directed to be employed in the purchase of land, and land directed to be sold and converted into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by will, contract, marriage settlement, or otherwise: 1 Powell on Devises, 60; 1 Williams on Executors, 414; *Loughborough's Ex'r v. Loughborough's Dev.*, 14 B. Mon. 441; so lands purchased by the guardian of an infant with his personal estate will, in case of his death during his minority, be considered still as his personal property; so also where the committee of a lunatic invested part of his personal estate in lands in fee, it was held that they should be taken as personalty, and at his death not go to the heir at law: 1 Williams on Executors, 418. And we can perceive no good reason why the rule should not operate in the present case. The fund is placed by the instrumentality of the guardian, under the control of the chancellor, with the assent of the infant, as he alleges, for a certain purpose, and incipient steps taken to accomplish that end. It was considered by all parties as a fund for that purpose; and in our opinion, the chancellor did not err in treating it as realty for purposes of distribution, and applying the rules applicable to realty in making division between the widow and heirs.

In reference to the error assigned by Collins, on the score of an improper charge of interest, it is only necessary to say that it is now too late to raise that question. He should have excepted to the report in the court below, and the presumption arises from his failure thus to except that he used the money which came to his hands, and was properly chargeable with interest.

The decree of the circuit court is affirmed.

EQUITABLE CONVERSION: See *Baker v. Copenbarger*, 58 Am. Dec. 600, and note, where the prior cases in this series are collected.

MCMILLAN v. MAYSVILLE & LEXINGTON R. R. Co.

[15 B. MONROE, 218.]

SUBSCRIBERS ARE BOUND TO PAY FOR RAILROAD STOCK SUBSCRIBED BY THEM, upon the location of the road so as to make a designated town a point, and before its construction, where they agree to pay for the shares "at such times and places as may be required by the board of directors," upon condition that the road "shall be located and constructed" so as to make such town a point in the road.

CONDITIONAL DISPOSITION OF STOCK MAY BE MADE by the president and directors of the Maysville and Lexington railroad, under its charter; and where subscribers agree to take stock upon condition that the road shall be so located as to make a designated town a point, they become unconditional stockholders when the road is thus located.

SUBSCRIBERS FOR RAILROAD STOCK ARE NOT RELEASED FROM LIABILITY FOR SUBSCRIPTIONS by the fact that the company have suspended operations upon the road, that it will require a large additional expenditure of labor and money to complete its construction, and even that the means of the company are wholly inadequate to accomplish its object.

ACTION to compel the payment of ten shares of stock alleged to be due upon the following subscription signed by the defendant: "We, the undersigned, citizens of Nicholas county, state of Kentucky, hereby subscribe for the number of shares in the capital stock of the Maysville and Lexington Railroad Company set opposite our names respectively, and hereby promise and agree to pay fifty dollars on each share so subscribed, in such installments and at such times and places as may be required by the board of directors of said company, upon condition that said road shall be so located and constructed as to make the town of Carlisle a point in said road: otherwise these

subscriptions shall be null and void." The company had judgment, and the defendant appealed.

Garrett Davis and T. E. Quisenberry, for the appellant.

F. T. Hord, for the appellees.

By Court, SMITHSON, J. The obligors, among whom the appellant was one, agreed to pay to the Maysville and Lexington Railroad Company fifty dollars on each share of stock subscribed by them, upon condition that said road should be so located and constructed as to make the town of Carlisle a point, otherwise the subscriptions were to be null and void. Now, this stock was to be paid only upon the condition that the road should be so located and constructed as to make the town of Carlisle a point. But when was it to be paid? The appellant contends that it was not to be paid until the road was finished, and that such is the meaning of stipulation that the road should be so located and constructed as to make the town of Carlisle a point, otherwise the subscriptions were to be null and void. The place and not the extent of the construction of the road was evidently referred to in this stipulation. The stock was to be paid if the road was so constructed as to make the town of Carlisle a point, not when the construction of the road should be completed. But the writing itself fixes the time of payment. By it the subscribers agreed to pay the stock subscribed by them, in such installments and at such times as might be required by the board of directors of said company. In giving construction to the instrument, the whole of it must be considered. Now, it is evident, looking to all the stipulations contained in it, that the entire construction of the road was not understood or intended by the parties to be a precedent condition to the payment of the stock. The construction and payment of the stock were to be concurrent acts. No payment was to be made unless the road was so constructed as to make the town of Carlisle a point; but if it were constructed in that manner, the payment was to be made, at such time and place as the board of directors might designate.

But if, instead of restricting ourselves to the letter of the instrument to ascertain its true meaning, we take into consideration the object to be accomplished by the subscription, the nature and extent of the enterprise in which the parties were embarking, and the means by which it was to be effected, no difficulty can exist in determining the intention of the parties, or in giving

such an exposition to the writing as will be consistent with it. The stock was subscribed for the very purpose of aiding in the construction of the road. To effect this object, it must be paid as the work progresses. The postponement of its payment until the work should be finished is inconsistent with the very end to be accomplished by it. No road could ever be made on this principle, and therefore it can not be supposed that these stockholders could have intended that the payment of the stock subscribed by them should not be made until the work had been completed. They desired to make the town of Carlisle a point in the road, and the payment of their stock was made to depend upon that condition. The road has been so located as to effect that object, and it is incumbent on them, according to any fair interpretation of their agreement, to pay the stock subscribed by them to aid in its construction.

It is also contended, on the part of the appellant, that the agreement sued on is void, on the ground that the company had no authority under their charter to receive any but unconditional subscriptions of stock.

By the twenty-fourth section of the charter (session acts, 1849-50, p. 302), the president and directors were authorized to sell or dispose of the unsubscribed stock for the benefit of the company. The only limit on this power was that the stock should not be disposed of under its par value. The right to make a conditional disposition of the stock seems to be unquestionable under this provision in the charter. The substance of the agreement of the company and the signers of the instrument of writing sued upon was, that if the former would locate the road so as to make the town of Carlisle a point the latter would take the amount of stock subscribed by them.

When the road was thus located, the signers became unconditional stockholders, and as such were entitled to all the corporate rights and privileges of members of the company. The stock itself was not conditional; it was only the agreement to take it that was conditional. The subscribers were not stockholders until the company had performed the condition upon which their undertaking depended; and when that was done, they became stockholders by force of the agreement of the parties. The acquisition of stock in this manner was, in our opinion, sanctioned by the foregoing section of the charter, and does not seem to be prohibited by sound policy, or by any of the other provisions in the statute. Besides, it has been usual under similar charters to make contracts of this kind, which

fact, although insufficient of itself to give validity to such subscriptions of stock, may very properly be referred to for the purpose of showing the contemporaneous construction which has been given to charters containing similar provisions.

The other matters of defense set up and relied upon in the answer are obviously untenable. The fact that the company have suspended operations upon the road, and that it will require a large additional expenditure of labor and money to complete its construction, and even the additional fact that the means of the company are wholly inadequate to the accomplishment of this object, do not furnish any sufficient reason why the defendant should not pay his stock. It may be, and probably is, necessary to aid in the payment of debts already incurred in the work previously done upon the road, or it may be required for the purpose of assisting in its further prosecution. The defendant could only be absolved from liability for the payment of his stock by alleging and proving a final abandonment of the work by the company, and also that its payment was not necessary for the purpose of satisfying any existing demand against the corporation.

Wherefore the judgment is affirmed.

THE PRINCIPAL CASE IS CITED in *Missouri etc. Ry v. Thompson*, 24 Kan. 178, in considering the meaning and effect of a proviso in a subscription to railroad stock, that the company "should have its road constructed and in operation."

ALLEN v. VANCLEAVE.

[16 B. MONROE, 236.]

DECLARATIONS OF SLAVE, MADE TO ATTENDING PHYSICIAN, AS TO ILLNESS under which she is suffering at the time, the manner of the attack, and the progress of the disease, are admissible in evidence on the question of soundness or unsoundness, in an action for breach of warranty of soundness of the slave.

ACTION to recover damages for the breach of a warranty of soundness of a slave. The facts are stated in the opinion.

James Harlan, for the plaintiff.

M. Mayes, for the defendants.

By Court, MARSHALL, C. J. This action was brought by Allen to recover damages for the alleged breach of a written

warranty of the soundness of a female slave, purchased by him from the defendants. The bill of sale bears date on the tenth of December, 1852, and the slave died on the fifth of February following, after she had been for about two weeks under the constant attendance of a physician, who, from symptoms stated, and examinations made by him, was of the opinion that she had pneumonia and a chronic inflammation of the womb, which was incurable, and which, in his opinion, must have been of several months' continuance before her death. Other physicians, who heard the statement of the first, were of opinion, from the symptoms detailed by him, that the inflammation of the womb was acute, and not chronic. Upon this evidence, and that of many witnesses, male and female, proving the apparently vigorous health of the woman up to and after the sale to the plaintiff, and his own expressions of satisfaction with his purchase, the jury found a verdict for the defendants. And the plaintiff's motion for a new trial having been overruled, he has prosecuted a writ of error to this court for the reversal of the judgment against him, presenting, as the only question of law arising on the record, the propriety of an opinion of the court limiting the answer which the attending physician, above referred to, should be allowed to give to two questions propounded to him by the plaintiff.

The two questions asked: 1. What the woman said to the physician respecting her disease, when he visited and attended her as a physician; and 2. Whether he did not come to the conclusion that she had chronic inflammation of the womb, and also as to the length of time the disease had existed, from his own examination, from the symptoms he found prevailing, and from what she said in relation to her disease in answer to questions put by him while attending on her as a physician.

The defendants having objected to the answering of these questions, the court allowed the witness to state all the woman said as to her existing illness, and the manner of her attack, and the progress of her disease; but refused to let him state what she said in relation to any former illness, or the manner of the attack, or the progress of the disease, or the history of her former disease. To which opinion of the court the plaintiff excepted, and made it afterwards a ground of his motion for a new trial, and now urges it as a ground of reversal.

There might be some doubt whether by their own terms the questions are not confined to what the patient said respecting the illness for which the physician was then attend-

ing on her. But they admit of a broader construction, and from the fact of an exception being taken to the restriction imposed by the court, and from that restriction having been made a ground for the motion for a new trial, it seems probable that the questions were intended to elicit answers as to the statements of the woman relating to a previous disease or illness. If they were not so intended and understood, they would have been satisfied by answers which the opinion of the court allowed the witness to make, and a new question would have been framed to elicit any statements as to a former illness or disease. In this view, the limitation expressed by the court had no other effect than that of restricting the answer to the terms of the questions actually put to the witness. And as no interrogatory was offered, no questions would properly arise as to its admissibility, or the extent to which it might be answered. But whatever may have been the extent of the question, we are of opinion that the court was sufficiently liberal in stating the extent to which it might be answered, and that the restriction imposed upon any further answer, whether to be regarded as practically affecting the right of the party in adducing evidence, or as a theoretical opinion only, can not be regarded as tending to the exclusion, in this or any other case, of proper and legitimate testimony.

The only case in this court heretofore reported, in which the question was directly made as to the admissibility of the statements of a slave respecting his diseased condition, is that of *Tumey v. Knox*, 7 T. B. Mon. 88. In that case the court was so divided as that the majority concurred only in the opinion that improper evidence had been admitted of the statements of the slave in question. But while Chief Justice Bibb was of opinion that such statements, in the absence of the party against whom they were offered, were wholly inadmissible, the other two judges did not agree with respect to the circumstances under which, and the extent to which, they were admissible. Judge Owsley was of opinion that the declarations of a slave to different persons and at different times, relating to his condition when the declarations were made, might be admitted as parts of the *res gestæ*, and as evidence bearing upon the question of a continued disease. Judge Mills was of opinion that the declarations of a slave may sometimes constitute a part of the *res gestæ*, and be proper evidence, and as the opinion of a physician whether the disease is temporary or chronic is often founded upon his examination of the patient, combined with

other circumstances, it might be competent for him to detail the reasons for his opinion, combined with his examination.

In the case of *Marr v. Hill*, 10 Mo. 323, to which we have been referred, the court said that in addition to the appearances and actions of a slave, his exclamations or declarations as to the pains or afflictions suffered, whether made to a professional or unprofessional person, were a part of the *res gestæ*, and they were admitted on that ground. But the court further said that the mere declarations of a slave that he or she was diseased, without proof of any symptoms or appearance of disease, would be mere hearsay, which ought not to affect the rights of any person, and would be clearly inadmissible. This case certainly does not sanction the evidence of such declarations, except so far as they relate to a present disease, but has clearly an opposite tendency, since no mere statement of a past transaction or fact can be regarded as a part of that transaction or fact—that is, of the *res gestæ* to which the declaration relates—but would be mere hearsay, inadmissible if the declarations were made by a competent witness, and much more when they are made by a slave, who could not, if present, prove the fact.

The other cases referred to in the Tennessee and North Carolina reports, as cited in 10, 11, and 12 U. S. Digest, go no further than the case from Missouri just noticed, and some of them seem not to involve the question as to declarations made to unprofessional persons. The quotations from 1 Phill. Ev. 232, Cowen & Hill's notes, 446, also relate to declarations as to the condition of the person at the time. So in 1 Greenl. Ev., sec. 102, it is said that "whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence;" and that if natural, they are satisfactory, subject to the judgment and decision of the jury as to their being real or feigned. And further on in the same section, he says: "So also the representation of a sick person, of the nature, symptoms, and effects of the malady under which he is laboring at the time, are received as original evidence. If made to a medical attendant, they are of greater weight as evidence, but if made to any other person, they are not on that account rejected."

This doctrine is laid down by Greenleaf without particular reference to slaves. But it is the established doctrine with respect to the admissibility of the declarations of competent witnesses in relation to their mental or bodily con-

dition or feelings. And as their declarations are admitted as original evidence only when they relate to their feelings at the time, or to the nature, symptoms, and effect of the malady under which they are laboring at the time, and are regarded as mere hearsay, so far as they go beyond this limit, there can be no good reason for admitting evidence of the declarations of a slave to any greater extent. The question whether any declarations of a slave, with respect to his health, even at the time, are admissible unless made to the attending physician, is not now presented for consideration, and we express no opinion upon it. In two manuscript opinions at the present term, such declarations to the attending physician, in relation to the immediate malady under which the slave was laboring at the time, were held to be admissible on the question of soundness or unsoundness at a previous time. But they do not extend to the admission of declarations as to a previous malady or illness.

Wherefore, there being no error prejudicial to the plaintiff in the opinion of the court, on the subject which has been noticed, and the evidence being sufficient to sustain the verdict which has been sanctioned by the circuit court, the judgment is affirmed.

DECLARATIONS OF SLAVE AS TO SUFFERINGS AND CONDITION ARE EVIDENCE of the state of the slave at the time when made, in an action for a breach of warranty of soundness: *Lusk v. McDaniel*, 57 Am. Dec. 566. The principal case, among others, was cited to this point in *Livingston's Case*, 14 Gratt. 598, in considering the admissibility of the declarations of the deceased, in a prosecution for murder.

SWEENEY v. SMITH.

[15 B. MONROE, 325.]

PERSONAL JUDGMENT CAN NOT BE RENDERED AGAINST MARRIED WOMAN on a note executed by herself and husband. She can not bind herself personally, although she may render her separate estate liable for her engagements.

LANDS ARE SUBJECT TO WIFE'S POWER OF APPOINTMENT AND DISPOSITION, AS SEPARATE ESTATE, to which even the husband's limited power given him by the Kentucky statutes over his wife's lands does not attach, where they are conveyed directly to the wife, but expressly for her separate use and benefit, and not to be liable in any way for the debts of the husband.

ACTION on a note signed by Sweeney and wife, against both husband and wife. Mrs. Sweeney alone answered the petition,

and set up coverture as a defense. The plaintiff replied that the note was given for carpenter's work done on a house which had been conveyed to Mrs. Sweeney; and on the trial he exhibited a deed of conveyance from one Ford to Mrs. Sweeney. A verdict was rendered for the plaintiff, upon which judgment was given. Sweeney and wife appealed.

W. L. Underwood, for the appellants.

By Court, MARSHALL, C. J. If the judgment in this case had been against the land instead of the person of Mrs. Sweeney, it would not have been reversible, although rendered in an action by ordinary proceedings against herself and husband, and although there was no transfer of the case, as against her, to the equitable docket. But the deed referred to in the pleading of the plaintiff, and exhibited in evidence, conveys to her a separate estate in the land therein mentioned. And although she may render that estate liable for her engagements, she can not bind herself personally. She therefore was not subject to a personal judgment on the note executed by her husband and herself. In this case the deed conveys the land directly to the wife, yet as it is expressly for her separate use and benefit, and not to be liable in any way for the debts of her husband, there seems to be still some ground for distinguishing it from an ordinary conveyance to her in fee, and for regarding it as subject to her power of appointment and disposition as a separate estate, to which even a limited power, which under our recent statutes the husband has over the wife's land, does not attach. But even if this distinction be not made, the statutes referred to, while they subject the wife's land to debts contracted for necessities, and evidenced by writing signed by both husband and wife, do not make the wife personally liable, nor capacitate her to bind herself. They only capacitate her to bind her estate, and there seems to be no reason for enlarging the liability which she may thus create, or for changing the mode of enforcing it. In any view, therefore, the judgment, so far as she is concerned, should only have been against her land for improvements on which the debt seems to have been contracted.

Wherefore the judgment against her is reversed, and the cause is remanded for a judgment subjecting her estate to the satisfaction of the debt sued for, and the costs.

PERSONAL JUDGMENTS AGAINST MARRIED WOMEN: See the note to *Caldwell v. Walters*, 55 Am. Dec. 592, in which this subject is considered at length.

SEPARATE ESTATE OF MARRIED WOMAN, WHEN SUBJECT TO HER CONTROL: See *Bradford v. Greenway*, 52 Am. Dec. 203; *Harrie v. Harrie*, 53 Id. 393, and notes to these cases, where prior ones in this series are collected.

WALKER v. McKNIGHT.

[15 B. MONROE, 467.]

EXECUTION PLAINTIFF WHO ACQUIRES LEGAL TITLE TO LAND AT SHERIFF'S SALE CAN NOT BE COMPELLED TO SURRENDER AND CONVEY IT to one who has the equitable right to the land under a bond for title, where such plaintiff had no notice of the existence of the right before he obtained the title.

COMPLAINANT IN CHANCERY SUIT IS NOT COMPETENT WITNESS in favor of other complainants to whom he has assigned his interest, he being liable for costs in the event that the suit does not succeed, and therefore interested in the result.

SHERIFFS' SALES HAVE BEEN HELD TO BE VOID ONLY IN CASES where either there was no judgment to sustain the execution, or where the officer exceeded his power by selling more land than was required for the payment of the amount due on the execution.

SHERIFF'S SALE WILL BE VALID, ALTHOUGH PART OF DEBT MAY HAVE BEEN PAID, if there be a judgment, and the execution conforms to it substantially, and if the payment does not constitute a part of the judgment, or has not been indorsed upon the execution.

SHERIFF'S SALE IS VALID, where the execution not having been returned, the only evidence of its amount, and of the sum for which the land was sold, is furnished by the sheriff's deed, which does not show that any credit was indorsed upon the execution therein recited, nor that the sheriff sold the land for a sum exceeding the amount he was authorized to make.

STATEMENT IN RETURN THAT MONEY MADE ON EXECUTION WAS PAID TO PLAINTIFF IS NOT COMPETENT EVIDENCE to prove the fact or time of payment, it not being in response to the command of the writ.

EXECUTION PLAINTIFF, PURCHASING LAND AT SHERIFF'S SALE, SHOULD BE REGARDED IN EQUITY AS HOLDING TITLE IN TRUST for the benefit of persons having an equitable right to the land, to so much of it as was not paid for by the balance due on the execution, where the sale was made for a sum exceeding the amount actually due on the judgment.

BILL in chancery, filed in 1837, by Robert Thurston and wife and Mary S. Searcy, against Virgil McKnight and Ann C. Logan, to compel a conveyance of the legal title to a one-seventh part of a certain tract of land. The bill alleged that in 1821 John Logan had executed to Edmund Searcy his title bond to the land in question, which had descended to him from his father, Benjamin Logan, and was at the time undivided; that Searcy afterwards died without having received a conveyance,

leaving Maria Searcy, who had intermarried with Thurston, and Mary S. Searcy, as his only heirs at law; that John Logan had also died, having appointed his wife, Ann C. Logan, as his executrix; that McKnight had obtained a judgment against the executrix and heirs of John Logan, and had himself become the purchaser at the sale under execution of Logan's interest in the land; and at the time of the sale McKnight had notice of the complainants' claim. McKnight in his answer alleged that he was the legal owner of John Logan's interest in the land, by virtue of his purchase at the execution sale, and his deed from the sheriff; that at the time of his purchase he had no notice of the complainants' claim; and that a decree of partition had been made between the heirs of Benjamin Logan, in the suit of Newton and wife against Benjamin Logan's heirs, and that the portion to which John Logan was entitled had been conveyed to him. An amended bill was afterwards filed by Thurston alone, suggesting the marriage of Mary S. Searcy to Joseph W. Walker, a division of the estate of Edmund Searcy, and an assignment of the claim to the land in question to Walker and wife. This amended bill was answered by Walker and wife in a cross-bill against McKnight and Mrs. Logan. A decree was rendered by the circuit court directing McKnight to release to Walker and wife all his interest in the land in controversy, but on appeal the decree was reversed and the cause remanded, because the heirs of John Logan had not been made parties. On final hearing, after the cross-bill had been amended, it was dismissed, and Walker and wife appealed. Certain facts developed on the hearing appear in the opinion

Morehead and Brown, for the appellants.

James Harlan and J. B. Husbands, for the appellees.

By Court, SMITHSON, J. There does not seem to be any valid objection to the equitable right asserted by the complainants to the land in contest. The execution of the bond by John Logan, and of the subsequent agreement of 1825, in which the right of Searcy to one undivided seventh of the land is expressly recognized, is fully established. The bond executed by Logan not only imports a consideration, but the bond on its face states the amount of the consideration and admits its payment. There is no testimony tending to show that the contract was subsequently rescinded by the parties; and the fact that the bond was not surrendered up creates an opposite presumption. The delay in prosecuting the claim is accounted for by the death of Searcy

in 1827. Besides, his heirs may not have been fully apprised of their rights, or may have supposed that, as Logan had not made a deed in his life-time, the land was still subject to sale for the payment of his debts. Although, therefore, the claim was permitted to lie dormant for some ten or twelve years, yet it had not, in our opinion, been rendered unavailable by the mere lapse of time, if in other respects it can be sustained against the defendant McKnight.

If McKnight has acquired the legal title to the land, we do not think that the complainants can compel him to surrender, and convey it to them on the ground that he had notice, before he obtained the title, of the existence of their equitable right to it. He denies positively that he had any knowledge or information on the subject, or had ever heard of their claim. Thurston is the only witness that proves notice, and he is evidently interested in the result, and therefore incompetent. He is one of the original complainants, and therefore liable for the costs of the suit in the event that the complainants do not succeed in the suit. Besides, the release executed by Walker and wife is not executed in such a manner as to be obligatory upon the wife; and if Walker should die, Thurston would still remain liable to her for contribution, in the event that she failed to recover the land in contest.

Whether McKnight has acquired the legal title depends upon the validity of the sheriff's sale; for as we have not been furnished with a copy of the proceedings in the suit of Newton and wife against Logan's heirs, after the decree was reversed and the cause remanded to the circuit court, we can not decide that he obtained any title to it by the decree and proceedings in that case.

The sale made by the sheriff was valid, unless he exceeded his authority in making it. He acts under the execution in his hands, and from it he derives his authority. If he sells more land than is necessary to satisfy the execution, he exceeds his power, and the sale is void. If there be no judgment, or if the execution vary substantially from the judgment, the sale will also be void. But if there be a judgment, and the execution conforms to it substantially, the sale will be valid, although a part of the debt may have been paid, provided the payment does not constitute a part of the judgment, or has not been indorsed upon the execution.

An examination of all the cases on this subject will show that sales made by sheriffs have only been held to be void either

where there was no judgment to sustain the execution, or where the officer exceeded his power, by selling more land than was required for the payment of the amount due on the execution. All sales of lands made by sheriffs would be rendered uncertain if the principle were established that the sale would be void if any part of the debt had been paid, although such payment did not appear upon the execution. No person would be willing to purchase at such a sale, and the operation of the rule would be detrimental instead of advantageous to the defendant in the execution.

The sale under which McKnight claims the land is therefore valid, unless the execution under which it was made had the credit indorsed on it, of the amount made upon a previous execution. The execution under which the sale was made has not been returned, and the transcript of the record of the case in which it issued does not show whether or not the credit was indorsed upon it. Nor does that transcript show when the previous execution was returned, nor is there any other evidence upon the subject, so that we can not say with any certainty that it was returned before the execution upon which the rule was made was issued by the clerk. The only evidence of the amount of the execution, as well as of the sum for which the land was sold, is furnished by the sheriff's deed to McKnight. The execution as therein recited does not show that any credit was indorsed upon it, nor is there any testimony that the sheriff sold the land for a sum exceeding the amount he was authorized to make upon the execution. If the presumption that the clerk did his duty when he issued the execution should prevail, it would not avail anything in this case, because a similar presumption arises in favor of the acts of the sheriff. And besides, as already mentioned, it is by no means certain that when the second execution issued, the first one had been returned, although we think it is very probable that it had been.

It does not appear whether the purchase by McKnight was made in person or by agent, nor do we deem it very material, because there is no testimony that proves he had any knowledge at the time of the sale that part of the judgment had been made upon the previous execution. The statement made by the officer in his return on the execution, that he had paid the money to the plaintiff, not being in response to the command of the writ, is not competent evidence to prove that fact. Besides, the statement itself does not show when the payment was made, and if competent evidence of the fact of payment, would not prove

that it had been made before the sale, unless it appeared that the return itself had been previously made.

The purchase, therefore, made by McKnight can not be deemed void, and the sheriff's deed must be regarded as investing him with the legal title. But the question still occurs, As the sale was made for a sum exceeding the amount actually due to him on the judgment, shall he be permitted to hold the title thus acquired? or will a court of equity set aside and vacate the sale? There can be no doubt that it might have been quashed by the court that had the control of the execution, and the right to regulate the proceedings thereon, if a motion for that purpose had been made in reasonable time. But a court of equity will only interpose and vacate such a sale upon the ground of fraud, or some other equitable ground. In this case, we think that the purchaser should be regarded in equity as holding the title in trust for the benefit of the complainants, to so much of the land embraced by the purchase as was not paid for by the balance due on the execution. The price for which the land sold was one hundred and thirty dollars. The amount due upon the execution was ninety-six dollars. For thirty-four one hundred and thirtieths of the land purchased the purchaser did not pay anything. The title to this part of it he should be regarded as holding in trust for the benefit of the complainants. There does not seem to have been any fraud in the transaction, nor is there any other equitable ground upon which the purchaser ought to be deprived of the whole benefit of his purchase.

The land will have to be divided, and thirty-four one hundred and thirtieths of it laid off and conveyed to the complainants. In making the division, the part allotted to the complainants should not include any improvements made by McKnight, if the division can be thus made without doing injustice to them. If a just division can not be made without assigning to the complainants part of the land improved by McKnight, then an account will have to be taken of the improvements on the part so allotted to them, according to equitable principles.

Wherefore the decree dismissing the complainants' bill is deemed erroneous, and is reversed, and cause remanded for further proceedings, and decree in conformity with this opinion.

PURCHASER AT EXECUTION SALE WHETHER AFFECTED BY PRIOR EQUITY, of which he had no notice: See *Polk v. Gallant*, 34 Am. Dec. 410, and note; *Halley v. Oldham*, 41 Id. 282; *Oviatt v. Brown*, 45 Id. 539; and see *Smith v. Painter*, 9 Id. 344.

POLICY OF LAW IS TO PROTECT JUDICIAL SALES: *Coriell v. Ham*, ante,

p. 134; and see the cases in the note thereto, as to when a purchaser at an execution sale will be affected by irregularities.

EXECUTION SALE ON SATISFIED JUDGMENT WHETHER VALID: See *Boren v. McGehee*, 31 Am. Dec. 695; *Doe v. Snyder*, 32 Id. 311; *Hoffman v. Strohecker*, Id. 740; *Russell v. Huguenin*, 33 Id. 423; *Wood v. Colvin*, 38 Id. 598, and note; *Reed v. Austin's Heirs*, 45 Id. 336.

WITNESS WHEN INCOMPETENT BECAUSE INTERESTED: See *Edgerly v. Emerson*, 55 Am. Dec. 207; *Bank of Utica v. Mercereau*, 49 Id. 189, and note, where the prior cases are collected.

CAMPBELL v. HILLMAN.

[15 B. MONROE, 508.]

AGENT IS RESPONSIBLE INDIVIDUALLY TO PURCHASER FOR FRAUD committed by him in the sale of property, although he does not profess to sell the property as his own, but acts throughout in his capacity as agent.

AGENT IS NOT ABSOLVED FROM LIABILITY FOR MISREPRESENTATION as to his principal's title to slaves, by the mere fact that he informed the purchaser that his principal derived title under a will, which the purchaser had sufficient time and opportunity to examine, where the purchase was made upon the faith of the agent's representation that his principal had a good title, and the representation was calculated to induce belief and prevent further inquiry.

TO CONSTITUTE FRAUD, IT IS NOT ONLY NECESSARY THAT REPRESENTATION SHOULD BE UNTRUE, but also that the party making it should know it to be so at the time it was made.

DAMAGES ARE ENTITLED TO BE RECOVERED IN ACTION FOR FRAUD, adequate to the injury sustained, as a general rule, if the plaintiff succeed.

MEASURE OF DAMAGES FOR FRAUDULENT REPRESENTATION that the vendor's title to slaves was absolute, when it was but a life estate, is the difference in the value of the two estates at the time of the sale; but subsequent events and circumstances, calculated to aid in forming a correct estimate of this difference, and to show the actual extent of the injury sustained, may be given in evidence for that purpose.

ACTION against John P. Campbell for a fraudulent representation made by him as to the title to certain slaves. Campbell, as agent for Richard U. Buckner, had sold the slaves to the plaintiff, and executed a bill of sale in the name of his principal, purporting to convey an absolute title to the slaves, when in fact the principal had but a life estate in them, under a will. Further facts and the questions arising in the case appear in the opinion.

William W. Wallace and Robert McKee, for the appellant.

L. W. Powell, J. Harlan, J. W. Crockett, and Morehead and Brown, for the appellee.

By Court, SIMPSON, J. Two questions arise in this case: 1. Is the appellant responsible for representations made by him at the time of the sale, which he knew to be untrue, in relation to the title of the slaves which he, as the agent and attorney in fact of Richard U. Buckner, sold to the appellee? 2. If the purchaser has a right of recovery on account of the alleged fraud, what is the proper criterion of damages?

An agent is responsible individually to the purchaser for a fraud committed by him in the sale of property, although he does not profess to sell the property as his own, but acts throughout in his capacity as agent: Sugden on Vendors, 6.

If the agent represented to the purchaser that his principal had a good title to the slaves, and the purchase was made upon the faith of that representation, the mere fact that the agent informed the purchaser that his principal derived title to the slaves under his father's will, and that the latter, after receiving this information, had sufficient time and opportunity to have examined the will himself before he made the purchase, will not absolve the former from liability for the misrepresentation. When the inquiry about the title to the slaves was made by the purchaser, if he had been expressly referred to the will for information by the agent, or if the latter had expressed any doubt upon the subject, then, although he did state that the title was good and valid, yet it would have been incumbent on the purchaser, if the statement were made in such a manner as to suggest a doubt about the title, to have investigated the subject himself; and if he had failed to do so, the mistake he labored under in relation to the title would have been the result of his own negligence, and he would have had no redress against the agent for any injury he sustained in consequence of it. But if the representations were such as were calculated to induce the purchaser to believe that the title was valid, and really to prevent him from instituting any further inquiry in relation to it, and he made the purchase relying upon the information on the subject that he received from the agent, then the latter would be responsible for the fraud, if one was committed by him, although he did state that his principal derived title to the slaves under the will of his father.

The information given by the agent to the purchaser, that he was himself one of the trustees named in the will, and consequently that there would be no difficulty in making him a good title to the slaves, although it suggested the existence of a trust, yet it at the same conveyed the impression that the will

authorized the sale to be made; and as the agent represented himself as one of the trustees, and stated that a good title would be made to the purchaser, this representation, inasmuch as it showed that he was well acquainted with the contents of the will, and the nature of the title to the slaves which his principal derived under it, instead of diminishing was calculated to increase the confidence of the purchaser, in the information imparted to him on this subject by the agent.

The argument, therefore, that this information, being sufficient to put the purchaser upon an inquiry, was constructive notice to him of the contents of the will, and all the trusts and limitations created by it, and that consequently he must be regarded as being aware of the falsity of the representation at the time he made the purchase, is entirely fallacious, and the doctrine contended for is inapplicable to the facts of this case. The information, in the manner in which it was communicated, was calculated to suppress instead of to excite inquiry on the subject. The purchaser did not place more confidence in the representation than a man of ordinary prudence and circumspection would have done under the same circumstances. It was calculated to mislead and deceive him, and although, by resorting to an examination of the will, he could have had the full means of detecting the fraud and ascertaining the truth, yet when he was prevented from doing this, by the character of the representation itself, it can not be said with any degree of propriety that the deception under which he labored was the result of his own negligence.

1. To constitute fraud, however, it is not only necessary that the representation should be untrue, but also that the party making it should know it to be so at the time it was made. If, then, the agent, when he sold the slaves, actually believed that his principal had an absolute title to them, and that the sale would pass a good title to the purchaser, his representation to that effect, although untrue, yet having been made in good faith, would not amount to a fraud, or subject him to any responsibility to the purchaser. The legal effect of the devise of the slaves depended upon the construction of the will; and if the agent honestly believed the representation he made in regard to the title to be true, he could not have made it for the purpose of deceiving or defrauding the purchaser. But this was a matter of fact for the jury to determine, and as the will only vests in the devisee a life estate to the slaves, it devolved upon the agent to prove that he gave a different construction to it, and in fact

believed that it conferred upon the devisee an absolute title to them, and not a life estate merely.

2. In an action for a fraud, if the plaintiff succeed, he is entitled, as a general rule, to recover damages adequate to the injury he has sustained. The criterion by which the extent of the injury, in a case like the present, should be ascertained and determined is perfectly obvious. The difference between the value of the estate which he purchased and the one that he actually acquired in the slaves would ordinarily constitute the only standard by which the injury he sustained could be estimated; and if nothing had occurred subsequent to the purchase which tended to demonstrate that justice would not be fully attained by estimating that difference by reference to the actual condition of things at the time of the sale, then this mode of estimating it should be resorted to.

But it is evident that cases might arise in which this mode of ascertaining the difference in the value of the two estates, and thereby determining the extent of the injury sustained, might work manifest injustice. To illustrate this proposition, let us suppose the case of a sale of a male slave, where the owner of the life estate and the slave sold are about of the same age, and the life estate, according to all human probability, will continue during the life-time of the slave, yet nevertheless the tenant for life should die shortly after the sale was made. The purchaser would sustain by the fraud an injury almost equal to the full value of the slave; and yet, if the difference in the value of the two estates, to be determined by reference to the condition of things at the time of the sale, constitutes the criterion by which the extent of the injury must be regulated and governed, the damages recovered would furnish very inadequate redress for the injury actually sustained. It may be said, however, that to permit in such a case a recovery by the purchaser, to the full extent of the injury he has sustained, would be doing injustice to the owner of the life estate, who could have sold his interest in the slave for its value at the time of the sale. But there is a wide difference between the purchase of a life interest and the purchase of an absolute estate in a slave. The purchaser of the former, by the very nature of his purchase, agrees to risk both the life of the vendor and the life of the slave; the purchaser of the latter agrees to risk the life of the slave only. He might not have been willing to have incurred the double risk, and might have refused to purchase a bare life estate. The law will not compel him to accept and pay for an estate which he did

not contract for or purchase, but gives him indemnity for the injury he has actually sustained in consequence of having acquired a less estate than that which was purchased by him

According to the nature of the thing contracted for, the purchaser, however, agrees to incur the risk of the life of the slave, and if the slave should die before the termination of the life estate, the injury he would actually sustain by the fraud would be merely nominal, because the loss would not be occasioned by his failure to acquire an absolute title to the slave, but would be the result of a risk growing out of the nature of the property, and which every purchaser of such property necessarily assumes.

It is thus fully demonstrated that the difference in the value of the two estates, without any reference to subsequent events, would in some cases fail to furnish the purchaser with anything like adequate redress for the injury which he had sustained by the wrong; whilst in other cases it would greatly exceed the extent of such injury. Where, then, any subsequent events have occurred, previous to the time of the trial, which will aid in forming a correct estimate of the difference in the value of the two estates at the time of the sale, and thereby tend to manifest the actual extent of the injury the purchaser has sustained, they may be relied upon for that purpose. If, however, the condition of things remains as it was when the sale was made, then from necessity the difference in the value of the two estates at the time of the sale, estimated according to all the usual probabilities, is the only criterion that can be adopted in order to determine the extent of the injury the purchaser has sustained. But as such estimates, depending as they must upon mere conjecture with respect to future events, are from their very nature uncertain, they should not be relied upon when the events upon which they essentially depend, instead of being matters of conjecture merely, have actually occurred and become known and certain. So far as anything has happened, or any change in the condition of things has occurred, since the sale, which has a bearing upon the relative value of the two estates at that time, and which, if known, would have aided in forming a correct estimate of such value, if made at the time of the sale, should be considered by the jury in determining the amount of damages to which the purchaser is entitled.

The just operation of this principle is exemplified by its application to the facts and circumstances of the present case. The owner of the life estate whose life was considered so precarious

at the time of the sale, on account of his bad health, that its probable duration was estimated at about two years or a little upwards, was still living when the suit was tried, although more than seven years had then elapsed from the time the purchase was made; and his health had so improved as to justify the belief that he might still live for several years longer. Besides, one of the slaves had died in the mean time, and to that extent no substantial injury had occurred or could arise to the purchaser, in consequence of the difference in the value of the two estates, because the estate which he acquired by his purchase did not terminate during the life-time of the slave.

If, therefore, the measure of compensation for the wrong was made to depend upon the apparent difference in the value of the two estates, to be estimated according to the existing condition of things at the time of the sale, without any reference to subsequent events, it is perfectly evident that the damages to which the purchaser would be entitled under the operation of such a rule would greatly exceed in the present case the actual injury he has sustained. His right of recovery must be restricted to legal compensation for the loss actually resulting, and not for that which might have resulted, from the wrong inflicted on him. So far as the means for the ascertainment of this loss have been furnished by events occurring subsequent to the sale, they should be relied on for the purpose, and probability and conjecture should only be resorted to when all other more certain means fail or are exhausted.

The difference in the value of the two estates at the time of the sale constitutes, therefore, the measure of damages in this case. But subsequent events and circumstances, which from their very nature are calculated to aid in estimating this difference, and which render certain some important element in the estimate upon which it is predicated, and without which it would be uncertain and merely conjectual, may be resorted to and proved for that purpose. The circuit court refused to permit the defendant to avail himself of any of the events referred to which occurred after the sale, and excluded all the testimony which was offered by him for that purpose.

The inquiry before the jury was confined to the difference in the value of the two estates, when estimated according to the actual state of things at the time of the sale, and thus, in effect, making that difference the measure of damages. The decisions given by the circuit court in the progress of the trial, with respect to the testimony relating to the measure of damages, were

inconsistent with the principles of this opinion, and are deemed erroneous.

Wherefore the judgment is reversed and cause remanded for a new trial, and for further proceedings consistent with this opinion.

AGENCY IS NO EXCUSE FOR FRAUD: *Reed v. Peterson*, 91 Ill. 297, citing the principal case. And as to an agent's liability for torts in general, see *Lee v. Mathews*, 44 Am. Dec. 498; *Johnson v. Barber*, 50 Id. 416.

SCIENTER IS ESSENTIAL ELEMENT OF FRAUD AT LAW: *Fooks v. Waples*, 25 Am. Dec. 64; *Miller v. Howell*, 32 Id. 36; *Tryon v. Whitmarsh*, 35 Id. 339.

MEASURE OF DAMAGES IN FRAUD IN SALES OF REAL OR PERSONAL PROPERTY: See *Monell v. Colden*, 7 Am. Dec. 390; *Van Epps v. Harrison*, 40 Id. 214; *Stiles v. White*, 45 Id. 214, and note.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

PIPES v. HARDESTY.

[9 LOUISIANA ANNUAL, 182.]

PRESUMPTION IS AGAINST VALIDITY OF DEED WHICH PRESENTS MATERIAL INTERLINEATION ON ITS FACE; but this is not a presumption *juris et de jure*: it yields to contrary proof, and even to concurrent circumstances, which create a strong presumption that the interlineation was made before the execution and delivery of the deed.

APPEAL from the district court of the parish of East Feliciana. The facts are stated in the opinion.

Muse and Merrick, for the plaintiff.

Winter and Marr, for the defendants.

By Court, BUCHANAN, J. This case comes up upon a bill of exceptions to the admission of a deed in evidence without a material interlineation on the face of the deed being accounted for. In the bill of exceptions it is stated: "The court, however, being of a different opinion, permitted the document to go in evidence."

From this, together with the certificate of the clerk of the deed being offered in connection with certain depositions, we may infer that the court considered that the testimony offered with the deed accounted for the interlineation; and we can not say that the court erred. The deed in question bears date the twenty-first of March, 1831. Appended to it is the certificate of a justice of the peace of Adams county, Mississippi (where the deed was made), that it was acknowledged before him on the twenty-first of March, 1831, being the day of its date. Also

the certificate of the keeper of the records (county clerk) of Adams county that the deed, as it now appears, was deposited with him for record on the same day, twenty-first of March, 1831. The justice of the peace before whom the deed was acknowledged, James Carson, has also been examined as a witness in this cause, and having examined the original document, declares that the same was executed in his presence on the twenty-first of March, 1831. This witness was cross-examined by the defendant, but his attention was not called by the cross-interrogatories to the interlineation of the words "and separate" in the deed; which is probably the reason that he says nothing about that interlineation, although the original deed was before him, while giving his evidence. We understand this witness to testify to the execution of the deed as it now appears—with the interlineation. This conclusion is certainly rather a matter of inference; but an inference which is strongly favored by the internal evidence of the document itself, which comes up with the record. The interlineation is manifestly in the same handwriting as the rest of the deed, and written with the same ink.

In the case of *Morris' Lessee v. Vandurn*, 1 Dall. 67, it was held that the presumption is that an interlineation in a deed was made after its execution, unless otherwise proved. And in *Prevost v. Gratz*, 1 Pet. C. C. 369, Judge Washington said: "I find upon the face of the account a material erasure and interlineation, unexplained by any evidence whatever tending to show at what time they were made. These of themselves would be sufficient, upon the plea of *non est factum* to a deed, to avoid it. The presumption in such case is that the alteration was made after the execution of the deed." See also *Prevost v. Gratz*, 6 Wheat. 502; *Heffelfinger v. Schultz*, 16 Serg. & R. 46. The rule of the civil law seems to be that writings erased or interlined are presumed to be false: See Febrero, pt. 2, b. 3, c. 1, No. 341. And this rule is declared by Judge Matthews, in *McMicken v. Beauchamp*, 2 La. 292, in quoting the authority referred to by Febrero, to be in conformity with the law merchant, and with the jurisprudence of the other states. The rule is stated by the learned judge to be subject to exceptions and limitations; and in *Fletcher v. Cavelier*, 4 Id. 268, it is said by Judge Martin that when the alteration or interlineation is in an important part of the instrument, evidence to support it should be given.

From these authorities it results that the presumption is against the validity of a deed which presents on its face a material interlineation; but that this is not a presumption *juris et*

de jure. It yields to contrary proof, and even to concurrent circumstances which create a strong presumption that the interlineation was made before the execution and delivery of the deed. Now, it can not be denied that the interlineation in the case at bar was a material one; but the deed was not presented without accompanying proof tending to do away with the presumption that it had been altered after its execution; and we think that under the circumstances the paper was properly allowed to go to the jury, and the fact of the time when the interlineation was made submitted to their decision. That fact has been found for the plaintiff by the verdict; which seems to be warranted by the evidence before the jury.

On the subject of interest as between the defendant and warrantor, we do not think the defendant has any cause to complain of the judgment appealed from.

Judgment affirmed, with costs.

INTERLINEATIONS, ERASURES, OR ALTERATIONS IN DEEDS AS AFFECTING THEIR VALIDITY: See *Woolley v. Constant*, 4 Am. Dec. 246; *Hatch v. Hatch*, 6 Id. 67; *Den v. Wright*, 11 Id. 546; *Campbell v. McArthur*, Id. 738; *Jackson v. Osborn*, 20 Id. 649; *Letcher v. Bates*, 22 Id. 92; *Vanausen v. Hornbeck*, 25 Id. 509; *Read v. Cramer*, 34 Id. 204; *Davis v. Fuller*, 36 Id. 334; *Stewart v. Preston*, 44 Id. 621; *Wallace v. Harmstad*, 53 Id. 603.

SCHNEIDER v. COCHRANE.

[9 LOUISIANA ANNUAL, 235.]

NOTARIAL PROTESTS OF FOREIGN BILLS ARE RECEIVED IN EVIDENCE as making proof of themselves, and bills drawn from one state on another are regarded as foreign bills to this extent; but beyond this the acts of foreign notaries or of notaries of other states are not admissible in evidence without proof of the signatures and capacity of the notaries.

NOTICE TO PARTIES SOUGHT TO BE CHARGED AS DRAWERS AND INDORSERS OF BILLS MUST BE PROVED like all other facts; and the Louisiana statute of 1827, which makes the certificates of notice by notaries in Louisiana competent evidence of such notice, has no effect beyond such instruments executed within that state, and by officers whose acts are thus clothed by law with the authority of authentic evidence.

APPEAL from the first district court of New Orleans. The facts are stated in the opinion.

Defour and Preaux, for the plaintiff.

Clarke and Bayne, for the defendant.

By Court, OGDEN, J. The certificate of the notary who protested the bills on which the defendants are sued as indorsers

was the only evidence offered to prove notice of the dishonor of the bills. The evidence was objected to, and we think ought to have been rejected. Notarial protests of foreign bills of exchange have always been received in evidence as making proof of themselves according to the custom of merchants; but the acts of foreign notaries, or of notaries of other states of the Union, beyond that exception, are not admissible in evidence without proof of the signature and capacity of such notary or other public officer: *Waldron v. Turpin*, 15 La. 552 [35 Am. Dec. 210]; *Rosine v. Bonnabel*, 5 Rob. (La.) 164.

Bills drawn from one state of the Union on another are now regarded as foreign bills, so far as to give credit to the protests made by notaries in other states, and render them admissible without further proof in our courts; but notice to parties sought to be charged as drawers or indorsers must be proved like all other facts; and the statute of 1827, which makes the certificates of notice by notaries in this state competent evidence of such notice, has no effect beyond such instruments executed within the state, and by public officers whose acts are thus clothed by law with the authority of authentic evidence.

There being no other proof of service of notice of protest, the plaintiff's case is not made out.

The judgment of the court below is therefore affirmed, with costs.

PROTEST: See a full discussion of this subject in the note to *Dupré v. Richard*, 43 Am. Dec. 216.

BILLS DRAWN FROM ONE STATE ON ANOTHER ARE FOREIGN BILLS, requiring protest: Note to *Dupré v. Richard*, 43 Am. Dec. 216.

GOODLOE v. ROGERS.

[9 LOUISIANA ANNUAL, 273.]

PLANTER IS ENTITLED TO RECOVER DAMAGES FOR LOSS OF CROP AND EXTRA WAGES PAID, in consequence of the delay through the fault of the manufacturers, but without any bad faith or fraud on their part, in putting in operation a sugar-mill and steam-engine, which the manufacturers undertook to build and put up on the plantation of the planter within a certain time, where it is evident that it entered into the contemplation of the parties that the mill and engine were to grind a certain crop of sugar-cane.

APPEAL from the district court of the parish of St. Landry.
Action upon a contract to recover the price of a sugar-mill and

steam-engine sold to the defendant. The opinion states the facts.

T. H. Lewis, for the plaintiffs.

Swayze and Moore, and Dupré and King, for the defendant.

By Court, BUCHANAN, J. The contract of plaintiffs was to build and put in operation on the plantation of defendant a sugar-mill and steam-engine. The contract was made on the eighth of January, 1849, and the plaintiffs agreed to deliver the mill and engine at the Plaquemines landing on or before the eighteenth of June, 1849. On his part, the defendant bound himself to haul the said machinery to his sugar-house; to furnish the necessary brick-work and timber for putting up said machinery, and a suitable number of hands to assist in putting up the same, within thirty days from the delivery of the same at Plaquemines.

The law of Louisiana on the measure of damages for the in-execution of contracts is found in articles 1928, 2294, 2295, and following, of the civil code. "Every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence, or his want of skill:" Art. 2295. "When the object of the contract is anything but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained and the profit of which he has been deprived, under the following exceptions and modifications: 1. When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract:" Art. 1928.

It appears to us evident that it entered into the contemplation of the plaintiffs as well as of the defendant, that the sugar-mill and steam-engine in question were to grind the crop of sugarcane of 1849, on the defendant's plantation. The plaintiffs were extensive manufacturers of these articles in Cincinnati for the Louisiana market, and the contract was made by James Goodloe, in person, on a plantation in Opelousas.

This being conceded, it follows that the parties must have contemplated that the making of the crop of 1849 might be delayed or frustrated by a failure to fulfill the contract, the damage therefrom resulting might, therefore, amount to the total loss of the crop or to a partial loss. For such loss we consider the plaintiffs under their contract would be liable, according to the law cited.

Applying this law to the facts of this case, we find it in proof: 1. That plaintiffs were guilty of negligence in executing their contract by making a right-hand engine instead of a left-hand engine, which their written contract called for; 2. That they failed to execute their contract, in this, that the castings had defects which caused their breakage when the mill was put in operation; 3. That the plaintiffs were guilty of want of skill in putting up the sugar-mill out of line, by which it was strained and broken; 4. That the alterations and repairs necessary for changing the engine from right hand to left hand, and for repairing the breakage, etc., caused a delay of twenty-one days in the grinding of defendant's crop; 5. That defendant was compelled to windrow his crop to preserve it from the frost, by reason of the above delay, occasioning a deficiency of sugar estimated by witnesses at from ten to forty per cent of the crop; 6. That defendant paid, in consequence of the delay, twenty-one days' extra wages of six hired hands, at one dollar per day each, as well as extra time of an engineer.

Under the law and the evidence, we consider the defendant entitled to recover damages for his loss of crop and extra wages paid, in consequence of the delay for alterations and repairs in putting the sugar-mill and steam-engine in operation; said delay being caused by plaintiffs' fault, and by their failure to execute their contract.

The measure of damages for the inexecution of contracts, as we have seen by article 1928 of the Louisiana code, is the amount of loss sustained by the obligee, and profit of which he has been deprived, subject to the modification that when there is no bad faith or fraud the obligor is liable only for damages that may reasonably be supposed to have been contemplated by the parties at the time of the contract.

The rule with its modification is taken *verbatim* from the code Napoleon, arts. 1149, 1150. And those articles of the French code, in turn, were borrowed from Pothier on Obligations, Nos. 159, 160. It must not be supposed, however, that Pothier was the author of the rule. He tells us himself that it is as old as the Roman law, and gives us the text of the Pandects in which it was expressed. It is known to American jurists by the name of consequential damages; and those are distinguished into proximate and remote. Mr. Sedgwick, in the third chapter of his treatise on the measure of damages, has collected authorities on this subject from many different quarters. From his researches it appears that the doctrine of the

civil and common law is not materially different. In the case of *Armstrong v. Percy*, 5 Wend. 535, the language of the supreme court of New York was as follows: "Consequential damages may naturally arise from the mere breach of the contract, but they often depend on the peculiar circumstances of the case. Such are allowed without being stated in the pleadings as are the fair, legal, and natural result of the breach of the defendant's agreement; if they do not thus result, the jury can not allow them, unless they are stated in the declaration and established by proof." And in 2 Greenl. Ev. 210, it is said: "The damage to be recovered must always be the natural and proximate consequence of the act complained of."

It seems to us that the loss of the defendant's crop, and the extra wages of hands hired by him, were, in the language of these authors, the natural and proximate results of the failure of plaintiffs to comply with their obligation; or as an authority from the Scottish law, cited by Sedgwick, expresses it, a certain resulting damage: Kaine's Principles of Equity, b. 1, p. 1, c. 1, sec. 5.

Our own reports contain a case where the facts were precisely similar to the present one, with the exception that the sugar-mill was not contracted to be put in operation by the manufacturer.

The language of Judge Martin, in delivering the opinion of the court, was as follows: "In the present case, as no fraud or bad faith is alleged against the defendant, his liability must extend to such items as are to be presumed to have entered into his contemplation at the time of the contract. These are, the price of the mill, expenses of removing it to the appellant's plantation, and of putting it up and taking it down; the proper attempts to render it available. These are the losses which must have been contemplated as attending the delivery of an insufficient mill. Next, the sugar and molasses, which the appellant failed to make; these are the profits of which he was deprived:" *Lobdell v. Parker*, 3 La. 332.

In that case the remedy sought and awarded was the rescission of the contract and damages in addition for a defective sugar-mill. The authority of Pothier was quoted in support of the views of the court, which appear to be conclusive of the right of the defendant to recover upon the proof adduced by him; and as the point is of great importance to the planting interest of this state, we think it unwise to disturb a precedent of more than twenty years' standing; especially when we find a decision in

conformity thereto, made by our immediate predecessors: See case of *Rugely v. Goodloe*, 7 La. Ann. 294.

It is proper to observe that doubts have been entertained by some members of the court as to the measure of damages; but they have been yielded to the considerations of the repeated decisions with regard to this particular class of contracts—in which the rules as to conventional obligations in general are to be taken in connection with the provisions of the code pertinent to the subject-matter.

A calculation which we have made of the losses suffered, and of the profits of which the defendant has been deprived in the present case, based upon the elements laid down in *Lobdell v. Parker, supra*, has resulted in a less sum than was allowed by the district judge. We also think the plaintiffs entitled under their contract to a privilege upon the mill and engine.

It is therefore adjudged and decreed that the judgment of the district court be amended; that the damages of defendant be assessed at the sum of two thousand one hundred and seventy-four dollars; and that plaintiff recover of defendant the difference between that sum and the price of the contract sued upon, to wit, one thousand five hundred and twenty-six dollars, with interest at eight per cent per annum from the first of February, 1851, with costs in both courts, and privilege upon the sugar-mill and engine made by plaintiffs for defendant.

VOORHIES, J., absent.

CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT OR DEBIT IN SALE OF CHATTELS, to what extent allowed: See *Jeffrey v. Bigelow*, 23 Am. Dec. 476; *Blanchard v. Ely*, 34 Id. 250, and notes to these cases; note to *Cary v. Gruman*, 40 Id. 304; *Crain v. Petrie*, 41 Id. 765; *Masterton v. Mayor etc. of Brooklyn*, 42 Id. 38, and notes; *Eckel v. Murphey*, 53 Id. 607. The principal case was referred to in *Page v. Ford*, 12 Ind. 52, in considering what injuries were the natural and legitimate results of a breach of warranty of machinery.

The principal case is also reported in 10 La. Ann. 631.

ARMORER v. CASE.

[9 LOUISIANA ANNUAL, 298.]

PROPERTY PURCHASED IN LOUISIANA BECOMES PROPERTY OF HUSBAND, and not of the husband and wife jointly, where the spouses never resided in Louisiana, were not married there, and at the time of the marriage did not contemplate residing there.

INTENTION OF TESTATOR IN HIS TESTAMENT.

AM. DEC. VOL. LXI—14

DISPOSITION MADE BY TESTATOR, IN ERROR AND IN IGNORANCE OF MATERIAL FACT, WILL NOT BE ENFORCED, when, if carried into effect, his manifest intention will be defeated

VOLUNTARY EXECUTION OF WILL BY LEGATEE IS CONCLUSIVE OF HIS RIGHTS IN THE PREMISES, and the interpretation indicated by his execution will not be permitted afterwards to be changed.

APPEAL from the district court of the parish of Concordia. Action for the recovery of the amount due on certain notes. The opinion states the facts.

Stacy and Sparrow, for the plaintiff.

A. N. Ogden and H. B. Shaw, for the defendants.

By Court, CAMPBELL, J. This suit was instituted for the recovery of the amount of four notes, for five thousand dollars each, executed by the late Thomas D. Purnell in part payment for the undivided five twelfths of a plantation known as the Forest plantation, which was adjudicated to him at the probate sale of the property of the succession of Mary C. Culberson, deceased.

The respondents admit that the notes were executed by T. D. Purnell, but aver that they were given in error and are without consideration; that at the time of the adjudication to him of the undivided five twelfths of the Forest plantation he was himself the owner of three fourths of the whole plantation and the slaves thereon; and that in purchasing he was ignorant of his legal rights, and erroneously supposed that the legal title to five twelfths of said plantation was in the succession of his sister, Mary C. Culberson, while in fact she was only entitled to one fourth thereof.

The respondents further aver that Levi Purnell, the father of Thomas D. Purnell, who died in 1835, devised to the said Thomas one undivided half of said plantation and slaves; that after the death of his said father, and in ignorance of his rights under the will, and erroneously supposing that the children of his sister, Mary Culberson, then deceased, were equal owners with himself of the plantation and slaves, partition thereof was made accordingly, whereby the children of his sister received one fourth more than their legal share.

Respondents, averring that two of the notes given as the price of adjudication, amounting together to ten thousand dollars, have been paid, claim to recover back the amount from the plaintiff, as tutor of the minor heirs of his sister, and also to recover the share of the negroes belonging to T. D. Purnell, erroneously given in the partition, with hire for their services.

They claim that the notes sued on be reduced to one half of their amount, and that they be credited with one half of the amount of the two notes already paid, and with the value of the hire of the negroes.

Levi Purnell and his wife, the grandparents of the minors whose interests are involved in this controversy, resided in Mississippi. In 1833 Purnell purchased the Forest plantation and slaves, situated in the parish of Concordia, in this state, and died in 1835, leaving two children, Thomas D., the father of the minor defendants, and Mary C., the mother of the plaintiffs. He left a will in which the following clause, which has given rise to this suit, is found: "And I do further devise and bequeath to my son Thomas and his heirs all my undivided one half, being all my right, interest, and property in and to the following real, immovable, and movable property, held as community property by myself and aforementioned beloved wife, according to the laws of said state of Louisiana, said real, immovable, and movable property being in said parish of Concordia and state of Louisiana, and consisting of the Forest plantation of lands, negro slaves," etc. "And I give this property to my son Thomas and his heirs, under the belief that my beloved wife will, at her death, give her undivided half of the same property, as aforesaid, to our said daughter Mary and her heirs."

This will was probated in Mississippi, but not registered in Louisiana until 1851, when upon presentation of an authenticated copy of it to the probate court of Concordia, it was, upon defendants' petition, ordered to be executed. Mrs. Purnell, the wife of the testator Levi, died intestate. Besides the children Thomas and Mary, she left a daughter named Eliza Davis, issue of a former marriage. On the twenty-sixth of January, 1841, Thomas Purnell and his sister Mary Culberson presented a petition praying for an inventory of the succession of their father and mother, that they be recognized as their heirs, and placed in possession. On the twenty-seventh, they accepted the succession purely and simply as the forced heirs of their father and mother, and expressly stipulated a reservation to each of them respectively of all rights under any will which may be produced. In August, 1842, Eliza Davis, the half-sister of Thomas and Mary, accepts the succession of her mother, and in the same act sells to Thomas Purnell, and to Culberson, tutor, for ten thousand dollars, her interest in her mother's succession, situated in the parish of Concordia. On the twenty-eighth of December, 1843, Purnell and Culberson, as tutor of his minor children,

made a partition in kind of the slaves attached to the Forest plantation, and making part of the succession of Levi and Mary Purnell, and also of the slaves purchased from Eliza Davis. On the sixth of April, 1844, Culberson sold to Purnell the interest acquired by him in the Louisiana property from Eliza Davis. On the sixth of April, 1844, the interest of the minor heirs of Mary Culberson to the Forest plantation, amounting, as is expressed, to an undivided five twelfths of the whole, was adjudicated to Purnell, and, as has been seen, this suit has been brought on four of the notes given for the price.

The error assigned is that the ancestor of defendants, being the owner in indivision of three fourths of the estate, in purchasing five twelfths of it, purchased a part of what already belonged to him. To ascertain the effect to be given to this defense, it is necessary to inquire what was the interest of Thomas Purnell in the property at the time of the purchase. Levi Purnell, having but two children at the time of his decease, had the right to dispose of one half of his property: C. C. 1480. This disposition, as has been seen, was made by him in express terms, in favor of his son Thomas. But it is urged that it was made in error, and under the belief that by the laws of Louisiana he was the owner of only one half of the property, and his wife, as partner in community, the other half; and that, from the context of the will, it may clearly be gathered that the intention of the testator was that the property should be inherited by his two children equally. That the testator was in error in supposing that he was the owner of and had the power of disposing of only one half of the property in Louisiana is made clear by the declaration in his will. "I give," says he, "this property to my son Thomas, under the belief that my beloved wife will, at her death, give her undivided half of the same property to our daughter Mary." He likewise declares that the property in Louisiana is "held as community property, according to the laws of said state." If effect be given to this bequest, the title to one half of the property in Louisiana vested in the legatee upon the decease of the testator; and the surviving wife having died intestate, or even in case she were entitled to nothing, the remaining half, being undisposed of, descended in equal portions to the two children, by which Thomas would be entitled to three fourths and Mary to the remaining fourth. Now, the spouses never having resided in Louisiana, and not having been married in Louisiana, and not having, at the time of their marriage, contemplated residing in Louisiana, the

property purchased in this state became the property of the husband, and not of the husband and wife jointly. The declaration, then, that one half of the property belonged to his wife was made in error and in ignorance of a material fact.

Under this erroneous belief, he devised one half of the estate to his son, alleging as his reason for doing so his belief that his wife would give to the daughter the other half of the same estate, evidently intending thereby that the two should inherit equally.

The intention of the testator is his testament. This is the first rule, and all others which concern the interpretation of testaments are reduced to it: Domat, pt. 2, b. 3, tit. 1, sec. 6, art. 5.

The same jurist, in paragraph 3178, Cushing's edition of the same book and title, in treating of the rules for interpreting difficulties in testaments, even when the terms of the disposition are unequivocal, states that some of them are occasioned by an error the testator was under in a matter of fact that was unknown to him; and when it appears clearly enough by his dispositions what he would have ordered, if the truth which he was ignorant of had been known to him, and if his will be thus ascertained, that "we are to decide the matter by adjusting the difficulty in the manner that we judge the testator himself would have done it, according to the views and sentiments which his disposition (and we may add his declarations) show him to have had."

Being satisfied, therefore, that the intention of the testator was not to give preference to his son over his daughter, but on the contrary, that it was his desire that they might inherit equally the property in Louisiana; and that the disposition in his favor resulted from ignorance of a material fact and in error, and would if carried into effect defeat his manifest intention, we can not enforce it.

The children of Levi Purnell seem to have placed the same interpretation upon the will of their father which we give to it, and actually consented to carry it out, by the stipulations of the act of acceptance of the twenty-seventh of January, 1841. It is true that they reserve their rights to attack any will which may be presented; but it further appears that Purnell, who alone had an interest in enforcing the will, never presented it or claimed its execution; and that it was not until after his death that the step-father of his children, to defeat a contract advisedly entered into and partially executed, saw proper to present the will, and claim for the benefit of the children a strict enforcement of a

disposition in favor of their father, which he himself had virtually waived.

Thomas D. Purnell was *sui juris* at the time of the partition of the slaves of the Forest plantation estate, and of the purchase of the interest of his sister's succession in the land. Although these acts may not come up to the technical definition of "acts recognitive and confirmatory," yet they clearly amount to a voluntary execution of the will of his father, according to the interpretation we have given it. As such, they are conclusive of his rights in the premises: C. C. 2252, 2254; 5 Touillier, Nos. 175, 180.

Being of opinion that the arrangement entered into between the parties carries out substantially the intention of the testator, we are unwilling to disturb it.

It is therefore adjudged and decreed that the judgment of the district court be affirmed, with costs in both courts.

VOORHIES, J., absent.

OGDEN, J., being of counsel, did not sit in the case.

PROPERTY WHEN COMMUNITY: See *Succession of Packwood*, 43 Am. Dec. 230; *Love v. Robertson*, 56 Id. 41; *Huston v. Curi*, 58 Id. 110, and notes to these cases. Where a husband buys land in Missouri with money acquired in Louisiana during marriage, and takes the title in his own name, he will, after divorce, be regarded by a court of equity in Missouri as a trustee for the wife to the extent of her interest in the fund with which the purchase was made, there being no evidence to show any consent on her part to the change in the character of the property: *Depas v. Mayo*, 49 Id. 88.

TESTATOR'S INTENTION TO BE ASCERTAINED AND EFFICACIATED: *Morton v. Barrett*, 39 Am. Dec. 575, and note collecting prior cases in this series: *Montgomery v. Millikin*, 43 Id. 507.

DAMONT v. NEW ORLEANS & CARROLLTON R. R. Co.

[9 LOUISIANA ANNUAL, 441.]

PASSENGER WHO VOLUNTARILY JUMPS FROM CARS WHILE IN MOTION, to avoid being carried beyond her destination, where the cars did not stop as they were in the constant habit of doing, is guilty of such imprudence as relieves the railroad company from liability for injuries thereby sustained.

APPEAL from the fifth district court of New Orleans. Action to recover damages for injuries alleged to be sustained through the negligence and misconduct of the defendants' servants. The facts are stated in the opinion.

Ogden and B. C. Elliott, for the plaintiff.

Benjamin, Bradford, and Finney, for the defendants.

By Court, CAMPBELL, J. This suit was instituted by the plaintiff on behalf of his daughter, to recover damages for injuries to her person, resulting, as is alleged, from the negligence and misconduct of the servants of the company. The verdict of the jury was in favor of plaintiff, assessing the damages at seven thousand dollars.

Upon the facts proved, the counsel for the defendants asked the court to charge the jury as follows: 1. That the jury can not find a verdict for the plaintiff unless they are convinced from the evidence before them that the plaintiff's daughter was injured by some fault or negligence on the part of defendants or their servants. 2. That if the jury believe from the evidence before them that the accident was caused either wholly or partially by the imprudence of the plaintiff's daughter, or that if she had acted with ordinary care or prudence she would not have been injured, then the jury must find for the defendants, although they believe that the accident was partly the result of the fault or neglect of the defendants or their servants. 3. That it is the duty of the jury to examine the evidence in order to ascertain whether the plaintiff's daughter committed any fault or imprudence which contributed to the accident; and if they find that such fault or imprudence existed on her part, they must find for defendants. 4. That even if the jury believe from the evidence before them that the cars were in the habit of stopping regularly at the place where the accident occurred, and that the cars did not on this occasion make the usual stop, still, if the daughter of the plaintiff imprudently jumped down while the cars were in motion, the plaintiff can not recover.

The court charged the jury in accordance with the first, second, and third points submitted on the behalf of defendants, with the following modifications: "The plaintiff can not recover damages for the accident if that accident should appear to the jury, under the evidence, attributable to the imprudence of the plaintiff's daughter; but that this charge may not be misunderstood by the jury, it is deemed proper to state the following hypothetical case: If the jury should find it proved that the railroad train did not stop at a place where it was in the habit of stopping, and that a passenger, bound to that place jumped out rather than be carried beyond his destination, said jumping out, although probably imprudent, would

not absolve the railroad company from damages in case he should be hurt, because the accident would be the result of the fault or negligence of the servants of the company in not stopping the train."

Again, the court in its charge to the jury reviewed the various decisions quoted in argument relating to steamboat collisions and to railroad accidents, and observed that a distinction was to be taken between the two classes of cases, arising from the obvious difference of comparative force of two steamboats in the one case, and of a railroad train and an individual in the other case.

In the refusal of the court to charge as requested, and also to the charge actually given, the defendants excepted. The exception we think well taken. If the daughter of plaintiff voluntarily jumped from the cars when in motion, even though it was the constant habit of the company to stop at that place, the leap not being made to avoid an imminent impending peril, produced by the misconduct of defendants, but to avoid being carried beyond her destination, she was herself guilty of such imprudence as relieves the company from the consequences of the want of caution on the part of their servants; for in such a case the accident may be attributed to the fault of both parties, which would destroy plaintiff's right to recover. See *Fleytus v. Pontchartrain R. R. Co.*, 17 La. 340; *Lesseps v. Pontchartrain R. R. Co.*, 18 Id. 361. Even though there be fault on the part of the defendant, it has been held that plaintiff can not recover if the injury could have been avoided by the exercise of ordinary caution; *a fortiori*, then, can he not recover if by his imprudence, negligence, or fault he has contributed to bring about the injury: *Bridge v. Grand Junction Railway Co.*, 3 Mee. & W. 244.

The case of *Railroad Company v. Aspell*, recently decided in the supreme court of Pennsylvania, is in most respects similar to this. As reported in the journals of the day, it is as follows: "The plaintiff was a messenger in the defendants' cars from Philadelphia to Morgan's Corner. The train should have stopped at the latter place, but some defect in the bell-rope prevented the conductor from making the proper signal to the engineer, who therefore went past, though at a speed somewhat slackened on account of the switches which were there to be crossed. The plaintiff, seeing himself about to be carried on, jumped from the platform of the car and was seriously hurt in the foot. He brought this action, and the jury, with the approbation of the

court below, gave him one thousand five hundred dollars in damages:" National Intelligencer, May 25, 1854, vol. 55, No. 8025. [The case will be found reported in 23 Pa. St. 147.]

On the appeal, Chief Justice Black, delivering the opinion of the supreme court, said: "The remark that life and limb should not be weighed against time is true; and the plaintiff should have thought of it when he set his own life on the hazard of such a leap for the sake of getting to the ground a few seconds earlier. Locomotives are not the only things that may go off too fast, and railroad accidents are not always produced by the misconduct of agents. A large portion of them is caused by the recklessness of passengers. This is a great evil, which we would not willingly encourage by allowing a premium on it to be extorted from companies. However bad the behavior of those companies may sometimes be, it would not be corrected by making them pay for faults not their own. The court should have instructed the jury that the evidence, taken altogether, or even excluding that for the defense, left the plaintiff without the shade of a case. Judgment reversed, and *venire facias de novo* awarded."

Being of opinion that the instructions asked for by defendant should have been given, and that so much of the charge as is embraced in the hypothetical case put by the judge is erroneous and calculated to mislead the jury, it is ordered that the judgment appealed from be reversed, and this case remanded for a new trial, with directions to the district judge to charge the jury as requested by defendants' counsel and in conformity with the principles herein set forth. The costs of appeal to be paid by plaintiff.

BUCHANAN, J., dissented.

SLIDELL, C. J., dissenting, said that he concurred as to the erroneousness of a portion of the charge to the jury, but did not think, however, the cause should be remanded.

PASSENGER IS GUILTY OF CONTRIBUTORY NEGLIGENCE IN JUMPING ON OR OFF TRAIN IN MOTION: Note to *Ingalls v. Bills*, 43 Am. Dec. 364, where the principal case is cited, among others, on this proposition. As to contributory negligence in general, see *Freer v. Cameron*, 55 Id. 663; *Trow v. Vermont Central R. R.*, 58 Id. 191, and the notes thereto.

STEWART v. CITY OF NEW ORLEANS.

[9 LOUISIANA ANNUAL, 461.]

MUNICIPAL CORPORATION ENJOYS EXEMPTION OF GOVERNMENT, IN EXERCISE OF POWERS WHICH IT POSSESSES FOR PUBLIC PURPOSES, and which it holds as part of the government of the country, from responsibility for its own acts and the acts of its officers deriving their authority from the sovereign power; although it is answerable for the acts of its agents under powers conferred upon it for private purposes.

GOVERNMENTAL FUNCTION CONFERRED FOR PUBLIC PURPOSES IS EXERCISED by the city of New Orleans in appointing watchmen, whose duties are the preservation of public order and tranquillity; and the city is therefore not liable for the acts of such officers.

APPEAL from the third district of New Orleans. Action against the city to recover the value of a slave killed by the officers of Municipality No. 2. The facts are stated in the opinion.

Thomas Hunton, for the plaintiff.

T. L. Bayne and Thomas R. Wolfe, for the defendant.

By Court, CAMPBELL, J. Plaintiff seeks to render the city of New Orleans liable for the value of a slave, alleged to have been killed by the officers of the late second municipality. It is alleged that in January, 1852, the lieutenant of the watch, aided by other watchmen under his command, while in the regular service and employment of the Municipality No. 2, without any justifiable cause, made an assault with clubs upon the slave of plaintiff, and inflicted upon him wounds of which he died. The defense is the general denial.

It is in proof that on the twenty-first of July, 1852, a detachment of the police officers of the municipality, was ordered by their chief to suppress unlawful assemblages of slaves in cabarets; that in performance of this duty they entered a dram-shop, in which the slave of plaintiff was found; that the slave attempted to escape, was pursued and overtaken by the watch, and that, in capturing him, wounds were inflicted of which he died.

It may likewise be conceded, though the facts are by no means clearly proved, that when the watchman entered the cabaret the slave was neither drunk nor disorderly; that his conduct and character were good; that he was seated by the fire warming himself, and made no resistance; but merely sought to avoid capture by flight, and that he might have been arrested without taking his life.

The question presented is, whether, under this state of facts,

the city of New Orleans is amenable in damages for the acts complained of, by the act of consolidation, being bound by the obligations and liabilities of the second municipality.

Under the general rule regulating the liability of municipal corporations for the acts of their agents within their ordinary scope of employment, the district judge held the city liable, and rendered judgment for the value of the slave and the expenses of his illness.

The judgment we think erroneous; and the error results from a failure in the application of the principle to make the proper distinction between the liability of municipal corporations for acts of its officers, in the exercise of powers which it possesses for public purposes, and which it holds as part of the government of the country, and those which are conferred upon it for private purposes.

Within the sphere of the former, it enjoys the exemption of government from responsibility for its own acts and the acts of its officers, deriving their authority from the sovereign power: See *White v. City Council*, 2 Hill (S. C.), 571, as cited in the notes to *Wilson v. Beverly*, 1 Am. Lead. Cas. 469; also, *Martin v. Mayor etc. of Brooklyn*, 1 Hill (N. Y.), 545, 550; and *Mayor v. Furze*, 3 Id. 612, 618; whereas, in the latter it is answerable for the acts of those who are in law its agents: *Bailey v. Mayor etc. of New York*, Id. 352 [38 Am. Dec. 669]; S. C., 2 Denio, 433, 450.

In the case of *Bailey v. Mayor etc. of New York*, *supra*, Nelson, C. J., in treating of the difference between the powers conferred on municipal corporations in their public character for public purposes and those conferred on the same corporation for private advantage, with the view of distinguishing one class from the other, says: "To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company."

In the case of *Martin v. Mayor etc. of Brooklyn*, *supra*, the court say: "It is impossible to maintain that a village corporation is liable for a wrong committed by its officers. It is a political body, bound, I admit, and liable to an action when incurring a

debt through its corporate officers, acting within the line of their duty; but not for either a non-feasance or misfeasance committed by independent corporate officers."

The inquiry which is next presented is, whether the powers under which the officer of the municipality acted were conferred for public purposes. If so, it follows that the city is not liable for the acts of its officers, even though illegal, or of such a character as to subject the officers themselves to liability.

The act of 1805 incorporating the city of New Orleans provides for the appointment of a mayor, recorder, and aldermen, and such subordinate officers "for preserving the peace and well ordering the affairs of the city as the council shall direct." Through all the changes of city government, this power has been continued, and the conclusion, therefore, that these powers are governmental is strengthened by the fact that the constitutions of 1845 and 1852 both provide that "the citizens of the city of New Orleans shall have the right of appointing the several public officers necessary for the administration of the police of said city, pursuant to the modes of election which shall be provided by the legislature; and the legislature may vest in them such criminal jurisdiction as may be necessary for the punishment of minor crimes and offenses, and as the police and good order of the city may require:" Art. 128. So that the right of regulating the police of the city of New Orleans does not rest alone upon legislative permission, but is authorized by the constitution itself.

Under these sanctions, watchmen are appointed as a necessary branch of the police of the city. Their duties are the preservation of public order and tranquillity, and the city in appointing them exercised a governmental function conferred upon it, in its public or municipal character, for public purposes exclusively, and is not therefore liable for the acts of its officers.

It is therefore ordered and adjudged that the judgment of the district court be annulled and reversed, and that there be judgment in favor of the defendants; the costs of both courts to be paid by plaintiff and appellee.

VOORHIES, J., concurred.

SLIDELL, C. J. I concur in the conclusion that the municipal government is not liable in this case.

OGDEN and BUCHANAN, JJ., dissented.

MUNICIPAL CORPORATION'S LIABILITY WITH RESPECT TO ITS PUBLIC GOVERNMENTAL POWERS: See *Lloyd v. Mayor etc. of New York*, 53 Am. Dec. 347,

and note; and as to the personal responsibility of its officers exercising such powers, see *American Print Works v. Lawrence*, 57 Id. 420, and notes. The distinction observed in the principal case between the liability of municipal corporations for their acts in the exercise of powers which they possess for public purposes, and which they hold as a part of the government of the country, and for their acts under powers conferred upon them for private purposes, was approved in *Dargan v. Mayor etc. of Mobile*, 31 Ala. 477; *City of Richmond v. Long's Adm'rs*, 17 Gratt. 382; in the first of which it was held that a municipal corporation having authority to pass ordinances forbidding slaves to be abroad at night, or to assemble together without lawful permission, was not liable, at the suit of the owner, for the loss of a slave who was negligently killed by a city officer in attempting to arrest him for a breach of such ordinance; and in the last of which, that a municipal corporation was not responsible for the loss of a slave admitted into a city hospital, on the ground of negligence of the city's agents at the hospital.

MUNICIPAL CORPORATION'S LIABILITY WITH RESPECT TO ITS PRIVATE MINISTERIAL POWERS: See *City of Madison v. Ross*, 54 Am. Dec. 481; *Lloyd v. Mayor etc. of New York*, 55 Id. 347; *City of Buffalo v. Holloway*, 57 Id. 550; *Hutson v. Mayor etc. of New York*, 59 Id. 526; *Pittsburgh v. Grier*, 59 Id. 65; *Erie v. Schweigle*, Id. 87; *Wallace v. City of Muscatine*, ante, p. 131, and notes to these cases.

SARPY v. MUNICIPALITY No. 2.

[9 LOUISIANA ANNUAL, 597.]

ORIGINAL OWNER IS PRECLUDED FROM REVOKING DEDICATION, where property is set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it; the law considers it in the nature of an estoppel *in pais*.

SUFFICIENT EVIDENCE OF OWNERS' INTENTION TO MAKE DEDICATION IS FURNISHED by plans on which the land is designated in a manner indicating its abandonment to the public use, and by contemporaneous acts of the owners in making sales with reference to the plans, and in making partition in which the land was not embraced, followed by the long use and enjoyment of the property by the public without opposition on the part of the owners.

APPEAL from the fifth district court of New Orleans. Action to recover certain land. The facts are stated in the opinion.

Roselius and V. Burthe, for the plaintiffs.

Livingston, city attorney, for the defendants.

By Court, OGDEN, J. The plaintiffs set up title to a portion of ground in the city of New Orleans known as Tivoli Circle, and also to two strips of ground, each thirty feet wide, the one in the center of Triton Walk, running from Tivoli Circle to the extremity of Triton Walk, and the other in the center of Nayades street, and running from Tivoli Circle to the lower limits of

Fauburg Saulet. The defense is that the property was abandoned and dedicated by the ancestors of the plaintiffs and their vendors to the public use, and that they have been used and enjoyed as *loci publici* for more than thirty years. The New Orleans and Carrollton Railroad Company, in the year 1833, obtained permission from the defendant to build a railroad and run their cars through this property, and having been joined as defendants in the action, they set up the same defense with the city, and allege that they have occupied and enjoyed the premises for the purposes of the railroad, openly, publicly and uninterruptedly, and with the knowledge of the plaintiffs, for more than nineteen years.

To establish the fact of the dedication of this ground to the public use, the defendants produced two plans: one is a plan executed by B. Lafon, engineer, dated the eighth of July, 1807, on which the premises are designated by—1. A circle, with the words "Place Tivoli" written around it; 2. A narrow strip of ground in the center of Nayades street, running from the Circle, on which are the words "Canal de Tivoli;" 3. A similar narrow strip in the center of Triton Walk, with the words written on it, "Canal des Tritons." This plan was executed at the instance of Armand Duplantier, who purchased the plantation out of which the Fauburg Delord was created from Madame Delord Sarpy, the mother of the plaintiffs. He laid the property out into lots, streets, squares, etc., and after having sold a portion of the lots, he became insolvent, and in 1814 his syndics made a retrocession of the unsold portion to his vendor, Madame Sarpy. The other plan is one which the plaintiffs in this suit, in the year 1827, caused to be deposited in the office of Felix de Armas, notary public, to be annexed to an act of partition of the estate of their mother, executed before that officer. The only difference between that plan and the former one is, that the words written around the Circle are "Place du Tivoli," instead of "Place Tivoli," and that the strip in the middle of Nayades street has nothing over it.

The evidence shows that the mother of the plaintiffs, and after her death the plaintiffs themselves, sold lots according to their plan. In a sale of two lots to Jacob Ott, in 1825, one of the lots is described as "situated at the corner of the street called Cours des Tritons and of the circular place of Tivoli," and measuring one hundred and forty feet and seven inches front on said Cours des Tritons, and fifty-eight feet front on the place of Tivoli. Ott testified, as a witness on the trial, that before he

purchased, a plan of Tivoli place and the wide streets was shown to him, and he was then induced to purchase. In another sale made in 1826 to Andre Durnford, the property is described as follows: "Un morceau de terre formant un poligone irrégulier situé au Fauburg Delord, dans l'ialet compris entre les rues du Camp, Calliope, les Cours de Nayades, la place Tivoli et la rue Delord."

In the act of partition made between the plaintiffs, of the property belonging to the succession of their mother, no mention is made of any claim on their part to the ground which, by the plan annexed to the partition, appeared to have been thus set apart; and that they intended the partition to be a final and definite one of all the property in Louisiana belonging to their mother's succession, is evident from a clause in the act which is in the following words: "Comme il pouvait avoir dans la succession quelques créances à recouvrer et qu'il existe des terres dans l'état du Missouri, dont les titres de l'une ne sont pas encore confirmés par le congrès des Etats Unis, et il est convenu entre les parties, que ces biens demeureront indivis entre elles." It appears that in 1826 or 1827 the city planted trees around the Circle, and in 1837 they fenced it in. By an ordinance in 1833 they granted permission to the Carrollton railroad company to build their road and run their cars through this property, and it is proved that the strips of land on Triton Walk and Nayades street were kept in repair by the city authorities until the railroad company was established, after which the company kept them in repair.

It does not appear that the plaintiffs ever made any opposition to the exercise by the city of the absolute right of control over these places. The railroad company, under the authority of an act of the legislature, and of the permission granted by the city authorities, have ever since the road was built, and are now running their cars through the Circle, and through the strips of ground in the center of Nayades street and Triton Walk. No attempt was ever made by the plaintiffs or by their ancestor to subject this ground to any private use since the plan of 1807, and until the institution of this suit, forty years afterwards, no one has ever laid claim to it as private property.

The question, and the only one, to be decided is, whether these plans, with the contemporaneous acts of the parties, and the long use and enjoyment of the property by the public, without opposition on the part of the plaintiffs, are sufficient evidence of their intention to make a dedication. The true

principle of law applicable to this subject is laid down in the case of *Cincinnati v. Lessee of White*, 6 Pet. 431, "that where property has been thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication." In that case it was held that the assent of the owner of the land to its being used for public purposes, and the fact of its being so used, and that use continuing for such a length of time that the public accommodation and private rights might be injured by the interruption of the enjoyment, would be of themselves sufficient evidence of a dedication. In the present case, to arrive at the intention of the parties, we have abundant evidence out of the plans which have given rise to much discussion, as to what meaning should be attached to the words written thereon.

The evidence satisfies our minds that it was the intention of the plaintiff and of their mother that the ground claimed in this suit should be dedicated to the public use; and we do not rest that conclusion on the plans alone, but we consider the acts of the parties as irreconcilable with any other hypothesis but that of their having made the dedication. How otherwise are we to view their having made a partition of the property of their mother, with the plan before them, on which these several pieces of ground are designated, and yet not embracing them in the partition? At that time the city had not inclosed the Circle, and Nayades street and Triton Walk were not used; there was therefore nothing to prevent them from proceeding to the partition of those parcels of ground as well as of the lots which they divided between them, if in point of fact they considered themselves as the proprietors. The conclusion is not to be avoided, that having made, previously, sales of lots, recognizing these as public places, in the boundaries and description of the lots sold, they no longer claimed the property, but considered it abandoned to the public use, and subsequently acquiesced in the enjoyment of it by the city, for the uses to which it was afterwards subjected.

The counsel for the appellees has contended that this case is identical in principle with the cases of *Livaudais v. Municipality No. 2*, 16 La. 509; *Livaudais v. Municipality No. 2*, 5 La. Ann. 8; *Xiques v. Bujac*, 7 Id. 517; and *David & Lavaudais v. Municipality No. 2*, 8 Id. 397. There is a striking difference, we think, between those cases and the present one. The case first decided will illustrate that difference. The heirs of Livaudais claimed a

square of ground which figured on the original plan of Fauburg Annunciation, on which the word "colysée" was written. This, it was contended on the part of the city, constituted a dedication by the plaintiffs' ancestor of the square to a public use. Judge Martin, who delivered the opinion of the court, says: "The word 'coliseum' is the proper name of an edifice in Rome, originally known as the 'amphitheater of Titus,' and that it was originally the private property of the emperor." He says: "There is no evidence of the alleged dedication out of the plan in this case; and none in the plan out of the word 'coliseum.'" He then decides that there was no dedication, for the reason that the word thus written on the plan indicated only that the ground was reserved for the erection of a building which might be private property or sold or leased out as such. Judge Martin, in that case, observes: "The obligation which the plaintiff has contracted by the use of the word 'coliseum' might certainly be discharged by the erection of such an edifice. In the mean while, he may have lost the right of using the square for any other purpose." The subsequent decisions related to squares reserved on the same place, by the same founder, for a church and for a market-house. These decisions were based on the principle that the designation on a plan of a space for the erection of an edifice, which might be the private property of an individual or a corporation, could not be considered as a dedication to the public use.

That principle has no application in the present case. The words written on the plan of the Fauburg Delord, "Place Tivoli," or "Place du Tivoli," do not convey the idea of a place reserved for an edifice of any kind. Tivoli is the name of a town in Italy, not far from Rome, and was used, for its classical associations, as the name by which the Circle laid out for the public convenience was to be distinguished, and in the same sense and with the same design as it is usual to designate the streets and squares of a city by the names of persons and places, both historical and mythological.

Besides that difference, there is in the present case full and complete evidence of the dedication out of the plan and resulting from the acts of the parties. In the cases referred to, the city never appropriated the ground to the use indicated by the plan; in the present case they have done so—and without interruption or opposition, the public have had the use and enjoyment of the property as a public square and as public streets for many years.

We are unable to perceive any advantage to be derived to the plaintiffs' claim from the decisions relied on in the cases of *French v. Carrollton R. R. Co.*, 2 La. Ann. 87; and *Carrollton v. Jones*, 7 Id. 233. There is no evidence in the present case that either the plaintiffs or their ancestors used or exercised any rights of ownership over the strips of land in Nayades street and Triton Walk designated as canals. They were probably designed to serve as drains for those wide streets. They have, however, for many years before the institution of this suit, been used by the public, as making part of those streets, and this having been done with the assent of the plaintiffs, as their acts necessarily imply, the dedication for that purpose is sufficiently established.

To deprive the public of the use of these thoroughfares which the former owners have so long ago abandoned, and which all their acts tend to prove it was their intention to abandon in favor of the public, would be a disappointment of the just hopes and expectations which the acts of the plaintiffs and their ancestor have given rise to, and at the same time a violation of private rights which have sprung up on the faith of those acts.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be affirmed, with costs.

BUCHANAN, J. I prefer to put my concurrence in the decree of the court exclusively on the ground of the acts of the heirs of Madame Delord Sarpy, as amounting to a renunciation of the right of proprietorship in the premises claimed in this suit.

DEDICATION IRREVOCABLE WHEN ACCEPTED: Note to *State v. Trask*, 27 Am. Dec. 569.

DEDICATION HOW EFFECTED: See *Dwinel v. Barnard*, 48 Am. Dec. 507; *Godfrey v. Alton*, 52 Id. 476; *Stacey v. Miller*, 55 Id. 112; *Cole v. Sprout*, 58 Id. 696; *Warren v. President etc. of Jacksonville*, 58 Id. 610; *Gardiner v. Tiedale*, 60 Id. 407, and notes to the various cases.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

WILSON v. WILSON.

[38 MAINE, 18.]

ANY ONE INTERESTED IN CONDITION IN DEED OR IN LANDS to which it relates may perform the condition.

CONDITION IN DEED THAT GRANTEE SHALL MAINTAIN AND SUPPORT CERTAIN NAMED PERSONS in a comfortable and convenient manner does not raise a personal trust in the grantee, but the support may be furnished by others.

WITNESS LIABLE TO DEFENDANT ON COVENANT is competent to testify for him after being released by him.

ENTRY by the heirs of Ephraim Wilson to recover possession of real property formerly owned by the deceased. Entry for condition broken was made by the plaintiffs upon the premises in controversy before the commencement of this action. There was some evidence tending to show that Ephraim Wilson, jun., was not properly cared for. The case is otherwise sufficiently stated in the opinion. Verdict for the defendant, and exceptions by the plaintiffs.

Heath, in support of the exceptions.

Hinds, contra.

By Court, ROSE, J. On the eighth day of October, A. D. 1835, Ephraim Wilson conveyed certain real estate to William Wilson by deed of general warranty, subject, however, to the following conditions, to wit: "That the said William Wilson is to maintain and support in a comfortable and convenient manner the said Ephraim Wilson, together with his wife Eunice Wilson, also Ephraim Wilson, jun., and Polly Wilson, children

of the said Ephraim, during their natural lives; then this deed to remain in full force and virtue, otherwise to be null and void."

The case finds that Ephraim Wilson, jun., and Polly Wilson, mentioned in the condition of the deed from Ephraim Wilson to William Wilson, had been consigned to the charge of the defendant for support and maintenance, by the grantee in the deed of Ephraim Wilson, with the consent of Polly Wilson in writing, and that the defendant had employed one Quimby and others at different times to take care of Ephraim. It may be inferred, though it is not so expressly stated in the case, that Ephraim and his wife have deceased, and that William has conveyed the estate to the defendant. The court was requested to instruct the jury, or to rule, that the trust charged upon the grantee in Ephraim Wilson's deed was a personal one, and that he had no authority to transfer the care and support of Ephraim and Polly to other parties, and himself to leave them to be cared for by strangers. This request was refused.

The condition in the deed of Ephraim to William was designed to secure the support of Ephraim, his wife and two children. There does not appear to have been any personal obligation on the part of William to provide for the support of the parties mentioned in the condition of the deed from Ephraim. They were to be supported in a comfortable and convenient manner, or the estate was to be forfeited. But there was no place specified at which the support was to be furnished, nor is there any specific provision how they should be supported, further than that it should be done in a "comfortable and convenient manner." Such support could be furnished by other parties as well as by William. There is no language in the deed, nor can an inference be drawn from the situation of the parties as disclosed by the facts in the case, which would seem to render it necessary that the "support" provided for in the condition of the deed should only be furnished by William under his personal superintendence. Such does not appear to have been the intention of Ephraim Wilson, the original grantor: *Simonds v. Simonds*, 3 Met. 558.

With respect to the persons who may perform a condition, it is a general rule that every one who has an interest in the condition, or in the lands to which it relates, may perform it. As if a feoffee upon condition to pay at Michaelmas twenty pounds, enfeoffs another person before that time, the second feoffee may perform the condition: 2 Cru. Dig., Greenl. ed., c. 2, sec. 6. William Wilson, being under no personal liability to support

Ephraim, jun., and Polly, and being only liable to the defendant on his covenants, was, after being released by the defendant, a competent witness for him.

No error is perceived in the ruling.

Exceptions overruled, and judgment on the verdict.

SHEPLEY, C. J., and APPLETON and CUTTING, JJ., concurred.

WHEN DEED MAY BE AVOIDED FOR BREACH OF CONDITION SUBSEQUENT.—This subject is treated at length in the note to *Cross v. Carson*, 44 Am. Dec. 743-759.

RELEASE OF INTEREST OF WITNESS TO QUALIFY HIM TO TESTIFY: *Shaw v. Berry*, 58 Am. Dec. 702; *Otis v. Thom*, Id. 303; *Bank of Utica v. Mercereau*, 49 Id. 189, and note 232, citing prior cases.

WILLIAMS v. MORTON.

[88 MAINE, 47.]

CONVEYANCE OF REAL ESTATE OF WARDS BY GUARDIAN UNDER LICENSE OF PROBATE COURT, but without giving the statutory bond, vests no title in the grantee.

MONEY PAID FOR CONVEYANCE BY GUARDIAN THAT PASSES NO TITLE, by reason of no bond being given, may be recovered from the guardian upon his covenants in the deed or in an action for money had and received.

GUARDIAN'S BOND GIVEN FOR FAITHFUL DISCHARGE OF GUARDIANSHIP DUTIES is not security for the observance of the statutory provisions in a sale of real estate, and the proper application of the proceeds, when the sale is under a special license, and a special bond is required.

OMISSION BY GUARDIAN TO GIVE SPECIAL BOND REQUIRED UPON SALE OF WARD'S REALTY is no breach of the guardian's general bond.

GUARDIAN'S DEED OF WARD'S REALTY UNDER LICENSE but without the statutory bond is not valid as a release under the Maine statute.

CONDITION IN GUARDIAN'S GENERAL BOND THAT HE SHALL RENDER ACCOUNT as often as required by the court is not broken by a failure to account after due citation for that purpose, if the ward's estate consists only of real estate which has been duly inventoried, although the real estate has been sold by the guardian and he has not accounted for the proceeds; for such accounting is secured by a special bond required upon the sale of real estate.

DEBT by the probate judge Williams against Morton and another, upon a bond given by the defendants upon the appointment of one of them as guardian of certain minor children, the other defendant signing as surety. The estate was duly inventoried. It contained no personal property, and consisted only of a piece of real estate, upon which were situated two dwelling-houses. Upon the return of the inventory, the guardian petitioned the court for leave to accept immediately a good

offer for the real estate. After due publication of legal notice, the court granted the guardian license to sell the property. The guardian took the oath to faithfully execute the license, but did not give the special bond as required by statute upon the sale of real estate. The advantageous offer accepted by the guardian was made by the K. & P. R. R. Co., to which the guardian conveyed the houses and land, and from which he received the full amount agreed upon. Two or three years after this, the guardian having rendered no account, one of the wards and a creditor of another petitioned the probate judge for a citation to the guardian to settle an account, give a new bond, or be removed. The citation issued, but the guardian not appearing, another guardian was appointed, who gave the required bond. Morton, the former guardian, never settled any account. The case was submitted upon these agreed facts, the court to render such judgment as the law and the facts would authorize.

Lancaster and Baker, for the plaintiff.

Emmons, for the defendants.

By Court, TENNEY, J. In the sale of real estate under a license from the court authorized to grant it, "the requisites provided by statute, of bonds to account, of a previous oath, of advertisements, and of a public sale, are important to the interests of all concerned in the estate to be conveyed, as heirs at law, creditors, and others. The rights of persons thus connected with the estate conveyed, and whose interests are affected by the authority to sell, are regarded by these provisions; and they, and any claiming under them, are not concluded by the exercise of the authority and license to sell in derogation of their rights, unless every essential requisite and direction of law has been complied with:" *Knox v. Jenks*, 7 Mass. 488.

In an attempted sale, similar to the one now under consideration, of *Williams v. Reed*, 5 Pick. 480, where there was an omission to give a bond and take the oath after the license to make the sale, the court say: "There being no bond and no oath, the sale is void, or at least voidable, so that the parties to it are at liberty to vacate it and consider it annulled." The fee of the land remains in the wards, it not having passed from them by a sale authorized by the statute. In *Moody v. Moody*, 11 Me. 247, a sale of real estate by an administrator was held void as against heirs, by reason of his neglect to give the bond required by law. If the title of the heirs has not passed from them to the railroad company and vested in the latter, the money has been

paid without consideration, and it can be recovered back, of the guardian, upon his covenants in the deed, or in an action for money had and received by him for their benefit. But if the guardian and the railroad company were disposed to treat the sale as valid, and the former had failed to account in any manner for the money received, as the consideration of the deed, are the defendants liable upon the bond in suit for the omission?

Upon a guardian's appointment, he shall give bond with sufficient surety or sureties, conditioned for the faithful discharge of his trust, to render a true and perfect inventory of the estate, etc., of his wards; to render a just and true account of his guardianship as often as and whenever by law required; at the expiration of his trust to pay and deliver over all moneys, etc., on a final and just settlement of his accounts, etc.: R. S. c. 110, sec. 15. By the statute of Massachusetts, guardians are required to give bond to the judge of probate, in a reasonable sum, with sufficient sureties, for the faithful discharge of the trust reposed in them, and more especially for the rendering a just and true account of their guardianship when and so often as they shall be thereunto required: Mass. Stat. of 1783, c. 38, sec. 6, p. 136. This is substantially the same as the requirement in the revised statutes referred to, excepting the last condition in the latter, which is immaterial for the present inquiry.

In the license provided for the sale of the real estate of persons under guardianship, that the avails thereof may be put out and secured to them on interest, a bond is required of the person licensed, with surety or sureties, conditioned for the observance of the rules and directions of law in the sale of real estate by executors, etc., and to account for and make payment of the proceeds, agreeably to the rules of law: Mass. Stat. of 1783, c. 32, sec. 5, p. 121. This provision is similar to that contained in the revised statutes of this state, chapter 112, section 5. In *Lyman v. Conkey*, 1 Met. 317, the court in Massachusetts have given a construction to the provisions of the statutes of 1783, *supra*, and they say: "Whenever the object is to dispose of real estate of the ward, to raise a fund to stand in lieu of the real estate for the future use of the ward, or of any other person who would have been entitled to the real estate, it is deemed a separate, special trust, for the due execution of which a separate security is required, as a condition precedent to the validity of the sale; and therefore the court are of the opinion that the accounting for the proceeds of the sale, made under such special license to sell for the benefit of the ward, is not one of the gen-

eral duties of guardianship for the performance of which the sureties on the original guardianship bond are responsible."

It could not have been designed by the legislature that a bond given for the faithful discharge of the duties of guardian, which by his letters of guardianship he is bound to perform, should be the security for the observance of the provisions in a sale of real estate, and the proper application of the proceeds, when the sale was under the authority of a special license only, and a special bond is required that the duties to be done under that license, as the law prescribes, shall be faithfully performed. The proceedings under the license, as required by the statute, are not strictly speaking guardianship duties; but as matter of convenience, the change of the real estate of the ward into money is to be done by him who had the charge of the former, and who is to see that the latter is properly secured upon interest. It is very clear that a breach of the special bond, under a license, does not constitute a breach of the general bond of guardianship; and consequently an omission to give the special bond violates none of the conditions in the other. It is contended that the deed of the guardian is valid as a release under the provisions of chapter 81, section 7, of the revised statutes, and that the money received of the corporation may be treated as the consideration therefor.

The land attempted to be sold had upon it two dwelling-houses, and by section 5 of the chapter referred to houses can not be taken without consent of the owner. The provision in section 7 can not be construed to authorize a guardian to agree with the corporation to permit it to take dwelling-houses, and to settle the damages therefor; as this authority extends only to those cases where the corporation shall take any real estate as aforesaid, of any minor, etc., referring clearly to section 2 of the same chapter, which gives the power to take real estate with the restriction contained in section 5.

The railroad company, however, in this case must be understood to have intended what these acts clearly indicate. The case finds that the corporation made the offer to purchase the estate. The consideration of a transfer of title was paid, there being no fact reported showing that anything less was intended. The license was to sell real estate, and the deed was appropriate for an absolute conveyance. The real estate being still the property of the minors, in an action upon the covenants in the guardian's deed that he had pursued the steps to make the deed effectual, a defense that the license was granted without proof of

any other fact could not avail. The provisions in the statutes of 1843, chapter 1, can not be so construed as to give to the plaintiff the right to maintain the action. It is again insisted that as one of the conditions of the bond in suit is to render an account as often as required by the judge, and as he omitted to do so on being cited for that purpose, that condition has been broken. The case does not find that the wards were possessors of any property, excepting the real estate attempted to be sold, which was duly and seasonably inventoried. No delinquency was imputable, by reason of having settled no accounts, unless it be for the omission in reference to the avails of the real estate supposed to have been sold. The bond required by law upon the license to sell was conditioned that he should account for the proceeds of the sale according to law. The law required that the proceeds of the sale should be put out at interest; and when this was done, he had fulfilled his whole duty. It not appearing that any property was in his hands for which he was bound to render an account, the omission to render such when cited was not a breach of the general bond of guardianship: *Hudson v. Martin*, 34 Me. 339.

Plaintiff nonsuit.

SHEPLEY, C. J., and RICE, APPLETON, and CUTTING, JJ., concurred.

COVENANTS IN GUARDIAN'S DEED BIND HIM ALONE: *Young v. Lorain*, 51 Am. Dec. 463.

PROCEEDINGS UPON EXECUTORS' AND ADMINISTRATORS' BONDS form the subject of the note to *Commonwealth v. Stub*, 51 Am. Dec. 519-534.

FAILURE TO GIVE ADDITIONAL BOND AT SALE OF REALTY.—After great lapse of time and undisturbed possession of purchaser at administrator's sale of realty, the requisite bond will be presumed to have been given: *Stevenson's Heirs v. McReary*, 51 Am. Dec. 102. In *Palmer v. Oakley*, 47 Id. 42, it is held that a failure by the guardian to execute the additional bond, or to give due notice of the sale, did not invalidate the sale, for the purchaser need see only that the court had authority to direct the sale. The case of *Watts v. Cook*, 24 Kan. 279, cites the principal case as holding guardians' sales void in the absence of security, but prefers the rule of other cases, that such sale is erroneous or voidable merely.

LIABILITY OF SURETIES ON GENERAL BOND FOR ACTS SECURED BY SPECIAL BOND.—In *Board of Supervisors etc. v. Ehlers*, 45 Wis. 293, the principal case is cited to the point that where an officer is required to perform a duty which is special in its nature, and he is required to give a special bond for the faithful performance of such duty, in the absence of any declaration that the general bondsmen shall also be liable, no such liability attaches to them. A different rule prevails in Illinois. The case of *Wann v. People*, 57 Ill. 206, held that the sureties on the guardian's general bond were liable for rents of lands leased, notwithstanding the statutory requirement of a special

bond conditioned for the faithful application of such funds, distinguishing the principal case as not in point, on the ground that the Illinois statute required the general bond to be in double the amount both of the real and personal property, "thus showing the intention of the legislature to require security for all acts to be done by him in reference to either class of property, and recognising the fact that he would have to deal with both classes."

KNOWLES v. ATLANTIC & ST. LAWRENCE R. R. Co.

[38 MAINE, 55.]

COMMON CARRIERS AFTER COMPLETION OF TRANSIT ARE NOT LIABLE AS common carriers to owner of transported freight still on their cars, after notifying the owner of the completion of the carriage and that the freight must be at his risk.

COMMON CARRIERS RETAINING FREIGHT UPON THEIR CARS FOR OWNER'S ACCOMMODATION and at his special request, but without additional compensation, are liable only as gratuitous bailees or depositaries.

BAILEES WITHOUT REWARD ARE BOUND TO SLIGHT DILIGENCE ONLY, and are not answerable except for gross neglect.

BAILEE KNOWING GENERAL CHARACTER AND HABITS OF GRATUITOUS BAILEE, and the place where and the manner in which the goods deposited are to be kept, is presumed to assent that his goods shall be so treated, and can not maintain an action for loss or damage under such circumstances.

ACTION to recover damages for the loss of sixteen tons of hay. The plaintiff had a contract with the defendants for the transportation of his hay from Belgrade to Portland. The plaintiff determined to ship some hay from Portland to Boston. This hay was carried to Portland by the defendants. At that place Knowles engaged one Hamlin to supervise its shipment to Boston. After the completion of the transportation, and while the cars loaded with hay were still standing on the track at Portland, the defendants notified the plaintiff that their risk was terminated, that the hay was in good order, and must be in future at the owner's risk. The plaintiff desired that the hay should remain on the cars until shipped, and asked the company where it could be placed so as to be out of the way of the company until shipped. And he was informed that it would be better to run the cars upon another track down upon the wharf, where they would be out of the way and convenient for the shipment of the hay. The cars were run upon the wharf, but by whose order it did not appear. The next morning the wharf gave way from being overloaded with railroad iron, which had been there for several months, and most of the hay was lost. The case came up on report from *nisi prius*.

Lancaster and Baker, for the plaintiff.

Paine, for the defendants.

By Court, *RACE*, J. The evidence in the case shows that the original contract of the defendants, as common carriers, was fully executed to the satisfaction of the plaintiff. Howe, the forwarding agent of the railroad company, in his deposition states that "I told Mr. Knowles that the hay was now delivered in good order; that that was an end of our contract, and that it must now be at his risk against any damage. He replied that he acknowledged he received it in good order." The defendants, therefore, clearly are not liable as common carriers. The case provides that if, in the opinion of the court, the plaintiff is entitled to recover in any form of declaring, the defendants are to be defaulted. It is contended that they are liable as bailees or depositaries. The hay was permitted to remain upon the defendants' cars for the accommodation of the plaintiff, and at his special request. For this the defendant received no additional compensation nor consideration. At most, therefore, they were naked bailees or gratuitous depositaries.

The defendants contend that there was no responsibility upon them; that the whole risk of loss or damage to the hay was assumed by the plaintiff. Mr. Hamlin, who acted as agent for the plaintiff, testified that "Mr. Howe consented that the hay might remain on the cars (until it could be shipped), with the understanding that the whole risk should be on Mr. Knowles. Mr. Knowles asked at the time, 'Is there any risk?' or something like that. I told Mr. Knowles, Howe being present at the time, that there was a risk; that there was a risk in all cases. He asked, 'What risk?' I told him there was the risk of fire and water or rain; and there were other risks which could not then be thought of—there were a thousand risks. After a little more conversation it finally ended in Mr. Knowles assuming the whole risk; * * * that it should remain on the cars, and at his risk, until it was shipped."

This witness further testified that the cars on which the hay then was were on the principal track, from which they must be removed to make room for other trains. The track down on the wharf, and the one where the cars then stood, were the only tracks from which freight could be shipped.

This was on the sixteenth of July, 1851. On the eighteenth of the same July, the cars on which the plaintiff's hay was transported, having been removed, but under whose direction

does not appear, to the defendants' wharf, were precipitated into the dock by the breaking down of the wharf, in consequence of its being overloaded with railroad iron. This risk, the plaintiff affirms, was not contemplated by the parties, nor assumed by him, but was the consequence of the gross negligence of the defendants, and therefore they should sustain the loss. Being a bailee without reward, the defendants are bound to slight diligence only, and are not therefore answerable except for gross neglect: Story on Bailments, sec. 62; *Foster v. Essex Bank*, 17 Mass. 500 [9 Am. Dec. 168]. The authorities do not concur in a uniform standard by which to determine what constitutes gross negligence in a gratuitous bailee or depositary. Such a bailee, who receives goods to keep *gratis*, is under the least responsibility of any species of trustee. If he keeps the goods as he keeps his own, though he keeps his own negligently, he is not answerable for them. He is only answerable for fraud, or that gross neglect which is evidence of fraud: Just. Inst., lib. 3, tit. 15, sec. 3; *Coggs v. Barnard*, 2 Ld. Raym. 909, 914; *Foster v. Essex Bank*, *supra*; 2 Kent's Com. 561, 562.

Judge Story, in his work on bailments, section 64, says: "The depositary is bound to slight diligence only; and the measure of that diligence is that degree of diligence which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns. The measure, abstractly considered, has no reference to the particular character of an individual; but it looks to the general conduct and character of a whole class of persons; and so Sir William Jones has intimated on some occasions." He cites Jones on Bailments, 82, 83; *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Dorman v. Jenkins*, 2 Ad. & El. 256.

Both of the above rules, which on a strict analysis will not be found in any essential point dissimilar, are subject, under some circumstances, to modification. Thus when the bailor or depositor not only knows the general character and habits of the bailee or depositary, but the place where and the manner in which the goods deposited are to be kept by him, he must be presumed to assent, in advance, that his goods shall be thus treated; and if under such circumstances they are damaged or lost, it is by reason of his own fault or folly. He should not have intrusted them with such a depositary, to be kept in such a manner and place. Applying these principles to the case under consideration, and whatever view we may take of the extent of the plaintiff's liability by reason of his special con-

tract, the result can not be doubtful. That it was the expectation of both parties that the hay was to be shipped from the defendants' wharf is very apparent. That wharf was open to the inspection of the world. The plaintiff had the same opportunity to observe its condition as the defendants. The iron by which it was ultimately carried down had been deposited upon it months before. No additional incumbrance appears to have been placed upon the wharf by the defendants after the arrival of the hay before it finally broke down.

In view of all the facts in the case, and independent of the special contract testified to by Mr. Hamlin, we are of opinion that the defendants are not liable. Therefore, according to agreement, a nonsuit must be entered.

SHEPLEY, C. J., and TENNEY, APPLETON, and CUTTING, JJ., concurred.

GRATUITOUS DEPOSITARY LIABLE ONLY FOR GROSS NEGLIGENCE: See *Lloyd v. West Branch Bank*, 53 Am. Dec. 581, and cases cited in the note 586. The degree of care necessary to avoid the imputation of bad faith is estimated by the carefulness which the depositary uses towards his own property of a similar kind: *Id.*

LIABILITY OF COMMON CARRIER CEASES AFTER COMPLETION OF TRANSPORTATION and deposit in its depot. It is then liable for want of ordinary care only: *Thomas v. Boston etc. R. R. Corp.*, 43 Am. Dec. 444; and see cases cited in the note 450. See *Stone v. Waitt*, 52 Id. 621. It is bound to keep the goods a reasonable time: *Farmers' etc. Bank v. Champlain T. Co.*, 56 Id. 68.

WHAT DELIVERY OF GOODS SUFFICIENT TO RELEASE CARRIER'S LIABILITY: See *Fisk v. Newton*, 43 Am. Dec. 649, and note 650.

BUCKNAM v. THOMPSON.

[38 MAINE, 171.]

"RESIDE WITHOUT STATE," IN STATUTORY PROVISION THAT STATUTE OF LIMITATIONS shall not run in favor of any one during the time he shall be absent from and reside without the state, means only an established residence or home without the state.

DOMICILE REMAINS, NOTWITHSTANDING ABSENCES FOR SPECIAL PURPOSES AND FOR DEFINITE PERIODS, so long as the intention to return remains.

ASSUMPSIT upon promissory notes. The pleas, the general issue and the statute of limitations. The defendant was a subcontractor on railroads. After making the note, he went to Massachusetts and lived there with his wife several months. He and his wife then went to Vermont, where they also lived

for some time. When out of Maine he boarded, maintaining no private establishment of his own; and when his contracts were completed, he returned to this state. At the house of his wife's father he had a furnished room where he kept house before he left Maine. During a portion of his absence his wife occupied and used the room and furniture, and during the rest of the time they were retained. With regard to the statute of limitations in Maine, it is provided by section 28, chapter 146, of the revised statutes, that "if after any cause of action shall have accrued, and the person against whom it shall have accrued shall be absent from and reside without the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the action." The jury were instructed as stated in the opinion. The verdict was for the defendant, and the plaintiff excepted.

Ingalls, in support of the exceptions.

Gould, *contra*.

By Court, TENNEY, J. The jury were instructed that the phrase "and reside without the state" had reference to an established residence or home without the state; that the terms "established residence" and "home" were used to communicate the same idea. In order to suspend the operation of the statute of limitations, after the cause of action has accrued and the statute has begun to run, the person who sets it up in defense must not only be absent from but reside without the state: R. S., c. 146, sec. 28. This language is similar to that used in chapter 32, section 1, under the sixth head, providing that any person of the age of twenty-one years who shall hereafter "reside in any town" within this state for the term of five years together, etc., shall thereby gain a settlement in such town. The term "reside in any town" has received the judicial construction of this court and others, which fully sustains the instructions given to the jury: *Green v. Windham*, 13 Me. 225; *Wayne v. Green*, 21 Id. 357.

It was obviously the intention of the legislature to give to the creditor six full years, and no more, in which to bring his action for the recovery of a debt on simple contract, unless the evidence of debt be a witnessed note. And so long as the debtor has such a residence in the state as to make him subject to the jurisdiction of its courts, the statute would continue to run. If he had such a residence when the cause of action first accrued as constituted a home, it would remain such, notwithstanding his absences for special purposes, and for periods which were def-

nite as to time or purpose, so long as there should remain the intention to return.

Judgment on the verdict.

RICE, APPLETON, and CUTTING, JJ., concurred.

WHAT CONSTITUTES CHANGE IN DOMICILE: See cases cited in note to *Haggart v. Morgan*, 55 Am. Dec. 355; note to *City of New Albany v. Mackin*, 54 Id. 532.

DISTINCTION BETWEEN RESIDENCE AND DOMICILE: See note to *Frost v. Brisbin*, 32 Am. Dec. 427; *Haggart v. Morgan*, 55 Id. 350.

INTENTION TO REMAIN COMBINED WITH ACTUAL RESIDENCE CONSTITUTES DOMICILE: *Gravillon v. Richard's Ex'r*, 33 Am. Dec. 563; *Hart v. Lindsey*, 43 Id. 597; *Lyman v. Fiske*, 28 Id. 293.

MOODY v. WHITNEY.

[38 MAINE, 174.]

MEASURE OF DAMAGES IN TROVER IS VALUE OF PROPERTY AT TIME OF CONVERSION.

ORIGINAL OWNER REGAINING POSSESSION OF CONVERTED PROPERTY WITH ITS ACCRETIONS after conversion may recover the value of the property and its accretions if it be again converted, either by the original converter or by a stranger. *Per Tenney, J.*

DEMAND BY ORIGINAL OWNER AND REFUSAL BY CONVERTER, after converted property has passed into an improved condition, may be regarded as evidence of a conversion after the first taking, so as to admit of the owner recovering in trover the value of the property in its improved state. *Per Tenney, J.*

DAMAGES IN TROVER FOR TIMBER CUT AND HAULED are confined to the value of the timber at the time of its severance from the freehold, if the possession of the converter subsequent to that time has been uninterrupted.

TROVER for the value of mill-logs taken from land of the plaintiff. The evidence showed that the defendants cut the timber upon the plaintiff's land and hauled it two or three miles, and then deposited it upon the plaintiff's land near his mill. From this place the defendants rolled the logs into the stream and converted them to their own use. Verdict for the plaintiff, who excepted to the instruction that the measure of damages was the value of the logs when they first became personal property, that is, after the trees were cut down.

Ingalls and Ruggles, in support of the exceptions.

Lowell and Foster, contra.

By Court, TENNEY, J. The question presented in this case is whether the plaintiff, if entitled to recover in the action, can

have in damages the value of the timber at the place where it was deposited, which was two or three miles nearer the destined market than the spot where the trees were cut; or is he limited in damages to their value, where they were first severed from the freehold? In England, it has been held that the jury are not restricted to find as damages the mere value of the property at the time of the conversion, but they may find as damages the value at a subsequent time in their discretion: *Greening v. Wilkinson*, 1 Car. & P. 621. And the doctrine in the case of *West v. Wentworth*, 3 Cow. 82, is somewhat similar. But in Massachusetts the court say: "We adhere to the value at the time as a rule which works well; and its certainty is quite an equivalent for its occasional want of perfect exactness:" *Greenfield Bank v. Leavitt*, 17 Pick. 1 [28 Am. Dec. 268]. And it is believed that the rule in *Greening v. Wilkinson*, *supra*, has never been practically adopted in this state.

When the property has undergone some change after it was first taken, by additional labor being bestowed upon it, or by other materials being connected with it, the original owner has been allowed to take it, unless the identity of the thing be destroyed, as by annexing it to and making it a part of some other thing which is the principal, or by changing its nature from personal property to real estate. Cloth made into a garment, leather into shoes, trees squared into timber, and iron converted into bars may be reclaimed by the original owner in their improved condition: Vin. Abr., tit. Property, E, pl. 5; *Betts v. Lee*, 5 Johns. 348 [4 Am. Dec. 368]; *Curtis v. Groat*, 6 Id. 168 [5 Am. Dec. 204]. It has been held in some cases that, in an action of trover for property alleged to have been converted, the value of the property in its new and improved state is the measure of damages, thereby allowing the original owner to receive not only the value of the property when first converted, but all that has been added to it, provided its identity remains.

Brown v. Sax, 7 Cow. 95, was trover for logs cut on the plaintiff's land and afterwards drawn to the mill of the defendant, who converted the boards; the damages were held to be the value of the boards. In *Baker v. Wheeler*, 8 Wend. 505, it appeared that saw-logs, proved to have been the plaintiff's, were cut by the servant of the defendants, and hauled to Fort Edward, and sawed into boards and plank by them; in trover for the logs, the measure of damages was held to be the value of the sawed stuff and interest thereon. If in these cases there was no evidence of a distinct conversion after the logs had been

converted into boards and plank, the rule for the damages seems not only to be a departure from the principle that the damages shall be the value of the article at the time of the conversion, and interest thereon, but at variance with adjudged cases.

In the case of *Morgan v. Powell*, 3 Ad. & El., N. S., 282, which was trespass for taking coal from the plaintiff's mine, the damages were adjudged to be the value of the coal immediately after it was severed. The court relied upon and adopted the rule in *Martin v. Porter*, 5 Mee. & W. 351, which was, that the plaintiff was entitled to the value of the coal as a chattel "at the time the defendant began to take it away;" that is (as there stated), as soon as it existed as a chattel; which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth. And in *Wood v. Morewood*, 3 Ad. & El., N. S., 440, note, before Parke, B., he told the jury that they might give damages under the count in trover, the value of the coals at the time they became chattels, on the principles laid down in *Martin v. Porter*, *supra*. It is understood by the report of the case that the one last named was trespass for coals after they were severed, but the principle was held to apply to the action of trover for the same reason. And it is difficult to perceive why a more rigid rule should be applied to a defendant in an action of trover than to one of trespass. If, however, the original owner chooses to possess himself of the same property, with its accretions after the conversion, and it is again converted, there is no good reason why the taker, whether he is the one who originally took it, or a stranger, should not be held to pay the value which it had when last converted. And a demand by the owner and a refusal by the taker, after it had passed into an improved condition, might be regarded as evidence of a conversion after the first taking, which might admit of the same rule of damages: *Cushing v. Longfellow*, 26 Me. 306. A strong analogy exists between an article wrongfully converted, and afterwards changed into an improved state without losing its identity, and goods fraudulently mingled with other goods; in which case, if the mixture is undistinguishable and a new ingredient is formed, not capable of a just appreciation and division, according to the original rights of each, then the party who occasions the wrongful mixture must bear the whole loss. But if the party who would be entitled to the whole of the mixture makes no attempt to obtain the

whole, but resorts to his action of trover, the damages would be, not the value of all that which he might rightfully take, but only of that which was first wrongfully converted by the act of mingling.

In the case before us, the evidence tended to show that the defendants caused the timber standing on the plaintiff's land to be cut down and cut into mill-logs, and hauled two or three miles, and deposited on other land of the plaintiff. Farnsworth, one of the defendants, states in his letter to the plaintiff that he became interested in the timber as a purchaser of the other two defendants in the winter and spring of 1848, that Whitney and Kimball cut and hauled the logs, and that he was on the land before the timber was cut, and several times while they were cutting, and the timber was afterwards landed near Sabattis river, on the plaintiff's land, and subsequently the defendants rolled it into the river and converted it to their own use. A part of the lumber purchased by Farnsworth was surveyed in the woods, and a part on the plaintiff's land before it was turned into the stream. The jury must have found that all the defendants were engaged in cutting the timber from the stumps, and hauling therefrom, and the statements in the letter are not inconsistent with such finding. It does not appear that any possession was taken by the plaintiff of the timber after it was landed near his mill, although it was still upon his land; neither does it appear that he made any demand therefor at that place; and there is no evidence of a conversion by the defendants after they began to take away the timber from the place where it originally stood, it being constructively in their possession during the whole time.

Exceptions overruled. Judgment on the verdict.

APPLETON and CUTTING, JJ., concurred.

MEASURE OF DAMAGES IN TROVER, GENERAL RULE OF: See *Harker v. Dement*, 52 Am. Dec. 671, and note citing prior cases 680. The principal case is cited in *Sturges v. Keith*, 57 Ill. 459, to the point that the current or market value of property at the time of the conversion, with interest from that time until the trial, is the true measure of damages in trover; and in *Winchester v. Craig*, 33 Mich. 219, to the point that the rule of damages in trover for timber is the value of the timber at the time of severance from the freehold. As to the rule in Texas, see *Pridgin v. Strickland*, 58 Am. Dec. 124.

MEASURE OF DAMAGES IN TROVER WHERE VALUE ENHANCED BY WRONGDOER.—This subject receives a discussion at length in the note to *Baker v. Wheeler*, 24 Am. Dec. 70-88; see also the note, on title by accession, in *Pulcifer v. Page*, 54 Id. 586, under the head, "Bestowal of Labor upon Another's Property;" and the note to *Betts v. Lee*, 4 Id. 369. In trover, where the prop-

erty is taken by mistake, the rule of damages should be the same as in trespass; that is, the value where first taken.

THE PRINCIPAL CASE IS CITED TO THIS EFFECT in *Weymouth v. Chicago etc. Ry Co.*, 17 Wis. 555. To the point that the plaintiff is not to have the benefit of the additional labor bestowed upon the property in transporting it to a better market, it is cited in *Webster v. Moe*, 35 Id. 76. In *McLean County Coal Co. v. Long*, 81 Ill. 362, it is held that the measure of damages in an action of trover for coals taken from a mine and converted is the value of the coals at the mouth of the pit, less the cost of conveying the coal from the place where it is dug to the mouth of the shaft; citing the principal case as sustaining the same rule. So also in *Austin v. Huntsville etc. Co.*, 72 Mo. 545.

KIMBALL v. CITY OF BATH.

[38 MAINE, 219.]

TOWNS ARE NOT LIABLE FOR NECESSARY INTERRUPTION OF TRAVEL AND INCONVENIENCE TO PUBLIC in repairing streets and sidewalks.

TOWNS LEAVING THEIR STREETS OR SIDEWALKS WHILE UNDERGOING REPAIRS in such a condition as unnecessarily to expose those who may pass upon them to inconvenience or danger are as liable for injuries resulting as they are when their ways are permitted to become unsafe from want of repair.

PUBLIC STREETS OR SIDEWALKS WHILE UNDERGOING REPAIRS SHOULD NOT BE LEFT AT NIGHT without some temporary railing or other means of protection, or some beacon to warn passengers against such uncommon danger.

VERDICT WILL NOT BE SET ASIDE ON GROUND THAT DAMAGES are either excessive or inadequate, unless it is apparent that the jury acted under some bias, prejudice, or improper influence, or have made some mistake of fact or law.

MERE FACT THAT DAMAGES AWARDED BY JURY ARE GREATER than court would have awarded upon the evidence is not sufficient ground to set aside the verdict.

ACTION to recover damages for personal injuries received at night while passing along a sidewalk in Bath, from which a length of plank had been necessarily removed by the street commissioner for the purpose of repairing the street, thus leaving a break in the level of the sidewalk of from twelve to eighteen inches in extent. The injury received affected the tendon of the heel, and there was evidence to show that it would be permanent. Verdict was for the plaintiff, and assessed the damages at something over one thousand four hundred dollars. The case comes up on a motion by the defendants to set aside this verdict. The grounds of the motion are stated in the opinion.

Gilbert and Tullman, for the plaintiff.

Randall and Booker, for the defendants.

By Court, RICE, J. This is a motion to set aside the verdict on the ground that it was rendered against the evidence and the weight of the evidence in the case, and because the damages were excessive; and also on the ground that the jury was improperly selected and filled up. The objection to the manner of selecting and filling up of the jury we do not, however, understand is relied upon. As to the weight of the evidence, we do not think the jury erred in the conclusion that the way was defective at the time and place of the injury. But it is contended that inasmuch as the street was then undergoing repairs, the defendants are not liable. Towns are not only authorized but required by law to repair their public ways, including streets and sidewalks, so that they may be safe and convenient for those who may have occasion to pass and repass upon them. To do so effectually, it may be necessary to break up and remodel both the bed of the streets and the sidewalks, and at such times the public are necessarily subjected to some degree of inconvenience and insecurity. For such necessary interruption of travel and inconvenience to the public, towns are not liable. But while, for the purpose of repairs, they may thus break up and temporarily obstruct the passage over their public ways and sidewalks, they are not authorized to leave their streets or sidewalks, while undergoing repairs, in such a condition as unnecessarily to expose those who may pass upon them to inconvenience or danger. At such times, ways should not be left during the night without some temporary railing or other means of protection, or some beacon to warn passengers against such uncommon danger. By neglecting to adopt such reasonable precautionary measures for the safety of citizens and travelers, towns are equally culpable, and as liable as they are when their ways are permitted to become unsafe from want of repairs. Any other rule would enable negligent or vicious town officers to set pitfalls for the unwary with impunity. We think the evidence shows very clearly that the city authorities did not adopt suitable precautionary measures to protect, during the night-time, passengers upon the street where this accident occurred, while repairs were being made.

The damages assessed by the jury may have been greater than the court would have awarded upon the evidence. But the parties are entitled to the judgment of the jury, and not of the court, upon that question, and courts will not set verdicts aside on the ground that damages are either excessive or inadequate, unless it is apparent that the jury acted under some bias, prejudice, or

improper influence, or have made some mistake of fact or law; mere difference of judgment is not sufficient. There is nothing in this case to induce the belief that the jury were prejudiced or unduly biased, or that they made any mistake of fact or law. If they have erred in judgment, the error is not so palpable as to authorize the belief that they were controlled by any improper influences.

Motion overruled. Judgment on the verdict.

SHEPLEY, C. J., and TENNEY, APPLETON, and CUTTING, JJ., concurred.

EXCESSIVE DAMAGES, VERDICT WHEN SET ASIDE FOR: See *McDaniel v. Baca*, 56 Am. Dec. 339; *Nicholson v. N. Y. & N. H. R. R.*, Id. 390, and cases cited in the notes thereto; *Milburn v. Beach*, 55 Id. 91.

DUTY OF TOWN TO KEEP HIGHWAYS IN REPAIR: See *Troy v. Cheshire R. R. Co.*, 55 Am. Dec. 177, and cases cited in the note 190. Liability for failure: *Raymond v. City of Lowell*, 53 Id. 57, and cases cited in note 67.

LIABILITY OF MUNICIPAL CORPORATION FOR NEGLIGENCE AND UNSKILLFULNESS OF AGENTS in carrying on public work: See *Rochester W. L. Co. v. Rochester*, 53 Am. Dec. 316, note 320; *Lloyd v. Mayor of New York*, 55 Id. 347, and note 349.

LIABILITY OF TOWN FOR INJURY FROM DEFECTIVE HIGHWAY: *City of Tallahassee v. Fortune*, 52 Am. Dec. 358, and cases cited in note 364; see also *Radcliff v. Mayor of Brooklyn*, 53 Id. 357, and note 366.

MAINTAINING GUARDS AND LIGHTS ABOUT EXCAVATION IN STREET is not an obligation implied in a contract with a municipal corporation for excavating a street; but the corporation is primarily bound to keep the excavation properly guarded, and can not cast this obligation upon the contractor, unless he has expressly assumed it: *City of Buffalo v. Holloway*, 57 Am. Dec. 550, and see the note to this case; *Lloyd v. Mayor of New York*, 55 Id. 347, and note 349.

MCGILVERY v. STACKPOLE.

[36 MAINE, 233.]

COMPENSATION OF SHIP-MASTER CHANGES WHEN VOYAGE IS BROKEN UP BY SHIPWRECK, and he can no longer act in capacity of master.

SHIP-MASTER MAY RECEIVE WAGES OF MASTER AFTER SHIPWRECK during the time he stays by the wreck rendering services to protect and secure the owner's property, until the wreck and other property of the owners are sold.

SHIP-MASTER IS ENTITLED TO REASONABLE COMPENSATION AS AGENT OF OWNERS for services rendered and expenses incurred in securing and transporting or transmitting funds of the owners, after shipwreck and the termination of his services as master.

SHIP-MASTER BECOMES AGENT OF OWNERS AND ALL CONCERNED AFTER INTERRUPTION OF VOYAGE by shipwreck or other casualty.

SHIP-MASTER IS NOT ENTITLED TO COMPENSATION AFTER SHIPWRECK FOR SERVICES RENDERED or expenses incurred in his own behalf, and not in the implied employment of the owners.

BILL in equity by McGilvery and others, owners of seven eighths of the schooner *Friendship*, against Stackpole, the master of the vessel and owner of a one-eighth interest, to recover the portion of the proceeds of the wrecked ship and cargo due the plaintiffs. The master, after completing the sale of the vessel and cargo, and with the proceeds thereof, took passage in the first vessel that came along, which brought him to Panama, from which place he went to New York, and thence to his home in Maine. McGilvery, the ship's husband, and the other plaintiffs resided in San Francisco. Stackpole claimed that the proceeds of the sale of the vessel and cargo were more than covered by the amount due him from the plaintiffs for services and expenditures, and presented the following statement:

Amount paid out.....	\$706 93
Expenses upon the voyage to New York, and compensation for his services until his arrival there, four months and twelve days, at \$300 per month (this was the usual rate of wages of masters at the time and place of the vessel's fitting out and departure).....	1,320 00
Paid for passage from Panama to New York	100 00
	<hr/> \$2,126 93
Amount realized from sales of vessel and cargo and credited to the owners.....	\$1,539 00
Money received at San Francisco.....	300 00
	<hr/> \$1,839 00

The disputed items in this account were the passage-money from Panama to New York, and the compensation for services after the disposal of the vessel and stores at the place of shipwreck. The case is otherwise sufficiently stated in the opinion.

W. Davis, for the plaintiffs.

Crosby, for the defendant.

By Court, HOWARD, J. The ultimate purpose of this suit is to obtain an adjustment of accounts between the parties, as part owners of a vessel. The plaintiffs resided at San Francisco, California, and one of them, McGilvery, was the major and managing owner; and the defendant was both part owner and master. The case is submitted upon the bill, answer, and agreed

statement of facts. The vessel was fitted out at San Francisco, and sailed, laden with passengers, in July, 1850, for Guaymas, on the Gulf of California, thence to Mazatlan for orders to some port on the Pacific, and back to San Francisco. Before reaching the first port of destination she was wrecked, at Cape St. Lucas, on the coast of California. She was then sold by the master, with her apparel, furniture, and supplies. His conduct in managing the vessel and making the sale is conceded to have been unobjectionable, and such as the emergencies demanded. Soon afterward the defendant left with the avails of the sale for Panama, in a vessel bound for that port. Thence he crossed the isthmus and took passage to New York, and returned to his residence in this state. He now claims to retain the entire proceeds of the sale, which are less than the amount of his account, which was rendered as a part of his answer. This account is admitted to be correct, with the exception of an item of one hundred dollars, "paid for passage from Panama to New York," and a large portion of the item for services as master up to his arrival in New York, covering four months and twelve days. The vessel was stranded and wrecked in one month after the defendant's employment as master commenced. But his wages would continue so long as he continued to render services under the contract. When the voyage was broken up, and when he could no longer act in the capacity of master, his compensation would cease.

It appears that the master and mate staid by the wreck, and rendered important services to protect and secure the property of the owners, until it passed into other hands by the sale and delivery, on or about the twenty-fifth of August, 1850. To that time wages were paid to the mate by the master, with the approbation of the owners. To the same time it would be but just that the wages of the master should be computed. If he had rendered further service, or incurred expense in securing, transporting, or transmitting the funds belonging to the owners, he would for that be entitled to a just remuneration. For when the voyage is interrupted by shipwreck or other casualty, the master of the ship becomes of necessity an agent for the owners and all concerned, with authority to act for them, as if upon special request. But there is no evidence in this case upon which he can base any claim for such services or disbursements. In going to Panama, and thence to New York and to Maine, he was not in the employment of the owners, but was following his own bent; and though with funds belonging to them, yet not

in pursuance of any obligation arising from his relation as master or joint owner, but rather, as it would seem, in avoidance of palpable duties. And so if he encountered perils on the way, as is contended, it was not in an enterprise in which the part owners were concerned, or in the accomplishment of which they are to be affected.

We have wholly failed to perceive upon what principles of law or equity the defendant can be entitled to the amounts charged and claimed as "paid for passage from Panama to New York," and for services after the relation and duties of master had been terminated by events that had transpired at the place of disaster. After disallowing these sums, and deducting from the proceeds of the sales the balance of the account of disbursements as charged, and the compensation of the master, to be computed as before stated, and one eighth belonging to him as owner, there will remain in his hands six hundred and thirty-one dollars and eighty-one cents belonging to the plaintiffs. For that sum, with interest from the date of the writ, as claimed, they are entitled to a decree, with costs; and it is adjudged and decreed accordingly.

SHEPLEY, C. J., and TENNEY, APPLETON, and HATHAWAY, JJ., concurred.

LIABILITY OF OWNERS FOR ACTS OF MASTER IN USUAL COURSE OF EMPLOYMENT: *Hewitt v. Buck*, 35 Am. Dec. 243, and cases cited in the note.

POWER OF MASTER TO SELL SHIP AND CARGO IN CASES OF EMERGENCY: See *Pike v. Balch*, *infra*, and note citing prior cases.

PIKE v. BALCH.

[38 MAINE, 302.]

MASTER MAY SELL SHIP AND CARGO WHEN VOYAGE IS BROKEN UP by ungovernable circumstances; but the sale must be in good faith, for the good of all concerned, and in case of supreme necessity, which sweeps all ordinary rules before it.

MASTER OF SHIP ACTS FOR OWNERS AND INSURERS BECAUSE THEY CAN NOT ACT for themselves, and he is not justified in selling ship or cargo except in case of extreme necessity.

MASTER MUST COMMUNICATE WITH OWNERS BY ANY AVAILABLE MEANS in his power before selling ship and cargo in case of emergency, if this can be done before they will probably be lost.

MASTER MUST COMMUNICATE WITH OWNERS BY SUCH OTHER MEANS THAN MAIL as may be in his power, and by which notice may be speedily communicated to them, before selling ship and cargo in an emergency, when the calamity occurs in a place from which transmission of intelligence by mail would be obviously fruitless.

WHETHER MASTER HAS EXERCISED SOUND JUDGMENT AND DISCRETION IN SELLING SHIP AND CARGO in an emergency without communicating with the owners is a matter of fact for the jury.

AUCTION SALES ARE WITHIN STATUTE OF FRAUDS.

SALE AT AUCTION IS NOT COMPLETE UNTIL AUCTIONEER, acting as agent of both parties, enters the purchaser's name in his memorandum-book, or until some other of the requirements of the statute of frauds be performed.

PROPERTY DOES NOT VEST IN HIGHEST BIDDER AT AUCTION merely by being knocked off to him.

PROPERTY KNOCKED OFF TO BIDDER AT AUCTION DOES NOT VEST IN HIM if a higher bid was made and known to or recognized by the auctioneer, and the sale was reopened or proposed to be reopened if desired.

IT IS NOT DUTY OF AUCTIONEER TO REOPEN SALE AFTER KNOCKING OFF ARTICLE upon a mere suggestion that there has been a higher bid, but if there is an affirmation to that effect, and he is satisfied of its truth, it is then his duty to reopen the sale.

WHETHER TRANSACTION BETWEEN BIDDER AT AUCTION SALE AND ANOTHER, before the sale was closed, prevented fair competition at the sale, is properly left to the jury.

ONE PURCHASING CARGO AT SALE BY MASTER, BUT ACQUIRING NO TITLE, the sale being unnecessary, has no claim for salvage when sued at law by the owner for the possession of the property, though he might have such a claim if sued in admiralty.

EQUITABLE CLAIM FOR SALVAGE BY ONE PURCHASING CARGO OF WRECKED VESSEL at master's sale, but acquiring no title, the sale being unnecessary, is enforceable only in a court of admiralty jurisdiction.

REFLEVIN for lumber in the possession of Balch and others. The lumber had been shipped by the plaintiff on board the schooner Baltimore from Calais to New York. A week or more after leaving Calais the schooner went ashore on an island off Little Machias bay, and was severely damaged by the rocks and filled with water. A protest was noted and surveyors called. And the next day after the accident the captain ordered the schooner to be stripped of her canvas and rigging, and advertised the vessel and her cargo for sale, and sold them at public auction that afternoon. Under this sale the defendants claimed title to the cargo. Two points were raised: the necessity and the fairness of the sale. No attempt was made to notify the plaintiff, the original owner of the cargo, of the calamity. When the captain went to Machiasport to make his protest before a notary, he was told that there was a telegraph office which communicated with Calais at Machias. But the captain decided not to go there and give notice to the owners, considering it of no use, the cargo being in such great danger. The questions in this court arise from the second, third, seventh, eighth, ninth, and tenth instructions requested by the defendants, as follows:

"2. That the true criterion for determining the occurrence of the master's authority to sell is the inquiry whether the owners or insurers, where they are distant from the scene of stranding, can by the earliest use of the ordinary means to convey intelligence be informed of the situation of the vessel and cargo in time to direct the master before they will probably be lost." This instruction was given word for word, except that the court substituted "any available means in the power of the master" for "the earliest use of the ordinary means to convey intelligence." "3. That where a vessel is wrecked or stranded on an island in the open sea, and the vessel and cargo are in imminent peril of immediate loss, and there is a telegraph station within a distance of twenty miles by sea and land from the scene of the wreck or stranding, it is not the duty of the master to leave the vessel and cargo and proceed to such telegraph station, and communicate with the owners prior to a sale for the benefit of all concerned." This instruction was refused, the court observing that it was the province of the jury to decide whether the master exercised a sound judgment and discretion in this matter. "7. That if the jury should find that the sale of the cargo of the schooner Baltimore was fairly conducted, and the lumber was fairly knocked off to Stevens, for himself and the other defendants, as the highest bidder, for two hundred and forty-one dollars, and that was the fair value of the property and the highest bid heard and known by the auctioneer, although a higher bid may have been made, not loud enough for the auctioneer to hear, or not until the cargo had been knocked off to Stevens, the title to the cargo became thereby vested in them." This instruction the court gave, with the qualification that if a higher bid was really made, which was known to or recognized by the auctioneer, and the sale was reopened or proposed to be reopened if desired, the title to the cargo "would not vest in the defendants. "8. That if they shall find that the cargo was fairly knocked off to Stevens as the highest bidder, at the best price which the property was fairly worth in the exposed situation it was at the time of the sale, it would not be the duty of the auctioneer, on a suggestion that a higher bid had been made which he did not hear, to reopen the sale and offer the property again for a higher bid." This instruction was given, with the observation that it was not the duty of the auctioneer to reopen the sale upon a mere suggestion that there had been a higher bid; but if it was affirmed that a higher bid had been made, and he was satisfied that such was the case, it was then his duty to

reopen the sale. "9. That if they shall find that the cargo was fairly knocked off to Stevens as the highest bidder, for himself and the other defendants, the property thereby became vested in them, and any arrangement which Stevens may have made with Cole subsequent to its being knocked off, by the payment of a sum of money for the purpose of pacifying Cole, could not invalidate the sale, or deprive the defendants of the benefit of their purchase." This request was given, with the qualification or addition that if the transaction between Stevens and Cole took place before the sale was closed, then it was for the jury to say whether it was not a preventing of fair competition at the sale. "10. That if they shall find that the sale of the cargo to the defendants was invalid by reason of the master's not consulting the owner and taking his direction before the sale, and that the absolute title of the defendants thereby fails; and shall also find that the cargo was relieved from its peril and brought into a place of security, and saved by the enterprise, labor, expense, and risk of the defendants, they were entitled to a liberal reward out of the property saved, and had the right of possession of the property until their claim to salvage should be adjusted, settled, and paid according to the principles of maritime law." This instruction, for the purpose of the trial, the court refused to give. Verdict was for the plaintiff, with damages assessed at one dollar. An opinion was also expressed by the jury that the defendants were entitled to salvage, but this was stricken out. The case was submitted on report from *nisi prius*, it being agreed that if the court should deem the defendants entitled to salvage and the possession of the property until the salvage was settled and paid, then the plaintiff was to be nonsuited and the property returned; if they had not the right of possession, judgment was to be entered on the verdict, unless error was committed in refusing or modifying any of the instructions requested by the defendants, in which case a new trial was to be ordered.

F. A. Pike, for the plaintiff.

J. A. Lowell, for the defendants.

By Court, HATHAWAY, J. The questions presented in this case are upon certain requests made by the counsel for the defendants for specific instructions to the jury, and the instructions thereupon given by the presiding judge. "If the voyage be broken up in the course of it by ungovernable circumstances, the master, in that case, may even sell the ship or cargo. pro-

vided it be done in good faith, for the good of all concerned, and in case of supreme necessity, which sweeps all ordinary rules before it:" 3 Kent's Com. 173. The questions presented by the second request, and the rulings of the judge thereon, pertain to the duties of the master in such a contingency. The defendants' counsel complains that his second request was not entirely complied with, and that the instruction given was too severe in its requirements of the master. The instruction given was the same as requested, except that the judge substituted the words "by any available means in the power of the master" for the words in the request, to wit, "the earliest use of the ordinary means to convey intelligence." In case of necessity or calamity during the voyage, the master becomes the agent of the owners and insurers of the ship and cargo. He is bound to act in good faith, and for the benefit of all concerned, and is not justified in selling either ship or cargo but in case of extreme necessity: *N. E. Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387. "The merchant should be consulted if possible. A sale is the last thing the master should think of, because it can only be justified by that necessity which supersedes all human laws:" Abbott on Shipping, 7th Am. ed., 367, 368, and notes.

In *Hall v. Franklin Ins. Co.*, 9 Pick. 466, Putnam, J., delivering the opinion of the court, said: "The master's authority to sell must be confined to a case of extreme necessity, which leaves no alternative, which prescribes the law for itself, and puts the party in a positive state of compulsion to act. The master acts for the owners or insurers, because they can not have an opportunity to act for themselves. If the property could be kept safely until they could be consulted and have opportunity in a reasonable time to exercise their own judgment in regard to the sale, the necessity to act for them would cease." The same doctrine was held in *Gordon v. M. F. & M. Ins. Co.*, 2 Id. 249; and in *Peirce v. Ocean Ins. Co.*, 18 Id. 83; and in *Bryant v. Commonwealth Ins. Co.*, 13 Id. 543, in which case, the law as given by Abbott, that "the merchant should be consulted if possible," was cited by the court with approbation as authority. *American Ins. Co. v. Center*, 4 Wend. 45, was a case of technical total loss of a vessel insured, in which it was said that the right of a master to sell was more extensive in this country than in England. Chancellor Kent, remarking upon that case, approved the doctrine of *Hall v. Franklin Ins. Co.*, *supra*, as asserting and supporting the stricter doctrine of the English law, which he held to be "best supported by reason and author-

ity:" 3 Kent's Com., 5th ed., 173, note d. In *Robinson v. Georges Ins. Co.*, 17 Me. 131 [35 Am. Dec. 239], Emery, J., delivering the opinion of the court, said: "Notwithstanding our desire to make all just allowances for the difficulty of deciding absolutely right by masters of vessels, in embarrassing cases occurring in foreign countries, we consider that the authority of the master to put in peril the interests of the owner in the ports of the United States must be narrowly watched."

The instruction requested is in the language used by Wayne, J., in his opinion in the case of *N. E. Ins. Co. v. Brig Sarah Ann*, before cited, and undoubtedly, as a general rule, "the earliest use of the ordinary means to convey intelligence" in such cases would be the most available and effectual means in the power of the master; but all general rules are subject to exceptions, and where the calamity occurs in a place so situated and limited in its ordinary means of transmitting intelligence by mail that a resort thereto would be obviously fruitless and nugatory, it is not going beyond the requirements of well-established law to hold the master bound to avail himself of such other means as may be in his power, and by which notice might be speedily communicated to the owners. The subject of the third request was entirely matter of fact to be considered and determined by the jury, and the request was properly refused.

The seventh, eighth, and ninth requests were concerning the duties of the auctioneer, and the effect of his proceedings. Auction sales are within the statute of frauds: *Davis v. Rowell*, 2 Pick. 64 [13 Am. Dec. 398]. "No contract for the sale of any goods, wares, or merchandise, for the price of thirty dollars or more, shall be allowed to be good, unless the purchaser shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain be made and signed by the party to be charged by such contract, or by his agent thereunto by him lawfully authorized:" Stat., c. 136, sec. 4. The auctioneer is the agent of both parties, and is bound to act for them both with equal fidelity; and his entry of the name of the purchaser on his book or memorandum containing the particulars of the contract is a sufficient signing within the statute. Until some one of those things required by the statute as necessary to complete the contract of sale be done, a time for repentance remains, and the sale is not perfected: *Kenworthy v. Schofield*, 2 Barn. & Cress. 945; *McComb v. Wright*, 4 Johns. Ch. 659; *Cleaves v. Foss*, 4

Greenl. 1; *Alna v. Plummer*, Id. 258. Neither of those things necessary to complete the contract of sale having been done, the business remained unfinished and open for further proceedings.

The instructions given upon the eighth request were quite favorable enough for the defendants, and were unexceptionable.

The seventh and ninth requested instructions were erroneously given, and might have furnished good cause for exceptions to the plaintiff if the verdict had been against him. The property did not become vested in the bidder by being fairly knocked off to him. There was something more to be done before his rights of property became vested. There can be no doubt of the propriety of the qualification to the seventh request; and the qualification of the ninth was correctly given according to the doctrine of *Goodwin v. Morse*, 25 Me. 140, which is sound law; the question was properly left to the jury.

By the tenth request the defendants seem to make a contingent claim as salvors. "Salvage is the compensation that is to be made to other persons by whose assistance a ship or its lading may be saved from impending peril, or recovered after actual loss:" Abbott on Shipping, 554. This case presents the defendants as claiming to be the absolute owners of the property, not as claiming a lien upon it for salvage. They saved it for themselves, not for the plaintiff. If this were a proceeding by the plaintiff in a court of admiralty jurisdiction to obtain possession of the property saved, and the court believed that although the sale was invalid by fault of the master, yet that on the defendants' part the purchase was *bona fide*, there might perhaps be a decree for possession on condition of paying the defendants their disbursements and expenses in saving the cargo according to the rules by which courts of admiralty are governed in such cases, as stated by Story, J., at the close of his opinion in case of the *Brig Sarah Ann*, 2 Sumn. 206; unless the conduct of the defendants in the matter had been such as to deprive them of the benefit of such equitable consideration. It appears by the testimony of Wilson that when the plaintiff's title and claim to the property were made known to the defendants, and the plaintiff offered to pay their disbursements and the expenses of getting the lumber on shore, and sought information of the amount, the plaintiff's title was not recognized by the defendants, his offer was not accepted, the information sought was not given, and the defendants claimed the lumber as their own property. The defendants virtually tendered an issue upon the mere title, and the plaintiff had his right of action at law: Ab-

bott on Shipping, 7th Am. ed., 556, and notes; *Clark v. Chamberlain*, 2 Mee. & W. 78.

In the language of the tenth request, "if the sale was invalid by reason of the master's not consulting the owner and taking his direction before the sale, and the absolute title of the defendants thereby fails," then the necessity for the sale did not exist: *Hall v. Franklin Ins. Co.*, before cited. And if the master sold without necessity, he sold without authority, and the persons who bought under such circumstances would not acquire a title as against the merchant, but must answer to him for the value of the goods: Abbott on Shipping, 5th Am. ed., 368, and notes. Upon the facts presented in this case, if the defendants have any equitable claim for compensation for services and disbursements in saving the cargo, their remedy is to be sought in a court of admiralty jurisdiction. In the rulings of the judge who presided at the trial, no error is perceived by which the defendants were aggrieved, and as agreed by the parties, there must be judgment on the verdict.

Exceptions overruled. Judgment on the verdict.

SHEPLEY, C. J., and TENNEY and HOWARD, JJ., concurred.

POWER OF MASTER TO SELL SHIP AND CARGO IN CASES OF EXTREME NECESSITY: See *Rugely v. Sun Mutual Ins. Co.*, 56 Am. Dec. 603; *Hassam v. St. Louis etc. Ins. Co.*, Id. 591, and prior cases in this series cited in the note 601; *Myers v. Baymore*, 49 Id. 586.

AGREEMENTS TENDING TO PREVENT FAIR COMPETITION AT AUCTION SALE: See *James v. Fulcrod*, 55 Am. Dec. 743, and prior cases collected in the note 755; *Hamilton v. Hamilton*, 46 Id. 58. As to the employment of by-bidders and puffers, and its effect upon the validity of the sale, see *Towle v. Leavitt*, Id. 195; *Staines v. Shore*, Id. 492, and prior cases cited in the note.

AUCTIONEER IS AGENT OF BOTH PARTIES, and his memorandum in writing is sufficient to take the case out of the statute of frauds: See *Craig v. Godfroy*, 54 Am. Dec. 299, and prior cases collected in the note 300.

AUCTIONEER'S MEMORANDUM OF SALE, TO TAKE SALE OUT OF STATUTE OF FRAUDS, must be contemporaneous with the sale: *Craig v. Godfroy*, 54 Am. Dec. 299; *Davis v. Rowell*, 13 Id. 398, note 399; or as early as practicable thereafter: *Episcopal Church v. Wiley*, 30 Id. 386; the auctioneer's clerk can not make the requisite memorandum: *Meadows v. Meadows*, 15 Id. 645.

SALVAGE, REASONABLE COMPENSATION FOR, IMPLIED IN ABSENCE OF EXPRESS CONTRACT: *Creevy v. Cummings*, 48 Am. Dec. 444.

DONAHOE v. RICHARDS.

[38 MAINE, 379.]

PUBLIC OFFICER ACTING IN GOOD FAITH IS NOT LIABLE FOR ERRONEOUS JUDGMENT in a matter submitted to his determination.

STATUTORY POWERS AND DUTIES OF SUPERINTENDING SCHOOL COMMITTEE RELATIVE TO EXPULSION OF PUPILS being of a semi-judicial character, for an honest though erroneous decision they are not liable to the expelled pupil.

RIGHT TO PRESCRIBE GENERAL COURSE OF INSTRUCTION AND TO DIRECT WHAT BOOKS SHALL BE USED being reposed by the legislature in a school committee, no power of revision being conferred upon any other tribunal, includes the power to make injudicious and ill-advised selections.

COURTS CAN NOT INHIBIT OR ANNUL LEGISLATION MERELY BECAUSE IT IS UNWISE, IMPOLITIC, OR IMMORAL.

SCHOOL COMMITTEE, BY EXPULSION OR OTHERWISE, MAY ENFORCE OBEDIENCE TO ALL REGULATIONS within the scope of their authority, to select and prescribe what books shall be used in schools.

REQUIREMENT THAT PROTESTANT OR ANY VERSION OF BIBLE BE READ IN PUBLIC SCHOOLS, and imposition of penalty of expulsion in case of refusal, is not in violation of either the letter or spirit of the constitution.

REQUIREMENT THAT BIBLE BE USED IN PUBLIC SCHOOLS MERELY AS READING-BOOK is not an interference with religious belief.

REQUIREMENT OF USE OF PARTICULAR VERSION OF BIBLE AS READING-BOOK by pupils who may conscientiously believe it to have been erroneously made, is not an imposition of hurt, molestation, or restraint upon religious worship or sentiments, nor of a religious test; nor is it a subordination or preference of any sect or denomination to another within the constitutional provisions of Maine.

PROVISION OF MAINE CONSTITUTION THAT "NO ONE SHALL BE HURT, molested, or restrained in his person, liberty, or estate for worshiping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace nor obstruct others in their religious worship," was intended to prevent pains and penalties, imprisonment, or the deprivation of social or political rights being imposed as a penalty for religious professions and opinions.

PUPIL CAN NOT BE EXCUSED FROM READING IN DULY PRESCRIBED TEXT-BOOK because of conscientious religious scruples; and if expelled for refusal to read in such book, he has no action for damages.

CONSCIENTIOUS BELIEF OF RELIGIOUS DUTY FURNISHES NO LEGAL DEFENSE to the doing or refusing to do what the state, within its constitutional authority, may require.

LAW IS NOT UNCONSTITUTIONAL BECAUSE IT MAY PROHIBIT WHAT CITIZEN MAY CONSCIENTIOUSLY THINK RIGHT or require what he may conscientiously think wrong.

CASE by Bridget Donahoe, a minor, by her father as *prochein ami*, against the superintending school committee of the town of

Ellsworth, to recover damages for maliciously, wrongfully, and unjustifiably expelling her from a district school in that town. The school committee had regularly prescribed the Protestant version of the English bible to be used as a reading-book in the public schools of Ellsworth. The plaintiff, a pupil in one of the schools, refused to read in this book, and was expelled for this reason. A nonsuit was granted by the judge of the *nisi prius*, and exceptions taken under agreement that if in the opinion of this court a cause of action was stated, the case should stand for trial; otherwise the nonsuit was to be confirmed.

Rowe and Bartlett, for the plaintiff.

J. A. Peters and R. H. Dana, jun., for the defendants.

By Court, APPLETON, J. It was decided in *Donahoe v. Richards*, 38 Me. 376, that the expulsion of a minor child from the public schools by the superintending school committee, even if wrongful, was no violation of any legal right of the parent, and would not entitle him to maintain an action therefor; that the wrong in such case is committed against the child, and that if entitled to redress, it must be sought in its name. The present suit is by the minor for her alleged wrongful exclusion from school in consequence of her refusal to read in one of the books directed by the defendants, who are the superintending school committee of the town of Ellsworth, to be used in the school of which she was a member.

The questions involved in the decision of this case are their liability, when acting in good faith in the discharge of their duty, to an action at the suit of the individual expelled, even if the exclusion was erroneous; their powers as to the selection of books to be used; their legal right to expel a scholar in case of a refusal to read in a book by them prescribed; the constitutionality of a regulation by which the bible or any version of it is designated as one of the books to be used.

The education of the people is regarded as so much a matter of public concern, and of such paramount importance, that the constitution of this state imposes on the legislature the duty to make suitable provisions for the support and maintenance of the public schools. "A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people, to promote this important object the legislature are authorized and it shall be their duty to require the several towns to make suitable provision at their own expense for the support and maintenance of public schools:" Const., art. 8.

This requirement of the constitution can only be rendered effectual by the enacting of fitting and appropriate laws. Different acts have been passed at different times to carry into full effect this constitutional duty. In 1850 the previous legislation of the state on this subject was repealed, and new enactments passed, which still remain in force, and under which the defendants justify their acts.

1. The defendants are public officers, discharging important public trusts, and in the exercise of this authority, necessarily clothed to a certain extent with judicial powers. In doing the act of which complaint is made, they were acting under the obligations of official duty and the sanctions of an oath. The plaintiff claims that when thus acting, and without malice or intentional wrong on their part, they can be held responsible in damages for an erroneous decision, an error of judgment either as to the facts or as to the consequences rightly deducible therefrom. In fine, that they should be held liable if they erred in judgment upon a matter submitted to their determination, and upon which they were bound to act.

By the act of 1850, c. 193, art. 5, sec. 1, the powers and duties of superintending school committees are defined and established, and the authority is given them "to expel from any school any obstinately disobedient and disorderly scholar, after a proper investigation of his behavior, if found necessary for the peace and usefulness of the school; also to restore him to the school on satisfactory evidence of his repentance and amendment." After investigation they are to determine what is to be done. If in the discharge of their duty in good faith and integrity they err, it is only what is incident to all tribunals. To hold them legally responsible in such a case would be to punish them for the honest convictions of the understanding in the decision of a matter submitted to them, and upon which, having assumed jurisdiction, they could not rightfully withhold a decision. The general principle is established, by an almost uniform course of decisions, that a public officer, when acting in good faith, is never to be held liable for an erroneous judgment in a matter submitted to his determination. All he undertakes to do is to discharge his duty to the best of his ability, and with integrity. That he may never err in his judgments, or that he may never decide differently from what some other person may think would be just, is no part of his official undertaking.

The plaintiff rests her right to recover upon the case of *Lincoln v. Hapgood*, 11 Mass. 350, where it was held that an action could

be maintained against the selectmen of a town for refusing to receive the vote of a qualified elector, although not chargeable with malice. This decision, though regarded as law in Massachusetts and in this state, is at variance with the law as established in England, and in most of the states of this Union in which the question has arisen. In the opinion of Parker, C. J., in *Lincoln v. Hapgood*, *supra*, reference is made to *Harmon v. Tappenden*, 1 East, 563, where the law was held otherwise. The doctrine of *Harmon v. Tappenden*, *supra*, was subsequently affirmed by Abbott, C. J., in *Cullen v. Morris*, 2 Stark. 577. In *Jenkins v. Waldron*, 11 Johns. 114 [6 Am. Dec. 359], the court say that in their opinion it "would be opposed to all the principles of law, justice, and sound policy to hold that officers called upon to exercise their deliberate judgments are answerable for mistakes in law, either civilly or criminally, when their motives are pure and untainted with fraud or malice." Such, too, was regarded as the law in New Hampshire, in *Wheeler v. Patterson*, 1 N. H. 89 [8 Am. Dec. 411]; and in Tennessee, in *Balls v. Balls*, 8 Humph. 225.

But without impugning the authority of *Lincoln v. Hapgood*, *supra*, in reference to the point there decided, it may be sufficient to remark that the doctrine therein set forth presents no such equitable considerations in its favor as to require it to be extended to cases in which it is not directly applicable. Such, indeed, seems to have been the view of the court of the state in which that case was decided in other instances where its authority was invoked. In *Spear v. Cummings*, 23 Pick. 224 [34 Am. Dec. 53], it was held that the teacher of a town school was not liable to an action by a parent for not instructing his children; and in the opinion delivered, the court remarked that the principle established in *Lincoln v. Hapgood*, *supra*, "is not applicable to the case under consideration, and can not be relied on as a precedent." In *Griffin v. Rising*, 11 Met. 339, it was decided that no action could be maintained against assessors by an individual who is liable to taxation for their omission to tax him, whereby he lost his right to vote at an election, unless it be shown affirmatively that they omitted to tax him willfully, purposely, or with a design to deprive him of his vote. In *Wilkes v. Dinsman*, 7 How. 89, it was held, in a suit brought by a marine against the commanding officer of a squadron, that the commander was a public officer invested with certain discretionary powers, and that he could not be made answerable for any injury when acting within the scope of his authority, and not in-

fluenced by malice, corruption, or cruelty; that his position was *quasi* judicial; that the acts of a public officer in public matters, within his jurisdiction, and where he has discretion, are to be presumed legal; and that it is not enough to show he committed an error in judgment, but it must have been a malicious and willful error. The plaintiff would seem not entitled to recover, according to the general principles and analogies of the law. But the very question here presented arose in New York, in *Stephenson v. Hall*, 14 Barb. 222, in which it was held that the action could not be maintained. In delivering the opinion of the court, Allen, J., says: "The trustees have the power and it is their duty to dismiss or exclude a pupil from the school, when in their judgment it is necessary for the good order and proper government of the school so to do. They had no personal interest to gratify or benefit, they were acting for the public without salary or reward. They acted, as they believed, judiciously, in a matter of discretion, pertaining to the duties of their office. If they erred in judgment in such a case, they ought not to be liable to an action." The defendants, therefore, however much they may have misjudged their duty, are not liable if they acted honestly.

2. By the act before referred to, under article 5, section 1, among various powers and duties conferred upon the superintending school committee, they are empowered, "fourthly, to direct the general course of instruction, and what books shall be used in the respective schools."

The right to prescribe the general course of instruction and to direct what books shall be used must exist somewhere. The legislature have seen fit to repose the authority to determine this in the several superintending school committees. They may therefore rightly exercise it. The power thus conferred is in the most literal and explicit terms. The power of establishing by-laws is given to the several city governments of the state. This court is authorized to establish rules for the regulation of business in court. The only restriction in either case is that the by-laws and rules thus established shall not conflict with the statutes and constitution of the state. Within these limits they have all the force and vigor of legislative enactments. So in this case the same general and extensive power over this subject-matter is granted, and the course of studies and the books prescribed by the superintending school committee are to be regarded, as if established and prescribed by the act of the legislature. The power of selection is general and unlimited

It is vested in the committee of each town. It was neither expected nor intended that there should be entire uniformity in the course of instruction or in the books to be used in the several towns in the state. The very distribution of power manifestly shows that no such intention could have existed. The manner of its exercise must depend upon the judgment, discretion, and intelligence of the different committees. The actual selection at any given time and place depends upon the views and opinions of those upon whom the law devolves this duty. The power of ultimate decision must rest somewhere. No right of appeal is granted. No power of revision is conferred upon any other tribunal. Because the right of selection may be injudiciously or unwisely exercised, it by no means follows that it does not exist. This court can not make an affirmative rule as to what books shall be selected, nor a negative rule prescribing what shall not be used, if the right to selection be exercised in conformity with existing statutes and the constitution. The power of selection includes that of making injudicious and ill-advised selections; but there being no right of appeal, the selection is binding and conclusive. But the argument is pressed upon our consideration that immoral and irreligious books may be selected—that children may be required to read the works of Strauss or of Bentham or of Hume. This may be so. But the exercise of power, which is the subject of complaint in this case, is not in that direction, nor is the danger that it will be regarded as very urgent. The legislature may undoubtedly make such a selection. So they may repeal any statute by which a crime, however atrocious, is punished, for the right to impose a punishment includes the right to modify or repeal it. If the legislature, acting within constitutional limitations, should prescribe a course of instruction, however unwise, or books, however immoral, we are not aware of any power on the part of the court to interfere. The abuse of a power is no argument against its existence. It is of the essence of all power that it may be exercised unwisely or abused by those to whom it is intrusted. In the case supposed, the remedy is obvious and at hand. It is to be found where are found all the remedies for bad legislation—in the people. They elect those by whom the laws are passed. If the legislature enact laws unwise, impolitic, removing the restraints on vice, or giving impunity to crime, the people have only to choose those for their agents by whom such legislation will be repealed. But if they will immoral legislation, that murder shall remain unpun-

ished, or that the reading-books of the young shall be such as are adverse to the recognized principles of morality, no power is given to this court to inhibit or annul such legislation. So if the committee, acting within their authorized limits, shall make an unwise and improper selection of books, the power to correct their misdoings is with those by whom they were elected, and whose wishes they have violated. This government rests upon the great constitutional axiom, that "all power is inherent in the people." It fully and implicitly relies upon them, and if that reliance fails, then this experiment of self-government must be regarded as a failure.

3. If the right to direct the course of instruction and the books to be used is given, the right to enforce obedience to the determining power must manifestly exist or the determination will be ineffectual. It would be worse than idle to grant this power to direct if any one can set at naught the action of the committee.

The committee may enforce obedience to all regulations within the scope of their authority. If they may select a book, they may require the use of the book selected. If the plaintiff may refuse reading in one book, she may in another, unless for some cause she is exempted from the duty of obedience. If she may decline to obey one requirement, rightfully made, then she may another, and the discipline of the school is at an end. It is for the committee to determine what misconduct requires expulsion. That is expressly left to their determination. "It may be urged," says Shaw, C. J., in *Sherman v. Charlestown*, 8 Cush. 165, "that if this power exists in school committees, they may exercise it arbitrarily and unjustly; but the answer is, that such a power must exist somewhere, that all power conferred for good may be abused to wrong uses; but this power is intrusted to bodies under all the responsibilities which can bind any public officers to the faithful performance of duty in such a trust. They are chosen by their fellow-citizens for their supposed capacity, impartiality, and fitness, and they are liable to be removed by the same constituents." It is not necessary to consider whether they acted wisely or not; if they acted in good faith in the exercise of their duty, they must be regarded as most clearly within the principles established in *Stephenson v. Hall*, 14 Barb. 222; *Wilkes v. Dinsman*, 7 How. 89.

4. The plaintiff seeks to avoid those conclusions by denying that the book selected was one in which she could be constitutionally compelled to read upon pain of expulsion in case of her

refusal to obey. She claims exemption from the general duty of obedience from the particular character of the book in which she was required to read. The question therefore is, whether, if the legislature should by statute direct any version of the bible to be read in schools, and should impose the penalty of expulsion in the case of refusal, such statute would be a violation of the constitution.

The use of the bible as a reading-book is not prohibited by any express language of the constitution. Is its use for that purpose in opposition to the spirit and intention of that instrument? If it be not, if it be a book which may be directed within the spirit and meaning of the constitution to be used in schools, it is obvious that its use may be required of all; for a regulation which any scholar may violate with impunity would cease to have the force and effect of a rule. The case finds that the superintending school committee directed that the English Protestant version should be used in all the public schools of Ellsworth, and that all who were of sufficient capacity to read therein should be required to read that version in school. This is the requisition of which complaint is made.

The common schools are not for the purpose of instruction in the theological doctrines of any religion or of any sect. The state regards no one sect as superior to any other, and no theological views as peculiarly entitled to precedence. It is no part of the duty of the instructor to give theological instruction; and if the peculiar tenet of any particular sect were so taught, it would furnish a well-grounded cause of complaint on the part of those who entertained different or opposing religious sentiments.

But the instruction here given is not in fact, and is not alleged to have been, in articles of faith. No theological doctrines were taught. The creed of no sect was affirmed or denied; the truth or falsehood of the book in which the scholars were required to read was not asserted. No interference, by way of instruction, with the views of the scholars, whether derived from parental or sacerdotal authority, is shown.

The bible was used merely as a book in which instruction in reading was given. But reading the bible is no more an interference with religious belief than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmance of the pagan creeds. A chapter in the koran might be read, yet it would not be an affirmation of the truth of Mohammedanism, or an interference with religious faith.

The bible was used merely as a reading-book, and for the information contained in it, as the koran might be, and not for religious instruction; if suitable for that, it was suitable for the purpose for which it was selected. No one was required to believe or punished for disbelief, either in its inspiration or want of inspiration, in the fidelity of the translation or its inaccuracy, or in any set of doctrines deducible or not deducible therefrom.

It is made, by chapter 193, section 2, article 7, the duty of all the instructors of youth, whether in public or private institutions, "to take diligent care and exert their best endeavors to impress on the minds of children and youth committed to their care and instruction the principles of morality and justice, and a sacred regard to truth; love to their country; humanity and universal benevolence; sobriety, industry, and frugality; chastity, moderation, and temperance; and all other virtues which are the ornaments of human society." It will not be insisted that this duty, so beautifully set forth, is other than in entire conformity with the constitution. Neither is it claimed that the bible, in any of its translations, is adverse to sound morality, or those virtues here designated as proper to be inculcated. The plaintiff, indeed, makes no objection to the bible as a book which she may not rightfully be required to read in schools, but only to a particular translation. Indeed, the report finds that she was willing to read from the Douay version. It is apparent that it is highly desirable that in the same class there should be a uniformity of books to be used. But if the book is proper, if consonant to the soundest principles of morality, then is there any translation which can be justly deemed adverse to those principles? Does the version in which the plaintiff was willing to read contravene sound morality, even in the judgment of the defendants? Does the version which the defendants required to be read conflict, even in the opinion of the plaintiff, with pure morality? If not, then the book itself, alike in the judgment of the plaintiff and the defendants, is one which may be read without reasonable grounds of objection in schools. But while the book itself would seem to be unobjectionable, the controversy arises merely from a difference between the version directed by the defendants to be used and that in which the plaintiff was willing to read. It is the remark of a profound scholar, that there is hardly a sentence in any of the best English authors about the meaning of which, if a question of property were to depend upon its construction, a doubt might not be raised.

The unavoidable difficulties of language, its necessary and irremediable imperfections, are enhanced in this case from the circumstance that the bible was first written in a foreign tongue. The readings of the various canonical books are almost innumerable, amounting in the New Testament alone to above fifty thousand, the inevitable result of transcription by individuals at different and successive times. They consist, for the most part, in the omission or insertion of words, in transpositions, or in differences of termination where the same word is used. Although the various readings are thus numerous, yet but in few instances do they affect the meaning. There may be a difference in the authority given to different readings, so that probably no two critical scholars could be found who would agree upon an entire identity of text. Besides variation of the text, even when that is identical, the meanings to be attached to the same word are frequently numerous, variant, and dependent upon its position in the text and its connection with what precedes and follows. Which, therefore, may in fact be the more accurate of various versions is a question of scholarly erudition, in respect to which there will be a difference of opinion resulting from the different education and prejudices of individuals, as well as from the intrinsic and ineradicable difficulties of the subject.

When the translation is accomplished, and an agreement as to the English word is established, the meaning is still a matter of conflict, as is evidenced by the dogmatic theology of numerous and discordant sects, who, all resorting to the same common source of instruction, differ so essentially in the meaning to be given to its language. Such being the case, all that is shown by the selection of one version is simply a preference of one over another, when there must from necessity be a difference of opinion. But in case of numerous translations of a work in itself unobjectionable, a preference may be expressed and acted upon without infringing upon the just rights of others. All that is done is, that a committee for the time being prefer one to another. Both, undoubtedly, may be used in schools, or both may be excluded therefrom. Or, as uniformity may be desirable, one committee may direct the use of one and another of a different version, according to their respective views of expediency. The Catholics deny the accuracy of portions of the version commonly used by Protestants. The Protestants assert that in some respects the Douay version is erroneous. Different sects of the Protestants express dissatisfaction, in some instances, with both. The adoption of one is no authoritative sanction of purity of text

or accuracy of translation. School committees could rarely be found competent to settle those questions. It is simply the adoption of a particular version of a work, which, from the idiomatic English of the translation, and the sublime morality of its teachings, furnishes the best illustration which the language affords of pure English undefiled, and is best fitted to strengthen the morals and promote the virtues which adorn and dignify social life.

The controversy seems to resolve itself into the inquiry, whether there is anything in the constitution which, in case of different translations of a work fitting and proper for schools, forbids the requirement of the use of a particular version as a reading-book by those who may conscientiously believe it to have been in some respects erroneously made. If so, it is obvious that the particular version must be entirely prohibited, for if the plaintiff has a constitutional right to be absolved from a regulation of the school requiring its reading because it is in conflict with her religious conscientious belief, it is not easy to perceive why she has not an equally valid ground of objection to hearing it read. If so, as others may have their consciences, it follows, not merely that no translation of the bible can be used, but that no book can be used which may contain any proposition opposed to the conscientious belief of any scholar.

The language of the constitution upon which the learned counsel for the plaintiff relies, in support of the grounds by him taken in argument, is found in article 1, section 3, and is in these words: "All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no one shall be hurt, molested, or restrained in his person, liberty, or estate for worshiping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship; and all persons demeaning themselves peaceably, as good members of the state, shall be equally under the protection of the laws, and no subordination nor preference of any sect or denomination to another shall ever be established by law, nor shall any religious tests be required as a qualification for any office or trust under this state."

The clause in the constitution upon which reliance is specially placed is that "no one shall be hurt, molested, or restrained in his person, liberty, or estate for worshiping God in the manner and season most agreeable to the dictates of his own con-

science, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship." The object of this clause was to protect all—the Mohammedan and the Brahmin, the Jew and the Christian, of every diversity of religious opinion, in the unrestrained liberty of worship and religious profession, provided the public peace should not thereby be endangered nor the worship of others obstructed. It was to prevent pains and penalties, imprisonment or the deprivation of social or political rights, being imposed as a penalty for religious professions and opinions. .

It was held by the supreme court of Massachusetts, in *Thurston v. Whitney*, 2 Cush. 104, that the rejection of a witness as incompetent by reason of his want of religious belief was not a violation of the second article of the bill of rights, which is similar in its language to the constitutional provisions in this state, to which reference has been made. "It was," says Wilde, J., "intended to prevent persecutions by punishing any one for his religious opinions, however erroneous they might be."

Another clause in the constitution upon which reliance is placed is, that "no subordination nor preference of any sect or denomination to another shall ever be established by law." This clause obviously provides for the equality of all sects, and forbids the preference of one over another. It is insisted that here is a preference by law. This relates to an act of the legislature, which shall establish the preference of one sect and the subordination of others. The selection of a school-book is no preference within this clause. The choice is left entirely to the popular will. One set of town officers may make one selection, and another may make an entirely different one. The most unrestrained liberty of choice is given. It would be a novel doctrine that learning to read out of one book rather than another, or out of one translation rather than another of a book conceded to be proper, was a legislative preference of one sect to another, when all that is alleged is, that the art of reading only was taught, and that without the slightest indication of or instruction in theological doctrines.

If this were to be regarded as a legislative preference, much more must those laws by which the sabbath is established as a day of rest, in which labor, except for necessity, is prohibited being done, be regarded as a subordination of the religious views of all other sects to those holding that day sacred. Indeed, this very objection has in many states been raised against

the constitutionality of such laws. The case of *Specht v. Commonwealth*, 8 Pa. St. 312, involved the question whether the members of a sect who conscientiously observe the seventh day of the week as the Christian sabbath are, upon conviction for violating the first day of the week, or Sunday, by working or pursuing any worldly employment, amenable to the penalties inflicted by the act of the assembly. In answer to the position that it exalts the religious belief of certain sects over that of others, Bell, J., says: "Though it may have been a motive with the law-makers to prohibit the profanation of a day regarded by them as sacred, it is not perceived how this fact can vitally affect the question at issue. All agree that to the well-being of society periods of rest are necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed may enjoy respite from labor at the same time. They may be established by common consent, or, as is conceded, the legislative power of the state may, without impropriety, interfere to fix the time of their stated return, and enforce obedience to their direction. When this happens, some one day must be selected, and it has been said that the round of the week presents none which, being preferred, might not be regarded as favoring some one religious sect. In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that that day should have received the legislative sanction, etc. Yet this does not change the character of the enactment. It is still essentially a civil institution, made for the government of man as a member of society, and obedience to it may properly be enforced by penal sanctions."

In South Carolina the question arose whether Jews could enjoy immunity from the law prohibiting sales on Sunday. This question was very fully considered in *Charleston v. Benjamin*, 1 Law Rep., N. S., 7, and it was there held that the right of appointing the sabbath as a day of rest from labor must be regarded as a municipal institution conducive to civil expedience. "This," says O'Neill, J., "is a mere police or municipal regulation. If the Israelite were allowed to make the objection that he could not be constitutionally restrained from pursuing public business on Sunday, the infidel would say, 'All days are alike to me, and therefore I will at all times pursue my business.' Such an assumption is so preposterous that no one would tolerate it." The same views were held in *Shaw v. State*,

10 Ark. 262, and in *Commonwealth v. Wolfe*, 3 Serg. & R. 48. It was held by the supreme court of Ohio, in *Bloom v. Richards*, 3 Ohio St. 388, that the statute prohibiting labor on the sabbath is to be regarded as a mere municipal or police regulation, the validity of which is neither weakened nor strengthened by the fact that the day of rest it enjoins is the sabbath. By recurring to the debates of the convention by which the constitution of this state was formed, it will be perceived that the establishment of the sabbath was regarded simply as a civil institution; while it was conceded that it was within the general powers of the legislature to select a day of rest, on which labor and recreation might be prohibited, it was denied that they had any right to prescribe this as a day of worship to those who might believe another to be the proper sabbath: *Perley's Debates*, 74.

The Jews and the Seventh-day Baptists, regarding Saturday as divinely set apart for rest, find legal impediments to labor on the Christian sabbath, when they believe it may be lawfully done, and conscientious scruples to their laboring on the preceding day, so that between the law and their consciences they are compelled to abstain from labor on both days; yet this is not regarded as hurting, molesting, or restraining them in their persons, liberties, or estates, within the meaning or constitutional prohibitions similar to our own, nor as creating a subordination or preference of one sect over another. Much more, then, should not the selection of the bible as a book in which reading only is to be taught be regarded as in the slightest degree in conflict with this portion of the bill of rights.

But the objection is urged that this is the creation of a religious test. But no requirements as to belief are made essential to entitle a scholar to the benefits of the common schools of the state. He may be a Jew or Mohammedan, a Catholic or Protestant; he may believe much or little, according to the instructions received at home—and for no such cause is he to be deprived of instruction. The state opposes no test or other impediment for the purpose of debarring any one from the public schools. But the claim of the plaintiff is much more liable to the exception that it is creating the subordination or preference of one sect or denomination over another. Her claim to be exempted from a general regulation of the school rests entirely on her religious belief, and is to the extent that the choice of reading-books shall be in entire subordination to her faith, and because it is her faith. The preference is manifestly given, if, in the selection to be made, the defendants

were bound to defer to the doctrines and authority and teachings of the sect of which she is a member. The right of negation is, in its operation, equivalent to that of proposing and establishing. The right of one sect to interdict or expurgate would place all schools in subordination to the sect interdicting or expurgating.

If the claim is that the sect of which the child is a member has the right of interdiction, and that any book is to be banished because under the ban of her church, then the preference is practically given to such church, and the very mischief complained of is inflicted on others. If Locke and Bacon and Milton and Swift are to be stricken from the list of authors which may be read in schools, because the authorities of one sect may have placed them among the list of heretical writers whose works it neither permits to be printed nor sold nor read, then the right of sectarian interference in the selection of books is at once yielded, and no books can be read to the reading of which it may not assent. Because Galileo and Copernicus and Newton may chance to be found in some prohibitory index, is that a reason why the youth of the country should be educated in ignorance of the scientific teachings of those great philosophers? If the bible, or a particular version of it, may be excluded from schools because its reading may be opposed to the teachings of the authorities of any church, the same result may ensue as to any other book. If one sect may object, the same right must be granted to others. This would give the authorities of any sect the right to annul any regulation of the constituted authorities of the state, as to the course of study and the books to be used. It is placing the legislation of the state, in the matter of education, at once and forever in subordination to the decrees and the teachings of any and all sects, when their members conscientiously believe such teachings. It at once surrenders the power of the state to a government not emanating from the people, nor recognized by the constitution. The case finds that the authorities of the sect of which the plaintiff is a member regard it sinful to read in the version directed by the defendants; but if a book is to be excluded for that cause in one instance it must be in all, and the use of books would be made to depend, not upon the judgment of those to whom the law intrusts their selection, but upon that of the authorities of a church, so that each sect would have precedence as a sect and for that cause.

From the report it appears that the plaintiff, from conscien-

tious religious scruples, refused to read in the version designated by the defendants as the one to be used, and that she and her father both regarded it as sinful so to do, both having been so taught by the authorities of the church of which they are members. As the suit is by the child, as her rights only are alleged to be violated, the conscientious religious views of the father are not involved in the determination of this suit. He is no party to it, for the purpose of obtaining compensation, nor is it brought on account of any infraction of his rights. The real inquiry is, whether any book opposed to the real or asserted conscientious views of a scholar can be legally directed to be used as a school-book, in which such scholar can be required to read. The claim on the part of the plaintiff is that each and every scholar may set up its own conscience as over and above the law. It is a claim of an exemption from a general law because it may conflict with the particular conscience.

The action being by the scholar, the invasion being of its rights, it is apparent that if the fact of opposition to conscience on the part of a child affords a well-grounded reason for its exemption from the general rules of the school, it may operate to the exclusion of books to an indefinite extent. As the existence of conscientious scruples as to the reading of a book can only be known from the assertion of the child, its mere assertion must suffice for the exclusion of any book in the reading or in the hearing of which it may allege a wrong to be done to its religious conscience. The claim, so far as it may rest on conscience, is a claim to annul any regulation of the state made by its constituted authorities. As a right existing on the part of one child, it is equally a right belonging to all. As it relates to one book, so it may apply to another, whether relating to science or to morals. Error may reach the understanding by the hearing equally as by vision—by the ear as by the eye. As the child may object to reading any book, so it may equally object to hearing it read, for the same cause; and thus the power of selection of books is withdrawn from those to whom the law intrusts it, and by the right of negation is transferred to the scholars.

The right as claimed undermines the power of the state. It is that the will of the majority shall bow to the conscience of the minority, or of one. If the several consciences of the scholars are permitted to contravene, obstruct, or annul the action of the state, then power ceases to reside in majorities and is transferred to minorities. Nor is this all: while the laws are made and established by those of full age, the right of obstruction,

of interdiction, is given to any and all children, of however so immature an age or judgment.

Neither can the committee select books, for they do not know all existing, and they can not foreknow, all contingent and prospective scruples of conscience. If the fact that a book, or some portions of it, is not in accordance with the conscientious scruples of some scholar makes the requirement of its use by such scholar, or the permission of its use by another to whom it is unobjectionable, in the presence of the dissenting scholar, the unconstitutional exercise of power, then the constitutional selection of books becomes a variable quantity, dependent on the present and temporary conscience of every scholar in every school.

But while the constitution recognizes "the goodness of the Sovereign Ruler of the universe," it does not recognize the superiority of any form of religion, or of any sect or denomination. It knows no religion, nor form of religion as such, as having any binding force over its citizens, against its will constitutionally expressed. It regards the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quaker, as all possessing equal rights. The decrees of a council, or the decisions of the *ulema*, are alike powerless before its will. It acknowledges no government external to itself—no ecclesiastical or other organization as having power over its citizens, or any right to dispense with the obligation of its laws. Its doctrine is the supremacy of the people, and that "all free governments are founded on their authority, and instituted for their benefit."

The legislature establishes general rules for the guidance of its citizens. It does not necessarily follow that they are unconstitutional, nor that a citizen is to be legally absolved from obedience because they may conflict with his conscientious views of religious duty or right. To allow this would be to subordinate the state to the individual conscience. A law is not unconstitutional because it may prohibit what a citizen may conscientiously think right, or require what he may conscientiously think wrong. The state is governed by its own views of duty. The right or wrong of the state is the right or wrong as declared by legislative acts constitutionally passed. It may pass laws against polygamy, yet the Mormon or Mohammedan can not claim an exemption from their operation, or freedom from punishment imposed upon their violation, because they may believe, however conscientiously, that it is an institution founded on the

soundest political wisdom, and resting on the sure foundation of inspired revelation. It may establish a day of rest as a civil institution, though the effect of it may be to deprive the Jew of one sixth of his time for purposes of labor or of business.

The claim of exemption from the operation of a general law, as a matter of right, has received the consideration of courts of the greatest learning and ability. The case of *Simons v. Gratz*, 2 Penr. & W. 412 [23 Am. Dec. 33], involved the question whether the affidavit of a Jew, who was one of the plaintiffs, that he could not appear in court on Saturday from conscientious scruples, that day being his sabbath, and that the cause could not be tried without his assistance, presented a ground for the continuance of the case. In delivering the opinion of the court, Gibson, C. J., says: "The religious scruples of persons concerned in the administration of justice will receive all the indulgence that is compatible with the business of government; and had circumstances permitted, this case would not have been ordered to trial on the Jewish sabbath. But when a continuance for conscience' sake is claimed as a matter of right, the matter assumes a different aspect. It has never been held, except in a single instance, that the course of justice may be obstructed by any scruple or obligation whatever. The sacrifice that ensues from an opposition of conscientious objection to the performance of a civil duty ought, one would think, to be on the part of him whose moral or religious idiosyncrasy makes it necessary; else a denial of the lawfulness of capital punishment would exempt a witness from testifying to facts that might serve to convict a prisoner of murder, or, to say nothing of the other functionaries of the law, excuse a sheriff for refusing to execute one capitally convicted. This is an exemption which no one would claim, yet it would inevitably follow from the principle insisted on here." In *Commonwealth v. Leshner*, 17 Serg. & R. 155, the question arose whether it was a good cause of challenge to a juror, by the commonwealth in a capital case, that he has conscientious scruples on the subject of capital punishment. "The question," remarks Gibson, C. J., "has been argued in part as if it stood on a challenge by the juror himself. It would be more difficult to sustain such a challenge than that which has been made by the attorney general. It is declared in the constitution that 'no human authority can in any way control or interfere with the rights of conscience:' Art. 9, sec. 3. But what are those rights? Simply a right to worship the Supreme Be-

ing according to the dictates of the heart; to adopt any creed or hold any opinion whatever on the subject of religion, and to do or forbear to do any act the doing or forbearing of which is not prejudicial to the public weal. But, *Salus populi suprema lex*, is a maxim of universal application; and when liberty of conscience would interfere with the paramount rights of the public, it ought to be restrained. Even Mr. Jefferson, than whom a more resolute champion of liberty never lived, claims no indulgence for anything that is detrimental to society, though it springs from a religious belief or no belief at all. His position is that civil government is instituted only for temporal objects, and that spiritual matters are legitimate subjects of civil cognizance no further than they may stand in the way of those objects. He denies the right of society to interfere only when society is a party in interest, the question and the consequence being between the man and his Creator. But as far as the interests of society are involved, its right to interfere on the principle of self-preservation is not disputed. And this right is resolvable into the most absolute necessity, for were the laws dispensed with whenever they happen to come into collision with some supposed religious obligation, government would be perpetually falling short of the exigency. There are few things, however simple, that stand indifferent in the view of all sects into which the Christian world is divided." In *Stansbury v. Marks*, 2 Dall. 213, a Jew who refused to be sworn as a witness in a cause tried on a Saturday, because it was his sabbath, was fined by the court. In *United States v. Coolidge*, 2 Gall. 364, one who was not a Quaker, but who refused to be sworn on the ground of conscientious scruples, was in consequence of such refusal committed as for a contempt. The conscientious belief of religious duty furnishes no legal defense to the doing or refusing to do what the state within its constitutional authority may require. If it were so, the obligations of a statute would depend, not upon the will of the state, but upon its conformity with the religious convictions of its members. When a conflict arises, as it may, between the requirements of law and the obligations of conscience, each man must determine his course of action according to his views of duty and of right.

The claim on the part of the plaintiff has been argued as a question of strict right. As such, without reference to what may be wise or expedient, it has been considered and determined by the court.

The trust conferred upon those who have the superintendence

of our public schools is hardly inferior in importance to that of the administration of the government. Indeed, the government itself depends in no slight degree upon the education of those by whom it is hereafter to be controlled. Amid the various and conflicting differences on moral, political, and religious subjects, there is need of mutual charity and forbearance—of mutual concession and compromise. Large masses of foreign population are among us, weak in the midst of our strength. Mere citizenship is of no avail, unless they imbibe the liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name. In no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools, which are alike open to the children of the rich and the poor, of the stranger and the citizen. It is the duty of those to whom this sacred trust is confided to discharge it with magnanimous liberality and Christian kindness. While the law should reign supreme, and obedience to its commands should ever be required, yet in the establishment of the law which is to control there is no principle of wider application and of higher wisdom—commending itself alike to the broad field of legislative, and the more restricted one of municipal, action; to those who enact the law, as well as those who, enjoying its benefits and privileges, should yield to its requirements—than a precept which is found with almost verbal identity in the versions which, from education and association, are endeared to the respective parties in litigation—“All things whatsoever ye would that men should do to you, do ye even so to them, for this is the law and the prophets.”

Plaintiff nonsuit.

SHEPLEY, C. J., and TENNY and HOWARD, JJ., concurred.

COURTS CAN NOT ANNUL LEGISLATION BECAUSE IT IS UNWISE, IMPOLITIC, OR INEXPEDIENT: *Winter v. Jones*, 54 Am. Dec. 379, 385. A court can not determine the reasonableness of a legislative act: *Moor v. Veazie*, 52 Id. 653. A statute against common reason is not invalid on that account: *Flint River Steamboat Co. v. Foster*, 48 Id. 249, *per Lumpkin, J.* The legislature may enact whatever laws it may please, provided they be not unconstitutional: *Hoke v. Henderson*, 25 Id. 677; and see the note to *Flint River Steamboat Co. v. Foster*, 48 Id. 269. And the power of courts to declare a statute unconstitutional is to be exercised with the most guarded circumspection and care: *Baughner v. Nelson*, 52 Id. 694.

THE PRINCIPAL CASE IS CITED in *State v. White*, 82 Ind. 286; S. C., 42 Am. Rep. 496, to the point that the trustees of a college have full power to prescribe reasonable regulations for the government of the students therein.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND

MOALE v. MAYOR AND CITY COUNCIL OF BALTIMORE.

[8 MARYLAND, 314.]

PRIVATE PROPERTY MAY BE APPROPRIATED TO PUBLIC USE BY STATE WHEN PUBLIC NECESSITY OR UTILITY REQUIRES IT, upon securing to the owner a just compensation for any injury he may sustain. This is a portion of its inherent sovereignty, and is an exercise of the right of eminent domain as contradistinguished from that of the taxing power.

TAXING POWER IS TO BE DISTINGUISHED FROM RIGHT OF EMINENT DOMAIN. The former exacts money or services from individuals, as and for their respective shares of contribution to any public burden; the latter takes private property, not as the owner's share of contribution to a public burden, but as so much beyond his share.

SPECIAL COMPENSATION IS TO BE MADE FOR PRIVATE PROPERTY TAKEN UNDER RIGHT OF EMINENT DOMAIN, because the government is a debtor for the property so taken; but not in taxation, because the payment of taxes is a duty, and creates no obligation to repay, otherwise than in the proper application of the tax.

LAW WHICH PROVIDES FOR OPENING OF STREET OR ROAD IS CONSTITUTIONAL, where it imposes all the costs on those who are the more immediately benefited instead of the community at large.

COVENANT THAT PURCHASER SHALL HAVE USE OF STREETS IS IMPLIED FROM SALE, where a party sells property lying within the limits of a city, and in the conveyance, bounds it by streets designated as such in the conveyance, or on a map made by the city, or by the owner of the property.

ACT DENYING OWNER USE OF HIS LAND WITHOUT COMPENSATION IS UNCONSTITUTIONAL AND VOID; it is in fact an act of confiscation. An act worded thus: "That no person shall be entitled to damages for any improvement, unless the same shall have been made or erected before the laying out or locating of such street," is one of this sort.

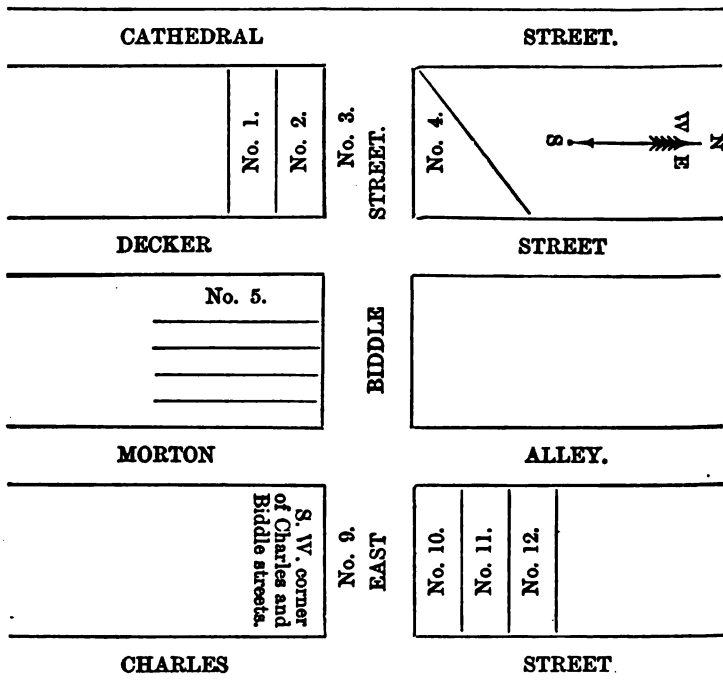
COMPENSATION MUST BE ALLOWED TO OWNER OF LOT LYING ON BED OF STREET TAKEN FOR PUBLIC USE, precisely as if no such street was opened over it.

PURCHASER OF LOT BOUNDED IN FRONT BY CERTAIN STREET ACQUIRES RIGHT TO USE OF SUCH STREET as a street, and a subsequent purchaser, from the same vendor, of the lot upon the bed of the street in front acquires only the naked fee, subject to an easement, or right of way, not only in the prior purchaser but in the public, and is entitled to but nominal damages for its condemnation upon the opening of the street.

TRUE RULE, WHERE THERE HAS BEEN NO DEDICATION, OF ASSESSING DAMAGES IS TO VALUE LOT PRECISELY AS THOUGH NO STREET WAS TO BE OPENED. To do this the value of neighboring and contiguous lots may be looked to, but they do not furnish an unerring standard to measure the value of the lot condemned.

APPEAL from the criminal court of Baltimore city. The mayor and city council of Baltimore, under ordinance of May 22, 1851, directed the opening of East Biddle street, in said city, from Cathedral to Charles streets. The commissioners for opening streets performed their duties under this ordinance, and made a return of their proceedings to the register of the city, and from their assessment of damages and benefits to him, William A. Moale, who was the owner of property on the line of the street proposed to be opened, appealed to the criminal court of Baltimore city, under the act of 1817, chapter 148, section 16, and revised ordinances of Baltimore city, No. 17, section 9. The plat on page 278 will illustrate the location of East Biddle street and the adjoining lots. Lots 1, 2, 3, 4, 5, 9, and 10, with others, were sold by a trustee under a decree of the court of chancery, and in the advertisement of sale East Biddle street was distinctly referred to in the description of all. At this sale, October 14, 1848, William Frick purchased lot No. 4, and Moale, lots Nos. 1 and 5. Moale subsequently purchased all the others at private sale. These deeds were confirmed by the chancellor, and Moale received but one deed for his entire purchase, and it included lots Nos. 3 and 9 in the bed of Biddle street. The south-west corner lot Moale had purchased in 1846. Moale, at the trial, proved the value per front foot of the lots on Cathedral and Charles streets on each side of Biddle street. But the same witnesses, by whom this was done, said they did not regard the bed of Biddle street, as owned by Mr. Moale, worth anything, it being the bed of a street laid down on Poppleton's plat, and therefore liable to be taken at any time by the city as a street, and hence worthless for any other purpose. Evidence was also given that in the

negotiation for the sale of this property between the trustee and Moale the lots on the bed of the street were estimated at a nominal value. Upon this evidence, Moale asked three instructions to the jury, but they were rejected; and the jury instructed that in making their estimate of the damages sustained by Moale by the opening of said street, they were to value the lots sought to



be condemned, being the bed of said street, as unimprovable lots under the provisions of the act of 1817, chapter 148. To this ruling Moale excepted, and the jury having, by their inquiry confirmed the commissioner's report, he appealed under the act of 1852, chapter 77.

John Nelson, for the appellant.

William F. Frick, for the appellees.

By Court, LE GRAND, C. J. We deem it but necessary to briefly state the principles which we think should govern the decision of this and all similar cases. In the case of *Alexander v. Mayor etc. of Baltimore*, 5 Gill, 383 [46 Am. Dec. 630], the principle was distinctly enunciated that it is a portion of the inherent sovereignty of the state to appropriate to a public use

the property of individuals when public necessity or utility requires it, upon securing to the party a just compensation for any injury he may sustain. This is not an exercise of the taxing power, but an exercise of the right of eminent domain as contradistinguished from it. These two powers, although somewhat alike, are not the same. The distinction between them is clearly pointed out in a very able opinion of Ruggles, J., in the case of *People v. Mayor etc. of Brooklyn*, 4 N. Y. 423, 425 [55 Am. Dec. 266]. He says: "Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burden. Private property taken for public use by right of eminent domain is taken not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay, otherwise than in the proper application of the tax."

The case of *Alexander v. Mayor etc. of Baltimore*, *supra*, also establishes the constitutionality of a law providing for the opening of a street or road, which imposes all the costs on those who are the more immediately benefited instead of the community at large. These principles, together with those recognized in the case of *White v. Flannigan*, 1 Md. 540 [54 Am. Dec. 668], furnish us with all that is necessary for the decision of this. In that case it was laid down that where a party sells property lying within the limits of a city, and in the conveyance bounds such property by streets designated as such in the conveyance, or on a map made by the city, or by the owner of the property, such sale implies, necessarily, a covenant that the purchaser shall have the use of such streets.

We proceed to apply these principles to the case before us. The appellant claims damages for the bed of Biddle street, according to its value, having reference to contiguous lots. On the other hand, it is said he is entitled to but nominal damages, on the ground that the first proviso of section 16 of the act of 1817, chapter 148, provides "that no person shall be entitled to damages for any improvement, unless the same shall have been made or erected before the laying out or locating of such street, lane, or alley, or part thereof respectively." And it was in conformity to this view that the court below instructed the jury that the appellant was only to be allowed for his lots in the bed of the street as unimprovable lots

This ruling of the court brings before us directly the constitutionality of the proviso to which we have adverted. While it is clear that the sovereign power has the right to impose a tax in such amount as to it may seem meet, and also to appropriate private property to public uses, yet it can not do the latter without making just compensation for it. The sacredness of the rights of property is everywhere recognized by the spirit of the common law, Magna Charta, and our bill of rights. Under our present constitution, there could be no question, for it distinctly provides in its third article, section 46, that compensation shall be made before the property is taken. Although the language of the bill of rights of 1776 is not so distinct, its spirit is equally as comprehensive, so far as the right to indemnification is involved. We hold, therefore, that it was not competent to the legislature to confiscate the property of the citizen, and we regard the provision of the act of 1817, which denies to the proprietor the use of his land, as nothing short of an act of confiscation. It has been said, in reply to this view, that the owner of the bed of a street liable to be opened would be more benefited by the enhanced value of his adjoining property than he would be damaged by the appropriation of his property in the bed of the street. This view assumes as a fact that which in many cases is not so. A person may not own any adjoining lots, and if his property lying in the street can be taken without compensation, then it is confiscation, and nothing else. It has now been thirty-seven years since the passage of the act of 1817, and many of the streets designated on the plat of the city have not as yet been opened. How many years may elapse before they are all opened it is impossible to say; for aught we can see, fifty or a hundred years may roll by before it is done. Besides, since the act of 1838, chapter 226, it is not incumbent on the city authorities to adhere to the line of the streets as laid down on the city plat. The power to widen, open, or close up any street in the city rests entirely on the discretion of the corporation. Under these two acts, those of 1817 and 1838, a person, for an indefinite space of time, may be deprived of the use of his property, because it lies on the bed of a street designated on the plat of the city, and eventually find that, whilst he has paid taxes, and been denied the advantages to which he was entitled from the proper use of his land, the street laid down on the plat has been abandoned. Such a state of things is repugnant to every notion of justice, and can not obtain our consent. We hold that a person owning a lot lying on

the bed of the street which is taken for the public use is entitled to be compensated for it, precisely as if no street was opened over it. Of course this view is wholly independent of all question of dedication. In such a case there could be no claim interposed for damages, for the party, having given the ground to the community, can set up no just claim to be compensated for it.

The evidence in the cause shows that the lots designated on the plat filed in it as Nos. 1, 5, and 4 were sold at public auction on the fourteenth day of October, 1848, the first two to the appellant and the other to Judge Frick. In the advertisement, Biddle street is distinctly referred to in the description of all three of these lots; and lot No. 4, the one purchased by Judge Frick, is described as "a small triangular lot commencing at the north-east corner of Cathedral and East Biddle streets, running on the latter about one hundred and fifty-one feet, northerly twenty-five and a half feet, and thence to the beginning." This sale was reported to the chancellor, and by him confirmed, in conformity to the descriptions of the advertisement which were embraced in the report of the trustee. Lot No. 2 was not purchased by the appellant until after the sale to Judge Frick of lot No. 4, and therefore subject to any rights which Judge Frick acquired by his previous purchase, among which, according to the principles we have indicated, was the right to the use of Biddle street as a street, between Cathedral and Decker streets. So far, therefore, as lot No. 3, which is the bed of Biddle street, is concerned, we think the appellant only acquired by his purchase the naked fee in it, subject to an easement, or right of way, not only in Judge Frick, but in the public; and this being so, he is entitled to but nominal damages for its condemnation.

In regard to lot No. 9, we think the case different. Prior to his purchase of lot No. 10, the appellant was the owner of the lot on the south-west corner of Charles and Biddle streets, and when, therefore, he purchased lots Nos. 9 and 10 he acquired a complete title to the three lots, and is just as much entitled to be compensated for lot No. 9 as would have been the original proprietor of it in the absence of all dedication. In regard to it there is no supervening or conflicting rights, as there is in regard to lot No. 3. The appellant owns the entire line of the three lots bounding on Charles street, whilst in relation to lot No. 3, before it became the property of the appellant, Judge Frick had acquired a title to lot No. 4, from the same grantor as

appellant obtained his to lot No. 2, which gave him a right to lot No. 3 as a public street. No subsequent act of the common grantor of both could affect the rights which had been previously conferred on Judge Frick. The prayers offered on behalf of the appellee and the instruction granted by the court are erroneous, inasmuch as they are equally applicable to lots Nos. 3 and 9.

The true rule, where there has been no dedication, of assessing damages is to value the lot precisely as though no street was to be opened. With a view to get at this, the neighboring and contiguous lots may be looked to, but they do not furnish an unerring standard to measure the value of the lot condemned. The one condemned may be more or less valuable than the adjoining lots. It or they may be in ravines, or covered with or free from rocks, making them more or less valuable according to the characteristics of the peculiar locality. Nor, in estimating the value of the lot to be condemned, ought the circumstance of a street to be opened to be considered, for it is the street which enhances the adjacent property; the estimate should be made as if no street was to be opened.

With these views, we remand the case to the court below.

Judgment reversed and *procedendo* awarded.

RIGHT OF STATE TO TAKE PRIVATE PROPERTY FOR PUBLIC USE IS PORTION OF ITS INHERENT SOVEREIGNTY: *Scudder v. Trenton Delaware Falls Co.*, 23 Am. Dec. 756; *Harding v. Goodlett*, 24 Id. 546; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 31 Id. 313; *Whiteman's Ex'x v. Wilmington etc. R. R. Co.*, 33 Id. 411; *Lexington & Ohio R. R. Co. v. Applegate*, Id. 497; *Ex parte Martin*, 58 Id. 321, and notes thereto. And this right is recognized by the constitution of the United States: *Enfield Toll Bridge Co. v. Hartford etc. R. R. Co.*, 42 Id. 716.

LEGISLATURE HAS NO RIGHT TO APPROPRIATE PRIVATE PROPERTY WITHOUT PREVIOUS COMPENSATION TO OWNER: *Gardner v. Newburgh*, 7 Am. Dec. 526; *Scudder v. Trenton Delaware Falls Co.*, 23 Id. 756; *Harding v. Goodlett*, 24 Id. 546; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 31 Id. 313; *Ten Eyck v. Delaware & Raritan Canal Co.*, 37 Id. 233; *Pearce's Heirs v. Patton*, 45 Id. 61; *Alexander v. Mayor etc. of Baltimore*, 46 Id. 630; *Nicholson v. N. Y. & N. H. R. R. Co.*, 56 Id. 390, and notes thereto. And this prohibition is implied though no such provision be contained in the state constitution: *Ex parte Martin*, 58 Id. 321; but party may renounce constitutional provision made for his benefit: *Embury v. Conner*, 53 Id. 325, and extended note.

FOR DOCTRINES CONCERNING COMPENSATION, see extended note to *Bloodgood v. Mohawk & Hudson R. R. Co.*, 31 Am. Dec. 313; *Case of Philadelphia & Trenton R. R. Co.*, 36 Id. 202; *Commissioners of Kensington v. Wood*, 49 Id. 582, and notes thereto.

POWER OF EMINENT DOMAIN AND THAT OF TAXATION EXPLAINED AND DISTINGUISHED; and constitutional provisions providing that no person shall

be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation, shown to be inapplicable to taxation: *People v. Mayor of Brooklyn*, 55 Am. Dec. 266.

ACT OF LEGISLATURE DIVESTING INDIVIDUAL OF HIS PROPERTY WITHOUT COMPENSATION IS INVALID: *Cochran v. Van Surlay*, 32 Am. Dec. 570; *Thompson v. Grand Gulf R. & B. Co.*, 34 Id. 81, and notes thereto. As to constitutionality of municipal ordinance imposing tax for street improvements, see *Alexander v. Mayor etc. of Baltimore*, 46 Id. 630.

STATUTES AUTHORIZING EXERCISE OF RIGHT OF EMINENT DOMAIN ARE TO BE STRICTLY CONSTRUED: *Harding v. Goodlett*, 24 Am. Dec. 546; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 31 Id. 313; *Thompson v. Grand Gulf R. & B. Co.*, 34 Id. 81.

THE PRINCIPAL CASE WAS RECOGNIZED in *Stewart v. Mayor etc. of Baltimore*, 7 Md. 510, where it is said that the proceedings under the act which gave rise to Poppleton's plat did not deprive the owner of the soil of his right to build upon or to improve it at his pleasure, although it might be covered by the bed of an unimproved street designated on the plat, provided he had not been allowed compensation for the same; and that whenever the city authorities might think proper to open such a street he would be entitled to damages, just as if the street had never been so designated. It was recognized in *Mayor etc. v. Bouldin*, 23 Id. 372, and there held that where the bed of the proposed road is still private property, every proprietor to be affected by the change must be consulted, and must consent. It was recognized in *Hawley v. Mayor etc. of Baltimore*, 33 Id. 281, a case where the very same question was involved. It was recognized in *Groff v. Mayor etc.*, 44 Id. 77, showing the distinction between the right of eminent domain and the taxing power under the act of 1870. It was recognized in *Norris v. Mayor*, Id. 607, holding that the jury are only authorized to assess as damages the actual market value of the property to be taken at the time of the condemnation. It was recognized in *McCormick v. Mayor*, 45 Id. 525, where it is said that the sale and conveyance of lots bounded upon a proposed street, in the plan of the town or city, imply a grant or covenant to the purchaser, that the street thus indicated and called for shall be and remain forever open to the use of the public, free from all claim or interference of the proprietor of the estate therein, inconsistent with such use; and the owner, having been compensated therefor, is estopped from making any further claim against the public.

YATES v. DONALDSON.

[5 MARYLAND, 389.]

ONE JOINT OBLIGOR CAN MAINTAIN ACTION OF CONTRIBUTION FOR EXCESS AGAINST ANOTHER, where the former has paid the whole or more than his share of the joint debt contracted for the purchase of property to be owned, as between themselves, in different proportions; and his right of action accrues on the expiration of the time at which the creditor could have sued upon the joint agreement.

FORMER DEBT CAN NOT BE EXTINGUISHED BY ACCEPTANCE OF SECURITY OR UNDERTAKING OF EQUAL DEGREE, unless it is received in satisfaction.

or is intended as an abandonment of the remedy on the first contract; and these are questions for the jury.

ACCEPTANCE OF PROMISSORY NOTES IN LIEU OF FORMER DEBT suspends the remedy on the first contract until the notes mature.

SURETY IS DISCHARGED BY GIVING TIME TO PRINCIPAL.

ONE JOINT PROMISOR IS NOT DISCHARGED BY GIVING TIME TO ANOTHER; both are principals.

RELEASE OF ONE JOINT PROMISOR OR PRINCIPAL RELEASES ANOTHER, except where the remedy against the other is expressly reserved.

ONE OF TWO MAKERS OF PROMISSORY NOTE CAN NOT DEFEND ACTION BROUGHT AGAINST HIM BY PAYEE, on the ground that he made the note as surety for the other and for his accommodation, which was known to the payee at the time, and that after it became due the plaintiff gave time to the other maker without the consent of the defendant.

PAYEE'S EXPRESS ASSENT IS NECESSARY, when a joint and several promissory note, made in the common form by two, is delivered to him, before he can be regarded as placing himself in a situation to treat one as surety for the other.

MAKER OF ACCOMMODATION NOTE IS LIABLE TO HOLDER, the latter knowing when it was made that it was for indorser's accommodation; and giving time to indorser does not discharge the maker.

THERE IS NO DIFFERENCE BETWEEN ACCOMMODATION NOTES AND THOSE NEGOTIABLE FOR VALUE. The court will look to the relation that parties bear to each other on the instrument itself, and determine their liabilities accordingly.

WHERE PARTY DOES NOT APPEAR ON INSTRUMENT TO HAVE MADE HIMSELF LIABLE AS SURETY, he can not, at law, avail himself of the equities between himself and the other parties to the instrument, unless he was accepted by the creditor as a surety, or has been discharged from the first contract by agreement of the creditor.

TWO JOINT DEBTORS CAN DISCHARGE THEMSELVES FROM THEIR FIRST CONTRACT, by giving two separate notes for their respective shares of the joint debt, if the notes are satisfactory to the creditor and he accepts them.

ASSUMPSIT. Appeal from the superior court of Baltimore city. Action by appellant against appellee and Garland to recover the balance due for the "Western Continent," a newspaper sold by plaintiff to defendants. Garland and Donaldson, on June 23, 1848, both signed a written agreement to pay one thousand seven hundred dollars for the property, one half payable in a satisfactory note six months from July 1st; four hundred and twenty-six dollars in nine months from date; and balance in twelve months from said date, June 23, 1848. Garland and Donaldson afterwards, in December, 1848, made an arrangement to give separate notes each for his share of the purchase. Yates agreed to this, "provided the notes were indorsed to his satisfaction." Donaldson complied, and the notes he gave for his one-third interest were paid at maturity. Garland failed to give

satisfactory notes for his two thirds of the purchase money, but in December, 1848, gave Yates a note on one Bailey for four hundred and forty-one dollars and twenty-one cents, which was paid at maturity. In January, 1849, Homans purchased one half of Garland's interest for one thousand dollars, and in payment gave him several notes; two of which, one for three hundred dollars and fifty-two cents, and the other for two hundred and ninety-six dollars and twenty-six cents, were in Homans' presence delivered to Yates for balance still due on Garland's two thirds. Homans said that Yates expressed himself satisfied, and accepted the notes; but Garland said Yates took them, with his indorsement, as an accommodation to him, advising him that he did not think they would be paid, and to get himself secured. These notes were not paid, and this suit was brought for their amount. All the negotiations for the sale to Homans were carried on between Homans and Garland exclusively as to amounts and time, and between those two and Yates exclusively as to the acceptability of Homans' proffered notes; Donaldson not being consulted in reference thereto. Garland said there was no understanding between Yates and himself at the time the separate notes were taken, or at any other time, by which the former stipulated to divide the responsibility of the parties, and forego his remedy against either, for the amount of the notes given by the other, in case they should not be paid; but Homans said he was led to believe that Yates considered Garland alone liable for his two thirds of the purchase. Upon this proof plaintiff asked instructions in substance as follows: 1. That he was entitled to recover from Donaldson the amount of purchase money due under the original agreement, and then unpaid, unless the jury should believe that the notes were received under an express agreement to receive them as absolute payment to the amount thereof, and run the risk of their being paid. 2. Or unless they should believe that the giving and taking of the notes was intended by and between the parties as an abandonment by Yates of his original claim against the defendants jointly. 3. That whether the notes were accepted by Yates as satisfactory was a question for the jury. 4. That whether the parties, by the transaction in reference to the notes, intended, as between themselves, an extinguishment of the joint liability and an acceptance in its stead of a separate liability, according to the tenor of the notes, was a question for the jury. 5. Even if the notes were accepted as satisfactory by the plaintiff, the acceptance of them did not extinguish the

joint liability of the defendants, unless they were accepted under an agreement to receive them as absolute payment and run the risk of their being paid, or unless the giving and taking was intended, by and between the parties, as an abandonment by Yates of his original claim against the defendants jointly and a severance of their joint liability. 6. If the giving and taking of the notes was merely an arrangement between the parties, made for the accommodation and at the request of the defendants, in order to facilitate the adjustment of their respective interests in the property, without its being intended, by either plaintiff or defendants, that the joint liability of the latter to the plaintiff under the original agreement should be altered thereby, or his ultimate remedy against them jointly be thereby affected, then such giving and taking of the said notes did not, nor did the payment of such of them as had been paid, preclude the plaintiff from recovering from the defendants in this action such part of the purchase money as was still due and unpaid. 7. That the knowledge by the plaintiff of the unequal interests of the defendants in the property, and the giving and taking of the notes, were not of themselves, either separately or together, conclusive in law as to the abandonment or loss by the plaintiff of his right against the defendants jointly, but that it was for the jury to judge whether it was intended by and between the parties to alter their rights under the original contract, or sever the liability of the defendants. Defendant then asked the following instructions: 1. If Garland and Donaldson owned, with the knowledge of the plaintiff, different interests in the property, and made an arrangement among themselves to give the plaintiff separate notes, each for his share of the purchase money, and the plaintiff, in pursuance of said arrangement, accepted from Donaldson three notes for one third of the purchase money, such being his share according to said arrangement, and the said notes were paid at maturity, Donaldson was discharged from all liability on account of the purchase money due for the other two thirds. 2. If the plaintiff, after agreeing to the said arrangement, called on Garland for indorsed notes for his proportion of the purchase money, and subsequently accepted from him Bailey's note, which was paid, and in January, 1849, Homans agreed to purchase the half of Garland's interest for one thousand dollars, and the plaintiff agreed with Garland to take Homans' notes for the amount still due for Garland's two thirds, provided they were satisfactory to him, the plaintiff, and did actually accept them, then Donaldson has

been discharged from all liability on account of the purchase money due for said two-thirds interest. 3. If there was an arrangement, either express or implied, between the plaintiff and Donaldson, subsequent to the execution of the original agreement, that Donaldson should give satisfactory notes for one third of the purchase money, on the payment of which he was to be discharged from all liability for any other part of said purchase money, and the said notes were given and accepted for the said amount and paid at maturity, the plaintiff was not entitled to recover against Donaldson. Plaintiff's prayers were all rejected, and those of defendant granted. To this ruling plaintiff excepted. Garland confessed judgment, and verdict and judgment being rendered in favor of Donaldson, plaintiff appealed.

F. K. Howard and S. T. Wallis, for the appellant.

Thomas Donaldson, for the appellee.

By Court, TUCK, J. By the agreement of June 23, 1848, the appellee and Garland became indebted to the appellant. As between them, Garland owned two thirds of the property, and Donaldson one third; and this was known to the appellant at the time. If either had paid the whole or more than his proportion, he would have been entitled to recover from the other for such excess: *Owens v. Collinson*, 3 Gill & J. 25; and his right of action would have accrued on the expiration of the time at which Yates himself could have sued upon the agreement.

It appears that before the expiration of that time, and before compliance with the agreement, by the delivery to Yates of notes for the amounts, and at the times stipulated, the purchasers made an arrangement between themselves to give separate notes for their respective interests, to which Yates assented, provided they were indorsed to his satisfaction. With this agreement the appellee complied; but it does not clearly appear whether Garland did or not. He says that he did not; but Homans states that two of his notes (for the amount due by Garland) were indorsed and delivered to Yates; that he expressed himself satisfied, and accepted them. Garland also states that the negotiation for the sale to Homans was carried on between them alone; and between Yates, Garland, and Homans as to the acceptability of Homans' notes, which Yates had agreed to take from Garland if they were satisfactory to him. The principle is well settled that the acceptance of a security or undertaking of equal degree does not extinguish the former

debt, unless it be received in satisfaction, or be intended as an abandonment of the remedy on the first contract. It is equally clear that these are questions for the jury. Such an arrangement, however, suspends the remedy on the first contract until the notes mature: *Glenn v. Smith*, 2 Gill & J. 493 [20 Am. Dec. 452]; *Hunter v. Van Bomhorst*, 1 Md. 504. It follows from this state of the law that the prayers offered by the appellant should have been granted, except the sixth, unless there be something in the case overlooked in framing the prayers, to the benefit of which the appellee was entitled in submitting the law of the case to the jury. And as to the sixth, the instruction would also have been proper if it had not submitted to the jury the finding of a fact of which there was no evidence whatever, to wit, that the acceptance by Yates of Homans' notes was at the request and for the accommodation of both the parties, Garland and Donaldson.

It is contended, however, on the part of the appellee, that the knowledge by Yates at the time of the purchase that the purchasers held separate interests, and his afterwards dealing with them separately for the security of their respective proportions of the debt, and accepting Homans' notes in the manner stated in the evidence, without the knowledge of the defendant, by which time was given to Garland, have discharged the appellee from all liability on the original contract. If Donaldson had been merely surety for Garland, this view of the case would be certainly correct; for time given to a principal will discharge the surety, because it places him in a new situation in reference to the principal debtor. But here both parties are principals according to the agreement, and how can it appear that a party to a joint contract is a surety for part of the debt except by going out of the instrument? Can this be done at law where both are sued? If one be released, both will be, except in a case where the remedy against the other is expressly reserved, as in *Clagett v. Salmon*, 5 Gill & J. 354, and the cases there cited.

Where the act of the creditor operates a release of the surety, there can be no difficulty in enforcing this principle. The remedy is gone entirely. But in a case where both are principals, how are the equities between them to be adjusted in a suit at law by the creditor against both? If time given to one released the other, the discharge would avail only to the extent of that portion of the debt which was due by the party to whom time has been given. The party not indulged would at any rate be liable for his own proportion of the debt. Supposing that this

might be easily worked out to its proper result in a case like this, where one party is liable for one third and the other for two thirds, and the verdict is to be rendered against one only, because the other has confessed a judgment, the difficulty of doing complete justice among all the parties is apparent in a case where there are several parties to the contract who are defendants in the cause liable in different proportions as among themselves, though all responsible to the creditor in the first instance. It would be impossible to render a judgment upon any adjustment of these equities. The judgment at law must be for the same amount against all the defendants. It is not a sufficient answer to say that the appellee paid his share, and that therefore this difficulty could not arise. We are dealing with a principle upon which the party, if discharged at all, was exonerated at the moment the indulgence was given by the arrangement with Garland as to Homans' notes; at which time the appellee's part had not been paid, because the notes passed for his share did not *per se* extinguish his liability.

We have not been referred to any case at law in which such a defense has availed, while there are some to the contrary. In *Bedford v. Deakin*, 2 Barn. & Ald. 210, one of the members of a dissolved firm undertook to pay the joint debts, and this was made known to a creditor who received his notes for the amount of the joint indebtedness, which notes were subsequently renewed and not paid, and the original partners were held liable on the joint note. It is true that the creditor reserved his remedy on the first note and retained possession of it, and sued on it; but all this was unknown to the other partner. The creditor had given time without his assent to the settling partner, and he had failed after being so indulged. The judges, Abbott, Bayley, and Holroyd, agreed that the first debt was not extinguished. They notice the very argument employed in this case—the injury to the appellee by preventing his recourse on the agreement if he had paid the debt, by saying that as a joint debtor it was his duty to have seen the debt was paid; and the last judge says: “The dishonor of the bill gave a right of action against all the partners, and the circumstance of a creditor giving time to one of three joint debtors will not discharge the others, nor even suspend his right of action against them.” In *Manley v. Boycot*, 18 Eng. L. & Eq. 357, the defendant, who was one of the makers of a promissory note, to an action against him by the payee, pleaded that he made the note as surety for another and for his accommodation, which was known at the time

to the payee, and that after the note had become due, the plaintiff gave time to the other maker, without the consent of the defendant. It was held that this was no defense to the action. Lord Campbell said that "the plea was bad in not alleging that the note was delivered by the defendant as surety for the other party. The *bona fide* holder of a bill or note can not be prejudiced in the rights which he *prima facie* has according to the terms of the instrument, by knowledge subsequently acquired, or even by knowledge which he has at the time he takes it, if there is no evidence of a special agreement at the time when he takes it, to affect the rights and liabilities of the parties. If the payee of a joint and several promissory note made in the common form by two may be placed in a situation for treating one as surety for the other, it can only be by his express assent to do so when the note was delivered to him." The case of *Smith v. James*, Id. 353, note, is likewise in point; *Perfect v. Musgrave*, 6 Price, 111; *Sprigg v. Bank of Mt. Pleasant*, 10 Pet. 257. See also *Rees v. Berrington*, 2 Ves. jun. 542; S. C., *White & Tudor's Eq. Cas.* 707; 72 Law Lib. 352; and Forsyth on Composition with Creditors, c. 8; 1 Lib. Law & Eq. 34—in both of which the subject is fully treated.

The same principle has been often applied in the instance of accommodation notes, where the indorser is the real debtor as between him and the maker. Although releasing the indorser does not discharge the maker, for the reason that the latter can have no claim against the former, if he should pay the debt, it being his own, yet equities between them will not vary the legal principle, and affect the operation of the instrument, where the party seeking to shield himself as surety appears to be a principal. He will not be allowed to deny the character in which he appears on the paper. In *Carstairs v. Rolleston*, 5 Taunt. 551, which was an action by the assignees of Kensington & Co., upon a promissory note of which they were indorsers and the defendants the makers, the latter pleaded that they made the note as sureties for one Rolleston, and not on their own account, and that Kensington & Co. had since released Rolleston from all their claims against him. Rolleston was an indorser; but the court held the release to him was no ground of defense, the defendant being the maker. This, however, was a case in which the state of the business, as between the maker and indorser, was unknown to the holder of the note, and the court reserved its opinion in such a case. But in *Fentum v. Pocock*, Id. 192, the same point was ruled without reference to knowledge on the part of the

holder. Mansfield, C. J., alluding to the judgment of Lord Ellenborough, in *Laxton v. Peat*, 2 Camp. 185, says: "We think we are bound to differ from him, and to hold that it is impossible for us to consider the acceptor of an accommodation bill in the light of a surety for the payment by the drawer, and that we can not, therefore, say that he is discharged by the indulgence shown to the drawer. If the holder had known, in the clearest manner, at the time of his taking the bill, that it was merely an accommodation bill, it would make no manner of difference, for he who accepts a bill, whether for value or to serve a friend, makes himself in all events liable as acceptor, and nothing can discharge him but payment or release." And Lord Tenterden, in *Yallop v. Ebers*, 1 Barn. & Adol. 698, said: "*Laxton v. Peat*, where it was held that an accommodation acceptor might be considered as a surety, has been long overruled." This question came before the court of appeals in *Clopper v. Union Bank*, 7 Har. & J. 92 [16 Am. Dec. 294], and the maker of the note was held liable to the bank which discounted it, with knowledge that it was for the accommodation of the indorser, even after the bank had given time to the indorser. In every bill of exchange the acceptor, and in every promissory note the maker, is in law the principal, and is first liable, and every indorser in the order in which his name appears on the bill or note. There is no difference between accommodation notes and those negotiated for value. The court will look to the relation that parties bear to each other on the instrument itself, and determine their liabilities accordingly.

The cases cited on the part of the appellee show that there must be an agreement to discharge, or something that amounts to an abandonment of the remedy on the first contract, and that this must be left to the jury, except in those cases where the nature of the evidence is such that the court must pass upon its construction and effect. In *Harris v. Lindsay*, 4 Wash. 271, the court said: "If it be agreed on dissolution that one member shall pay the debts, they are yet bound as principals, so that no indulgence granted by a creditor to the paying partner, which falls short of an agreement, express or implied, to take him as the debtor and to discharge the other, can place them in the situation of principal and surety so as to discharge the retiring partner." To support a defense of this kind, such an agreement must be satisfactorily made out: See also *Harris v. Lindsay*, Id. 98. The retiring partner in that case was discharged, because, in the opinion of the court, "the new cor

tract amounted to an agreement to discharge Lindsay, and the intention of the parties formed no part of the question which the jury had to decide. There were no circumstances in the case other than such as grew out of written documents, the construction and legal effect of which were proper for the consideration and decision of the court." But it was also held that if the agreement be a mere inference from circumstances tending to show that such was the intention of the parties, the jury were the proper judges of such intention. In this case the evidence, as is insisted, was taken in writing, as by a commission, but that is not such as Judge Washington meant when he spoke of documentary proof.

The present case, however, is not as favorable to the appellee, as far as concerns the propriety of the proposed defense, as those to which we have referred. Here the defendant does not pretend that he was surety for the whole debt; his original liability for one third is admitted. And hence the greater difficulty of allowing such defenses at law than where the party claims that he was mere surety for the whole, and that he has been altogether released by the acts of the creditor. If the law be correctly stated in the cases cited, it will apply more strongly and with greater reason to the one under consideration, where the party insisting on the benefit of this equity was at any rate liable for a part of the debts.

Upon a careful consideration of the record and of numerous decisions, we are of opinion that the appellee was not discharged at law; the principle deducible from the cases being, as we think, that where the party does not appear on the instrument to have made himself liable as surety, he can not at law avail himself of the equities between himself and the other parties to the instrument, unless he was accepted by the creditor as a surety, or has been discharged by the acts of the creditor, according to the principles recognized in *Glenn v. Smith*, 2 Gill & J. 493 [20 Am. Dec. 452].

The first of the appellee's prayers assumes that he was discharged by Yates having taken the notes of Donaldson for one third of the original purchase money, without reference to the question of agreement to take them in satisfaction of his liability on the contract, or of intention to release him. As the case is presented on that prayer, these notes when paid amounted only to a part payment of the original debt. The second, we think, should also have been refused. If the plaintiff agreed with Garland to take Homans' notes in satisfaction of

the amount then due by Garland provided they were satisfactory to him, and did actually accept them in performance of that agreement, the appellee was discharged; and had the jury been left to find that the plaintiff assented to the arrangement on that condition, that Donaldson complied on his part, and that Yates accepted Homans' notes as performance on Garland's part, the prayer would have been proper. The arrangement, if complied with, would, according to Judge Washington, have amounted to an agreement to discharge the parties from the first contract. But this prayer omits a fact material to be found, viz., the acceptance by Yates of Homans' notes in performance of Garland's part of this new arrangement.

The third prayer of the appellee was also erroneous. It assumed the defendant's right to a verdict on the delivery by him to Yates of notes for his third of the purchase money, under an agreement supposed in the prayer, which the jury were left at liberty to have implied from the proof adduced, when, as we think, it was not competent for them to have found any such agreement by implication, even conceding that there was no necessity for an express agreement in order to discharge the party. In the case of *Oakeley v. Pasheller*, 10 Bli. 548 (relied upon by the counsel for the appellee), before the house of lords, on appeal from the lord chancellor, it was held that by arrangements between the surviving partners and the representatives of a deceased partner the former had assumed a joint debt, and the latter had become sureties only, and that the extension of time granted this new firm, without the knowledge and assent of the representatives of the deceased partner, had discharged the latter; the creditor knowing that these arrangements had been made. We do not question this doctrine as between creditor and surety debtor, where that relation exists. That is the principle in *Harris v. Lindsay, supra*. In equity, the court decides both the law and the fact; but in cases like this, whether the relation of the parties is changed or not depends on intention, and at law that must be submitted to the jury. If we were sitting in equity, that case might be entitled to great weight, being an opinion of Lord Lyndhurst, affirming the master of the rolls and the lord chancellor. We think, however, it does not contravene what we suppose to be the principles governing courts of law. Upon the remedies in equity in such cases we express no opinion.

Judgment reversed, and *procedendo* awarded.

CONTRIBUTION AMONG JOINT PRINCIPALS: *Henderson v. McDuffee*, 20 Am. Dec. 557; *Peaslee v. Breed*, 34 Id. 178; *Mills v. Hyde*, 46 Id. 177, and notes.

SUIT BY ONE JOINT PROMISOR AGAINST ANOTHER FOR EXCESS PAID BY HIM BEYOND HIS SHARE: *Fletcher v. Grover*, 35 Am. Dec. 497; *Mills v. Hyde*, 46 Id. 177, and notes thereto.

RELEASE OF ONE JOINT DEBTOR IS RELEASE OF ALL: *Allen v. Shadburne's Ex'r*, 25 Am. Dec. 121; *Goodnow v. Smith*, 29 Id. 600; *Tremper v. Hemp-hill*, 31 Id. 673; *Berry v. Gillis*, 43 Id. 584; *Bozeman v. State Bank*, 46 Id. 291; *Benjamin v. McConnell*, Id. 474; *Williamson v. McGinnis*, 52 Id. 561, and notes thereto. See *Farmers' & Mechanics' Bank v. Rathbone*, 58 Id. 200, and note.

LIABILITY ON PROMISSORY NOTE WHEN IT IMPORTS TO BIND EACH PERSON WHO SIGNS IT: *Olcott v. Little*, 32 Am. Dec. 357, and note. See *O'Brien v. Bound*, 42 Id. 384, and *Glenn v. Sims*, Id. 405, as to joint liability on other contracts.

SURETY IS DISCHARGED BY GIVING TIME TO PRINCIPAL: *Grafton Bank v. Woodward*, 20 Am. Dec. 566; *Bank of Montpelier v. Dixon*, 24 Id. 640; *Everett v. United States*, 30 Id. 584; *Okie v. Spencer*, Id. 251; *Lime Rock Bank v. Mallett*, 56 Id. 673; *Burke v. Cruger*, 58 Id. 102, and notes.

WHEN TIME GIVEN TO INDORSE OF ACCOMMODATION NOTE DOES NOT RELEASE MAKER: *Bank of Montgomery v. Walker*, 11 Am. Dec. 709; *Clopper v. Union Bank*, 16 Id. 294; *Kennebec Bank v. Tuckerman*, 17 Id. 209; *Lambert v. Sandford*, 18 Id. 149, and notes.

ONE WHO SIGNS HIS NAME ON BACK OF PROMISSORY NOTE at the time it is made is liable as an original promisor, and not as an indorser: *Martin v. Boyd*, 35 Am. Dec. 501; *Sylvester v. Downer*, 49 Id. 786; *Colburn v. Averill*, 50 Id. 630, and notes thereto.

PARTY MAY SHOW THAT HE SIGNED NOTE AS SURETY: *Lime Rock Bank v. Mallett*, 56 Am. Dec. 673; *Burke v. Cruger*, 58 Id. 102, and notes thereto.

RIGHTS AND LIABILITIES, IN GENERAL, OF ACCOMMODATION INDORSERS, ACCEPTORS, AND MAKERS: See note to *Pitt v. Congdon*, 51 Am. Dec. 303.

THE PRINCIPAL CASE WAS RECOGNIZED in *Campbell v. Booth*, 8 Md. 116, holding that where two or more persons are bound jointly, the claimant may release one and reserve his remedy against the others, with their consent. It was relied on in *People's Bank v. Keech*, 26 Id. 533, to the point that if one party to a joint engagement is discharged by the act or default of the appellant, it operates to discharge the other also. It was also relied upon in *Berry v. Griffin*, 10 Id. 31, to the point that the acceptance of a security or undertaking of equal degree does not extinguish the former debt, unless it be received in satisfaction, or be intended as an abandonment of the remedy on the first contract. It was recognized to the same point in *Mailhouse v. Frazier*, 25 Id. 105; and *Haines v. Pearce*, 41 Id. 231.

ATWELL v. MILLER.

[6 MARYLAND, 10.]

AS ITEM OF EVIDENCE, BLOTTER MAY BE REFERRED TO BY WITNESS, salesman of a firm, to show that he had sent a bill copied therefrom to defendant, and to ascertain, by referring thereto, of what the bill consisted.

PROPER FOUNDATION FOR INTRODUCTION OF SECONDARY EVIDENCE OF CONTENTS OF BILL OF PARCELS must first be laid before blotter can be referred to, to show what articles were embraced in it, and may be done by showing a notice duly served upon defendant to produce the original paper, and disregard of the same.

EVIDENCE ADMITTED UNDER ASSURANCE THAT IT WILL BE FOLLOWED UP BY PROOF OF OTHER MATERIAL FACTS intimately connected with it should be disregarded by the jury if the assurance is not fulfilled, and it is the duty of the court to so instruct them upon subsequent application of counsel.

PLAINTIFF'S ENTRIES IN BLOTTER ARE NOT EVIDENCE PER SE IN HIS FAVOR, and can not become so without being collaterally connected with other facts and circumstances.

IT IS INSUFFICIENT NOTICE, TO LET IN SECONDARY EVIDENCE OF CONTENTS OF PAPER, to merely notify defendant during trial to produce such paper, without showing it to be in court at the time, and in his possession, or if elsewhere, that it would be of easy access.

WRITING OF ITSELF IS INSUFFICIENT TO PROVE CONTRACT, if it consist merely of a letter from vendee to vendor, asking for a bill of parcels of goods; yet it may be a circumstance, in connection with other facts, tending to establish the contract.

ACTUAL OR MANUAL DELIVERY OF GOODS IS NOT NECESSARY IN ORDER TO GRATIFY STATUTE OF FRAUD, where they are ponderous and incapable of being handed over from one to another, and where the buyer so far accepts them as to treat them as his own; or where the delivery is symbolical; or where actual delivery is impracticable, and can only be by such symbolical means as the circumstances of the case will allow.

DELIVERY IS FACT TO BE FOUND BY JURY.

CONSTRUCTIVE DELIVERY IS MIXED QUESTION OF LAW AND FACT, and the circumstances or facts necessary to constitute it must be found by the jury, as in actual delivery.

UNDER EVIDENCE SHOWING CONSTRUCTIVE DELIVERY either party has the right to ask instructions of the court as to the legal effect of any particular circumstance which may be offered to the jury, and from which the delivery is to be deduced.

INSTRUCTION TO EFFECT THAT ACTUAL DELIVERY IS NECESSARY TO MAKE VALID SALE, in all cases where it depends upon delivery alone, will be refused.

TO DETERMINE SUFFICIENCY OF PROOF TO ESTABLISH VALID CONTRACT BETWEEN PARTIES is the province of the jury.

ASSUMPSIT. Appeal from the superior court of Baltimore county. Action brought by appellees against appellant to recover a balance due plaintiffs on account of the sale of certain goods, fourteen bales of Osnaburgs and twenty-five bales of drills, alleged to have been first sold by plaintiffs to defendant, and afterwards, at his request, resold by them on his account. The paper referred to in the third exception was an account-sales of goods rendered defendant. The nature of the prayers and other facts will appear from the opinion.

J. Malcolm, for the appellant.

William F. Frick, for the appellees.

By Court, MASON, J. This is an action of *assumpsit*, instituted by the appellees against the appellant, to recover the balance upon certain sales alleged to have been made by the former, as factors, on account of the latter, the controversy involving the sum of one hundred and twenty-two dollars. The first question which is raised in the record relates to so much of the evidence of Goodwin which seeks to introduce the blotter of the store, containing the original entry of one of the plaintiffs at the time the alleged transaction with the defendant took place. This evidence was objected to by the defendant, "as proof of sale made." But the "plaintiffs stated that they did not offer the entry for any such purpose, but only to be connected with other proof thereafter to be offered, of a bill of the goods charged having been asked for by defendant and sent him." The record further shows that for this latter purpose alone the evidence was admitted.

It was competent, we think, for the witness to refer to the blotter as an item of evidence in the cause, to show that he had sent a bill copied therefrom to the defendant, and to ascertain by referring thereto of what the bill consisted. This testimony, however, would only be admissible for the purpose of showing what articles were embraced in the bill of parcels, after the proper foundation had been laid for the introduction of the secondary evidence of the contents of the said bill of parcels; and that foundation would have been a notice duly served upon the defendant to produce the original paper, and which notice had been disregarded.

In this instance, as the point is presented by the record, we think the book was properly admitted in evidence for the specific purpose for which it was offered. The assurance that this evidence would be followed up by proof of other circumstances and facts material and competent, with which it would have an important connection, rendered its admission proper. If, however, it should turn out that this assurance was not fulfilled, it would be the duty of the court, in a subsequent stage of the trial, upon an application by counsel, to direct the jury to disregard or reject it. The entries in the blotter were made, it appears, by one of the plaintiffs himself, and therefore were clearly not evidence *per se* in their favor. They could only have become so, as we have shown, by being connected collat-

erally with other facts and circumstances. In this case we think, as we shall presently show, the plaintiffs did not make good their pledge, inasmuch as they did not show that a legal notice had been given in order to lay the foundation for the introduction of the secondary evidence. This leads us to the consideration of the second question presented by the record.

In the progress of the trial, with the view of establishing the original contract of sale, out of which the present controversy arises, the plaintiffs offered to prove, *aliunde*, the contents of a written paper, being the bill of parcels of the goods. To authorize the introduction of this evidence, the plaintiffs, while the trial was in progress, served a notice upon the defendant in court to produce the original paper, which the defendant's counsel, after having examined his papers, declined to produce, and hence the attempt of the plaintiffs to give secondary evidence of its contents. Was this notice sufficient, under the circumstances, to warrant the introduction of the secondary evidence? is the point to be determined. Notice given at the bar, during the progress of the trial, to produce a paper, is not sufficient, unless it appears satisfactorily that the paper is in court at the time, and in possession of the party upon whom the demand is made, or if elsewhere, that it would be of easy access. In this case it does not affirmatively and sufficiently appear in the record that the paper was in court and in the possession of the defendant, or of easy access when the demand was made. It is true he declined to produce it, but it might as well have been that he so declined from inability to produce it as from an unwillingness to do so. The secondary evidence of this paper, therefore, was improperly admitted, and for that reason we reverse the ruling of the court upon this point.

From what we have said it follows that the notice to produce the other paper referred to in the record, and which constitutes the third exception, was sufficient; the same appearing to have been in court, and in the possession of the defendant when the demand for its production was made.

The object of the plaintiffs, in this case, was to show such a sale as would be operative and valid under the statute of frauds, and in order to do this, evidence was proposed to be offered that there was either a memorandum in writing signed by the parties witnessing the contract, or that there was such a delivery of the goods, either actual or constructive, as was sufficient to gratify the requirements of the statute. Upon the whole evidence, three prayers were offered by the defendant, all of

which were rejected by the court below. The first asked the court to say that "there was no evidence of a sale and delivery, within the provisions of the seventeenth section of the statute of frauds." This prayer was properly rejected. Without expressing any opinion in regard to the weight of testimony in the cause, we do not feel at liberty to say there was none tending to support such a proposition. The letter of the defendant in regard to this transaction, though not a sufficient writing of itself to witness the contract, might still well have been a circumstance, in connection with other facts, which might tend to establish the contract. The same may be said of the conversation of the defendant with the witness Grofflin, and of other circumstances proved in the progress of the trial.

In regard to the proof of a delivery of the goods, in order to gratify the statute, it must be conceded that an actual or manual delivery is not in all cases necessary. Upon this subject the law is well settled and clearly defined, and may be thus stated: Where the goods are ponderous and incapable of being handed over from one to another, and where the buyer so far accepts them as to treat them as his own, exercising acts of ownership over them, from which possession as owner may be inferred; or where the delivery is symbolical, such as the delivery of the key of the warehouse in which the goods are lodged; or where actual delivery is impracticable, and can only be made by such symbolical means as the circumstances of the case will allow, as in the case of a ship or cargo at sea, etc.—actual or manual delivery is not necessary: *Franklin v. Long*, 7 Gill & J. 407.

While delivery is a fact to be found by the jury, constructive delivery is a mixed question of law and fact, and the circumstances or facts necessary to constitute such a delivery must be found by the jury, as in the case of actual delivery. We think there was evidence adduced upon the trial which should properly have been submitted to the jury upon the question of delivery, and hence the additional error of the first prayer in assuming there was none. The second prayer, we think, was improperly rejected. It submits nothing to the jury but the simple question of delivery, which is a fact to be found by the jury. When, however, the delivery is not actual, but symbolical or constructive, then, as we have already said, it is a mixed question of law and fact, and either party has the right to ask instructions of the court as to the legal effect of any particular circumstance which may be offered to the jury, and from which the delivery is to be deduced.

The third prayer was properly rejected, because it assumes that in all cases like the present an actual delivery is necessary to make the sale a valid one where it is to depend upon delivery alone. We think, on the contrary, when, from the peculiar character of the goods sold they are not susceptible of an actual or manual delivery, as in this case, a symbolical or constructive delivery will be sufficient. If this verdict and judgment stood alone upon the evidence in regard to the delivery, we might be disposed not to disturb them; but as it is impossible to know upon what ground the jury based their verdict, whether upon the ground that a written contract had been sufficiently proved (the evidence in regard to which having been excluded by us), or whether, upon the proof of delivery, we must reverse the judgment. In doing so, however, we do not wish to be understood as intimating any opinion as to the sufficiency of the proof to establish a valid contract between these parties. To determine that is the province of the jury.

Judgment reversed, and *procedendo* awarded.

BOOKS OF ACCOUNT AS EVIDENCE: *Cogswell v. Dolliver*, 3 Am. Dec. 45; extensive note to *Union Bank v. Knapp*, 15 Id. 191; *Drummond v. Hyams*, 18 Id. 649; *Rhoads v. Gaul*, 27 Id. 277; *Vicary v. Moore*, Id. 323; *Merrill v. Ithaca & Owego R. R. Co.*, 30 Id. 130, and note 142; *Sickels v. Mather*, 32 Id. 521; *Smith v. Vincent*, 38 Id. 52; *Cummings v. Nichols*, Id. 501; *Mathes v. Robinson*, 41 Id. 505; *Burr v. Byers*, 52 Id. 239; *Thompson v. Porter*, 53 Id. 653; *Cameron v. Rich*, 57 Id. 747; *Tarleton v. Goldthwaite's Heirs*, 58 Id. 296, and notes to same, besides those cited.

NOTICE TO PRODUCE PAPER AT TRIAL is not sufficient to let in parol proof, unless served upon attorney before the term, where the paper is at the party's residence at a distance from the court: *Gorham v. Gale*, 17 Am. Dec. 549, and note.

DELIVERY IS FACT DEPENDENT UPON INTENTION, and must be determined by the jury from a consideration of the whole evidence: *Byer v. Etnyre*, 41 Am. Dec. 410, and note.

WHEN CONSTRUCTIVE INSTEAD OF ACTUAL OR MANUAL DELIVERY MAY BE MADE: *Jewett v. Warren*, 7 Am. Dec. 74; *Pleasants v. Pendleton*, 18 Id. 726; note to *Whipple v. Thayer*, 26 Id. 628; *Calkins v. Lockwood*, 42 Id. 729; *Van Brunt v. Pike*, 45 Id. 126; *Cocke v. Chapman*, 44 Id. 536; *Linton v. Butz*, 47 Id. 501; *Sanborn v. Kittredge*, 50 Id. 58; *Arnold v. Delano*, Id. 754; *Sahlman v. Mills*, 51 Id. 630, and notes thereto.

IT IS NOT ERROR TO ADMIT EVIDENCE which may be made competent by the introduction of subsequent testimony: *Hamilton v. Summers*, 54 Am. Dec. 509.

FOUNDATION HAVING BEEN LAID BY PROOF OF LOSS OF WRITTEN INSTRUMENT, its contents may be proved by explicit oral testimony: *Jones v. Robinson*, 54 Am. Dec. 212, and note.

THE PRINCIPAL CASE WAS RECOGNIZED in *Union Bank v. Kerr*, 7 Md. 101, holding that in all cases either party, if he thinks proper, may ask in-

structions of the court as to the legal effect of any particular circumstance which may be offered to the jury, and from which the particular matter in controversy is to be deduced. So in *Crawford v. Beall*, 21 Id. 230, and affirmed in *Fustings' Ex'rs v. Sullivan*, 41 Id. 171. It was relied on in *Thompson v. Baltimore & O. R. R. Co.*, 28 Id. 405, to show that actual or manual delivery of ponderous articles is not always necessary to constitute delivery. It was examined in *Jones v. Mechanics' Bank of Baltimore*, 29 Id. 298, and none of its propositions of law disturbed. It was recognized in *Romer v. Jaetchek*, 39 Id. 590, showing that accounts in Maryland can not be proved by entries made by plaintiffs themselves in the regular course of business.

STUMP v. HENRY.

[6 MARYLAND, 201.]

BILL IN EQUITY SWORN TO BY COMPLAINANT MAY BE USED AS EVIDENCE of the facts stated in it concerning his title to certain lands, in another case in chancery affecting the same lands.

ADVERSE, EXCLUSIVE, AND CONTINUOUS POSSESSION for period prescribed by statute of limitations will confer title to land.

TITLE OF DEFENDANT IS BY OPERATION OF LAW VESTED IN PURCHASER at execution sale.

ONE'S RIGHT OF ENTRY IS NOT BARRED BY ANOTHER'S POSSESSION, unless it be adverse, exclusive, and continuous for period prescribed by statute of limitations.

POSSESSION WILL NOT OPERATE AS BAR TO RIGHT OF ENTRY recognized or acknowledged by one in possession, until the statutory period has elapsed after such recognition or acknowledgment has been made.

BAR OF LIMITATIONS DOES NOT ATTACH TO MORTGAGE PAID IN PART until the statutory period has run from such payment, though mortgagor may have been in possession for nearly the whole of such time prior to the payment.

APPEAL from the equity side of Harford county court. Bill for partition, filed September 28, 1841, by appellees, heirs at law of Isaac Henry, deceased, and claiming one undivided third of certain lands situate in Harford county; the other two thirds belonging, they said, to appellant Stump. John Richie was the original owner of the lands, but they were sold at sheriff's sale on October 29, 1817, under an execution upon a judgment obtained by Sample against him. The father of complainants, Isaac Henry, together with Sample and Woolsey, were the purchasers, and took the sheriff's deed to the property, dated August 8, 1818. Subsequently, in 1818 and 1824, Parker Forwood purchased and received Sample's and Woolsey's interest in the land; and complainants insisted that Forwood's interest passed to Stump as purchaser at trustee's sale in January, 1840,

under a decree in chancery passed August 12, 1839, in a case between Richie and Forwood, commenced in 1836, the proceedings in which will appear from the opinion. Stump insisted that Richie had remained in possession of the land from before 1812, until his death in 1841; that he used it and claimed title to it; that Isaac Henry never made any claim to it; and that neither he nor any one claiming under him ever had possession. He therefore denied complainants' title, relied upon limitations, and insisted that the whole of Richie's title passed to him under the chancery sale. The court below regarded the evidence as insufficient to show an ouster or twenty years' adverse holding by defendants and those under whom they claimed, decided that the statute of limitations did not apply, and passed a decree of sale for the purpose of partition, from which defendants appealed.

Olho Scott, for the appellants.

Henry W. Archer, for the appellees.

By Court, EGGLESTON, J. The complainants (the present appellees), as heirs at law of Isaac Henry, claim title to one undivided third part of certain lands situate in Harford county, the remaining two thirds of which they say belong to the defendant Thomas C. Stump; and the bill is filed to effect a partition. Stump, who is in fact the only defendant having any real interest in the controversy, denies in his answer the title of the complainants, and relies upon limitation. It will be seen, however, that in reference to his own title he says he "purchased said lands from the trustee appointed by the chancellor to sell all the interest of John Richie and John Forwood in said lands, and hence this defendant avers that he holds and claims all of said lands that was ever owned, held, or claimed by said Forwood and Richie." Again, this defendant says that "the complainants are probably entitled to some part of some of the named tracts, which is not claimed by defendant, but this is not admitted or denied by this defendant, but merely stated by way of making it plain what this defendant claims, which is, all that was held, possessed, or claimed by either said Richie or said Forwood." It is evident, then, that Stump claims under Richie and Forwood.

The appellees' counsel has insisted that as Stump, in his answer, says he purchased the land from the trustee appointed by the chancellor to sell the interest of Richie and Forwood, as the

proceedings in that case are in the present record, the matters alleged or stated in the bill filed by Richie may be used as evidence in regard to the title under which he held the land.

Admitting it to be true, as a general rule, that a bill in another cause can not be used as evidence, the rule does not apply in a case like the present. In the first place, the bill referred to is not simply signed by a solicitor, but is sworn to by the complainants. In addition to which, the answer of Richie to the cross-bill filed by Parker Forwood admits the filing of the bill now sought to be used as evidence, and states it was for the purpose of obtaining a reconveyance of the lands mentioned therein. Under such circumstances, it can not be doubted that the plaintiffs may use the bill as evidence: 1 Greenl. Ev., sec. 551; *Belden v. Davies*, 2 Hall, 444; *Durden v. Cleveland*, 4 Ala. 227; *Rankin v. Maxwell*, 2 A. K. Marsh. 491 [12 Am. Dec. 431].

The bill states the lands were sold under an execution to satisfy a judgment of John Sample's against Richie, and were purchased by Henry Woolsey, John Sample, and Isaac Henry; making reference to the deed of John Moore, as sheriff of the county, to the three purchasers; that the lands were sacrificed for a mere trifle compared with their actual value, and being anxious to regain them, with a view to accomplish this object, he (Richie) applied to John Forwood, who, partly out of friendship, and partly to secure a debt due to him, consented to advance money enough, with what Richie could raise, to repurchase the land from Woolsey, Sample, and Henry, on condition that the deed should be made to Forwood, with the understanding that when the money so advanced should be refunded and his other claim paid, he would reconvey the property to Richie; that in accordance with the arrangement, Forwood purchased from Woolsey, in 1818, all his interest in the land, the deed for which was made to Forwood, and is referred to; that in 1824, he also purchased of James Johnson and John Kelly the interest which Sample had held in the land, he having sold the same to Johnson and Kelly, who gave a deed to Forwood, to which reference is also made.

Under Richie's bill, the heirs of John Forwood were made defendants, he being dead. Under the bill filed by Parker Forwood, one of the defendants in the first case, Richie and others are defendants. By agreement, the two causes were consolidated, and a decree passed, on the twelfth of August, 1839, for the sale of the lands mentioned in the proceedings, the

money arising from the sale to be brought into court, to be distributed as the chancellor might direct.

At the sale by the trustees under this decree, Thomas C. Stump, the present appellant, became the purchaser of the lands now in controversy.

The plaintiffs, as the heirs at law of Isaac Henry, claim an undivided third part of the land, to which they contend he became entitled by virtue of the sheriff's sale. The defense made in argument in opposition to this claim is, that Richie remained in possession from before 1812 till his death in 1841, claiming title and using the land as his own, by selling timber; and that Isaac Henry never made any claim, never had possession, nor had any one claiming under him.

If the title of Richie is upon possession alone, then it must be adverse, exclusive, and continuous for more than twenty years. Was it so for that time, prior to the filing of this bill, on the twenty-eighth of September, 1841? It surely was not, when according to his own bill filed in 1836 he admitted the land had been sold under an execution upon a judgment against himself; that he was anxious to regain it, and for that purpose entered into the arrangement with Forwood, who accordingly purchased the rights of two of the three purchasers who acquired title to the land under the sale by the sheriff; the deed to Forwood for Woolsey's part, bearing date in 1824. The object of that bill was to obtain from the heirs of Forwood a conveyance of the title he had acquired under the arrangement, upon payment of the money due to him by Richie. The two deeds to Forwood are in evidence, and both recite the sale by the sheriff to Sample, Woolsey, and Henry. The sheriff's deed is also before us, and that sets out the *fieri facias*, in which is recited the judgment corresponding with the statement or admission in Richie's bill. By operation of law, under the sale made by the sheriff, Richie's title was vested in the purchasers: *Bowie v. O'Neale*, 5 Har. & J. 226; *Barney v. Patterson*, 6 Id. 204, 205. But it has been said by the defendants' counsel that although a sale by a sheriff, with his deed in pursuance of it, will give to the purchaser a right to possession, the possession is not thereby transferred, so that the subsequent holding of the defendant in the execution is to be considered as the possession of the purchaser. And if this be so, inasmuch as Richie continued to hold the land for more than twenty years subsequent to the sale, the title acquired by Henry to one third of the land was barred by limitation. If, however, it should be

conceded that Henry, with the other purchasers, did not acquire actual possession, but only a right of possession, still such right could not be barred by possession alone, unless it should be adverse, exclusive, and continuous for at least twenty years. And any recognition or acknowledgment of such right by the party in possession will prevent his possession from operating as a bar to such right until twenty years after the acknowledgment has been made.

In England, a bond is presumed to have been paid twenty years after date; but payment of any part within that time would require twenty years subsequent to the payment to defeat the claim. And payment of part of a mortgage will prevent it from being barred by limitation for twenty years afterwards, although the mortgagor may have been in possession for nineteen years and upwards prior to the payment. Taking Richie's bill in connection with his answer to Parker Forwood's bill, the sheriff's deed, and the two deeds to John Forwood, we think there is proof of such a recognition of the title of Isaac Henry, the father of the complainants, by Richie, as would prevent him, if he were the defendant in this proceeding, from successfully resisting the claim of the complainants. And as Stump claims through him, his condition can be no better.

But it has been contended that the decree in favor of the appellees must be reversed, because their claim rests upon the sale by the sheriff; and although his deed is in evidence, the judgment and *feri facias* are not, and this is a defect in the complainants' proof. If this should be admitted, still we would not reverse the decree; but as there can be no doubt that there is such a judgment and *feri facias*, and inasmuch as the cause must, at all events, be remanded for further proceedings, we will send it back without reversing or affirming the decree, under the act of 1832, chapter 302, when the additional proof can be put in. The court will sign a decree accordingly.

Cause remanded for further proceedings to the circuit court for Harford county, sitting in equity.

WHEN BILL IN CHANCERY WILL BE RECEIVED IN EVIDENCE: *Owens v. Dawson*, 26 Am. Dec. 49, and note.

ENTRY ON LANDS AVOIDS OPERATION OF STATUTE OF LIMITATIONS AS EFFECTUALLY AS ACTION: *Altamas v. Campbell*, 34 Am. Dec. 494, and note.

ADVERSE POSSESSION FOR TIME PRESCRIBED BY STATUTE OF LIMITATIONS TOLLS OWNER'S RIGHT OF ENTRY AND GIVES TITLE: *Taylor v. Buckner*, 12 Am. Dec. 354; *Trotter v. Cassady*, 13 Id. 183; *Fitzhugh v. Orogan*, 19 Id. 139; *University of Vermont v. Reynolds' Ex'r*, 23 Id. 234; *Brown v. McKinney*, 36

Id. 139; *Moody v. Fleming*, 48 Id. 210; *Webbs v. Hynes*, 50 Id. 515; *Alexander v. Walter*, Id. 688; *Stevenson's Heirs v. McReary*, 51 Id. 102; *School District v. Benson*, 52 Id. 618; *Beverly v. Burke*, 54 Id. 351; *Stearns v. Henderson*, 57 Id. 65; *Strimpfner v. Roberts*, Id. 606, and notes thereto; and will bar ejectment: *Berthelemy v. Johnson*, 38 Id. 179; *Conyers v. Kenan*, 48 Id. 226, and notes.

OWNER'S RIGHT OF ENTRY IS NOT TOLLED UNLESS ADVERSE POSSESSION HAS EXISTED FOR PERIOD PRESCRIBED BY STATUTE OF LIMITATIONS: *Wallace v. Hannum*, 34 Am. Dec. 659, and extended note; *Webbs v. Hynes*, 50 Id. 515; *Alexander v. Walter*, Id. 688, and notes to same, beside the one cited. As to effect of change of time in statute of limitations, see *Nickles v. Haskins*, Id. 154.

LAND IN ADVERSE POSSESSION OF ANOTHER MAY BE SOLD UNDER EXECUTION, and by such sale defendant's title is vested in purchaser: *Nickles v. Haskins*, 50 Am. Dec. 154; *Lyerty v. Wheeler*, 53 Id. 414; and notes thereto.

ESSENTIALS OF ADVERSE POSSESSION TO DEFEAT STATUTE OF LIMITATIONS: *Rung v. Shoneberger*, 26 Am. Dec. 95, note 102; *Smith v. Hosmer*, 28 Id. 354; *Williams v. Buchanan*, 35 Id. 760; *Irvine's Heirs v. McRee*, 42 Id. 468; *Dikemas v. Parrish*, 47 Id. 455, and extended note; *Browning v. Estes*, 49 Id. 760; *Webbs v. Hynes*, 50 Id. 515; *Wallace v. Maxwell*, 51 Id. 380; *School District v. Benson*, 52 Id. 618; note to *McCullough v. Wall*, 53 Id. 726, and notes, beside the ones cited.

ACKNOWLEDGMENT OF OWNER'S TITLE BY ADVERSE POSSESSION OF LAND INTERRUPTS THE RUNNING OF STATUTE OF LIMITATIONS: *Ingersoll v. Lewis*, 51 Am. Dec. 536, and note.

ENTRY BY OWNER OR HIS AGENT ON LAND AVOIDS STATUTE OF LIMITATIONS AS AGAINST ADVERSE OCCUPANT: *Ingersoll v. Lewis*, 51 Am. Dec. 536, and note.

DISSEISOR MAY RELINQUISH POSSESSION TO DISSEISEE: *School District v. Benson*, 52 Am. Dec. 618.

THE PRINCIPAL CASE WAS RECOGNIZED in *Dean v. Brown*, 23 Md. 16, showing that possession, to be adverse, must be accompanied with a positive and exclusive claim of the entire title, and if the title claimed be subordinate to or admits the existence of a superior title, the possession will not be taken as adverse to that title; nor does it matter how long such a possession may be continued, for it can have no effect in the way of barring the legitimate title.

MCDOWELL v. GOLDSMITH.

[6 MARYLAND, 319.]

STATUTE OF LIMITATIONS WILL BAR AS TO TRUSTS CREATED BY OPERATION OF LAW, though it may not in express trusts.

STATUTE OF LIMITATIONS MAY BE RELIED UPON BY FRAUDULENT GRANTEE, where creditors of grantor impeach a deed as fraudulent in fact against them.

MORTGAGE UPON WHICH DECREE OF SALE, ETC., FOR PAYMENT OF MORTGAGE DEBT HAS BEEN OBTAINED, CAN NOT AFTERWARDS BE IMPEACHED in a court of concurrent jurisdiction, in a suit brought by creditors to AM. DEC. VOL. LXI—20

set aside such mortgage as fraudulent against them. As the decree can not be assailed, its foundation, the mortgage, can not be.

IF TIME OF PAYEE'S INDORSEMENT OF PROMISSORY NOTE IN HOLDER'S HANDS DOES NOT APPEAR, it will be inferred that it was indorsed, if not on the day of its date, at least before its maturity.

PARTY WILL NOT, BY HIS OWN DECLARATIONS, BE PERMITTED TO CONTRADICT PRIOR DEED; but in some cases the declarations and admissions of a grantor will be received where the effect may be to impair the title of persons claiming under him.

QUALITY AND INTENTION OF ACTS MAY BE PROVED BY EVIDENCE OF DECLARATIONS ACCOMPANYING, or so nearly connected with them in point of time as will serve to explain their true character and purpose.

DECLARATIONS NEED NOT TAKE PLACE IMMEDIATELY WITH OCCURRENCE OF MAIN ACT, but may be before and sometimes after, provided they be calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonize with them as to constitute one transaction.

DECLARATIONS OF GRANTOR ARE ADMISSIBLE AS PART OF RES GESTÆ AGAINST GRANTEE, if they tend to show fraud in the making of the deed; and though made to conveyancer who prepared the deed, but not in grantee's presence, may be received in a case where grantor's creditors seek to vacate the deed as fraudulent against them.

CROSS-APPEALS from the court of chancery. Creditors' bill filed in the equity side of Baltimore county court, on August 25, 1845, by McDowell and others, creditors of Elizabeth Osborne, to vacate three conveyances made by her to Goldsmith: the first, dated July 14, 1841, conveying a lot of ground for two thousand dollars; the second, dated November 5, 1842, being a mortgage of real and personal estate, subject to the acts of 1833, chapter 181, and 1836, chapter 249, to secure an indebtedness of twenty-one thousand five hundred dollars payable in five five years; the third, dated February 16, 1844, conveying her equity of redemption in the mortgaged premises in consideration of the mortgage indebtedness, and of the further sum of seven thousand five hundred and fifty dollars. The bill alleged that all these conveyances were fraudulent in fact, that they embraced all the property of Elizabeth Osborne, that Goldsmith claimed the whole property as absolutely his own, and that there was no other property out of which complainants' debts could be paid. Goldsmith, in his answer, put complainants to proof of their claims, and pleaded and relied upon the statute of limitations against such as might be shown to exist. It was proved by Julia McGee that Elizabeth Osborne's creditors were urgent for their money about January, 1841; that a meeting of creditors was then held, and all, with one exception, agreed to give her time. A few days after this Goldsmith called on her,

and was there several times in the day, and Elizabeth told witness, on the morning he called, that Goldsmith wished her to make over her property to him. Witness overheard him say to her, "This is the only way in which you can save your property, Betsy." Goldsmith shortly afterwards left with some papers which looked like deeds. Elizabeth went out without speaking to any one; but after remaining away some time returned crying, and calling witness into her room, told her that she had made over her property or some of it to Goldsmith. It was also proved by Spurrier, the conveyancer who prepared the mortgage of 1842 and the deed of 1844, that instructions for the preparation of said mortgage were given in his office in the presence of both Elizabeth and Goldsmith; and that Goldsmith informed witness that she would call and give him instructions concerning the deed of 1844, which she did, and was then asked by witness "if it was possible that she was about to convey her interest in said property to this man, and if she knew what she was about." She told him it was not to an absolute deed of the property; that she had every confidence in Goldsmith that he would reconvey back to her the property upon payment to him of the sum of from six thousand to eight thousand dollars, witness not recollecting the precise sum, and that Goldsmith would give her a written agreement to that effect. She also informed witness at the time that creditors were pressing her, and that she made the deed absolute then to prevent her creditors from seizing her property, and dragging her furniture about and taking it from her house. Goldsmith was not present at any conversation between witness and said Elizabeth except at the taking of the memoranda on instructions for the mortgage. Defendant filed exceptions to the testimony concerning the declarations of Elizabeth. The other proof in the case, and facts relating to the claim of Sarah Ann Truitt, will appear from the opinion. The chancellor decided that defendant's plea of limitations was available against the claims of all the complainants except Truitt and passed a decree vacating the deed of 1844, as against her, as the holder of a promissory note of Elizabeth's for one thousand one hundred dollars, dated November 6, 1843, and such other of the creditors of said Elizabeth as should hereafter come in under the decree and prove their claims, and for a sale of the equity of redemption in the premises included in said deed to pay the said claims. The decree then reserves for further directions all questions in regard to the claim of said Truitt on the note for two thousand eight hundred dollars, dated Oc-

tober 21, 1844; dismisses the bill without prejudice so far as it asks relief against the deed of 1841 and the mortgage of 1842; and dismisses it absolutely as to all the complainants except Truitt. The deed of 1842 was executed in conformity with the act of 1833, chapter 181; and as authorized by said act, a decree was passed by the Baltimore county court, on December 6, 1842, providing for a sale, etc., under the terms of such mortgage. This court, over mortgages of this description, had concurrent jurisdiction with the high court of chancery, and the last-named court disclaimed any power to vacate the deed and set it aside as fraudulent and void. For further facts and opinion concerning this decree, see 2 Md. Dec. 370. From this decree both Goldsmith and the complainants appealed.

S. T. Wallis and Charles H. Pitts, for the creditors.

Thomas S. Alexander and John V. L. McMahon, for Goldsmith.

By Court, TUCK, J. It is conceded that there is no question before us as to the deed of the fourteenth of July, 1841. Of all the creditors who offered proof of their claims, none was such prior to the fifth of November, 1842, the date of the mortgage, except Walter Cook, jun.; and if the plea of limitations can avail the defendant, none of them have a standing in court except Sarah Ann Truitt, whose claim can be enforced, if at all, only against the equity of redemption conveyed by the deed of the sixteenth of February, 1844. The first question, then, to be disposed of relates to the plea of limitations, relied on by Goldsmith.

There are decisions to show that in cases like the present this defense has been rejected, but whether correctly or not we are not at liberty to inquire, because the point has been definitively settled in this state. The chancellor, after having discussed the question upon principle as well as authority, referred to the case of *Farmers' Bank v. Mullikin*, in this court, December term, 1840 (not reported). We have carefully examined that record and the proceedings on the appeal, and find that it fully sustains the view taken here on behalf of the defendant below. The amended bill and answers distinctly raised the issue of fraud in fact. It was asserted that the deeds were made by contrivance and conspiracy between the parties, with intent and for the purpose of defrauding the complainants and other creditors of the grantor, and that that unlawful purpose would be accomplished if the deeds were allowed to stand as valid, inasmuch as the grantor had no other property wherewith to satisfy his cred-

itors. It appears by the minutes for the decree, taken down by the clerk of the court, and by the decree itself, that the deeds were "adjudged to have been made in fraud of the creditors of the grantor," and that the defense of limitations relied on in the answers of three of the defendants was sufficient to protect the interests of two of them; but that the benefit of that defense was denied to the other only because it had been waived by him. It was urged in argument there, as here, that the grantee should be treated as a trustee for the creditors, and as such could not interpose this defense against those for whose use he held the property. This point is thus answered in the minutes for the decree: "Limitations will bar as to trusts created by operation of law, though it may not in express trusts." There being no difference between the cases, we must yield to its authority without reference to the decisions in other courts.

This view of the case disposes of all the claims except those of Truitt, and relieves us from the necessity of passing upon the mortgage of the fifth of November, 1842, there being no party in court in whose behalf it can be assailed. Moreover, we agree with the chancellor as to the effect of the proceedings in equity, under the act of 1833, chapter 181, as a protection to the defendant against inquiry, in this case, into the question of fraud in obtaining that deed.

The remaining questions on these appeals relate to Truitt's claims and the charge of fraud as to the deed of the sixteenth of February, 1844. This complainant did not set out her cause of action in the bill of complaint, but subsequently filed two notes of Osborne under the commission to take proof, one for one thousand one hundred dollars, dated the sixth of November, 1843, and another for two thousand eight hundred dollars, dated the twenty-first of October, 1844, which was not due when the bill was filed. We can express no opinion as to the last of these claims. The chancellor has neither allowed nor rejected it; but on the contrary, has reserved it for further directions.

We think that her claim on the note for one thousand one hundred dollars was properly allowed. It was signed by Osborne, and indorsed by Goldsmith, the payee. The objection is that it does not appear that she held this note when the bill was filed, but we are of opinion that she must be regarded as the owner at that time until the contrary appears. She is described in the bill as a creditor, and at the proper time for proving her case she filed and proved this note under the commission. It does not appear when Goldsmith indorsed it, but the infer-

ence is that it was indorsed, if not on the day of its date, at least before its maturity: *Pinkerton v. Bailey*, 8 Wend. 600; *Anderson v. Weston*, 37 Eng. Com. L. 388; *Burckmyer v. Whiteford*, 6 Gill, 1.

The decision of the question of fraud depends on the bill, answer, and proofs. We might rather say on the proofs, as we do not attach much consequence to the answer. The evidence on the part of the creditors was assailed as general, contradictory, and unworthy of credit. This affirmation, we think, was more justly applied to the answer, for the contradictions are striking and irreconcilable, while the gross carelessness and want of system and precaution in large money transactions, which, according to the answer, appear to have signalized the defendant's habits of business, are calculated to impair the weight which an answer should have when furnishing no reason to suspect unfairness in the transactions of which it speaks. Concurring with the chancellor in what he has said respecting the case as disclosed by the answer, we proceed to consider the proofs; and first, the admissibility of the declaration of Osborne, as proved by Spurrier and McGee.

It is a general and very salutary rule of evidence that a party will not be permitted by his own declarations to defeat a prior deed; but it is also well settled, that in some cases the declarations and admissions of a grantor will be received where the effect may be to impair the title of persons claiming under him: *Dorsey v. Dorsey*, 3 Har. & J. 410 [6 Am. Dec. 506]; *Walls v. Hemsley*, 4 Id. 243; 1 Greenl. Ev., secs. 189, 190. Another principle is, that all such facts as have not been admitted by the party against whom they are offered, or by some one under whom he claims, ought to be proved under solemn sanctions by persons having knowledge of the facts; but to this certain exceptions have also been recognized, some from very early times, on the ground of necessity or inconvenience; and among these is proof of the quality and intention of acts by evidence of declarations accompanying, or so nearly connected with them in point of time as will serve to explain their true character and purpose. We are informed by Professor Greenleaf that it is very difficult to bring this class of cases within the limits of a particular description: 1 Greenl. Ev., sec. 108. The points of attention are, whether the circumstances and declarations are contemporaneous with the main fact, and whether they are so connected with it as to illustrate its character. Where a party does an act material to be understood, his declarations expressive of the character, motive,

or object of it are regarded as "verbal acts indicating a present purpose and intention." Their admissibility is to be determined according to the decree of their relation to the principal subject-matter of dispute, in the exercise of a sound discretion by the court. The cases will show that they need not take place immediately with the occurrence of the act, but may be before and sometimes after, provided they be calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonize with them as to constitute one transaction: 1 Greenl. Ev., secs. 108-110; Broom's Maxims, 442; *Mayor of Colchester v. Brooke*, 7 Ad. & El. 384; *Kolb v. Whitely*, 3 Gill & J. 188; *Cross v. Black*, 9 Id. 210; *Burckmyer v. Whiteford*, 6 Gill, 1; *Garner v. Smith*, 7 Id. 1; *Miller v. State*, 8 Id. 141; *Handy v. Johnson*, 5 Md. 450.

This doctrine has been applied in cases like this, in which the object was to vacate deeds at the instance of creditors. *Merrill v. Meachum*, 5 Day, 341, cited by the chancellor, is clearly in point, where the declarations of the grantor, "tending to show that the deed was executed for the purpose of securing the land against the attachments of his creditors," were admitted. But the correctness of the principle had been questioned, if not denied, in *Beach v. Catlin*, 4 Id. 284 [4 Am. Dec. 221]. The case of *Barrett v. French*, 1 Conn. 354 [6 Am. Dec. 241], relied on by the defendant, is not like the present. It does not appear that the declarations of the grantor were offered in evidence as part of the *res gestæ*.

In *Harshaw v. Moore*, 12 Ired. 247, where a deed was impeached for fraud as against creditors, the declarations of the grantor, immediately before and in contemplation of the act, were received to show his object in doing it, as strong evidence bearing upon the very point in issue against the party claiming under him. See also *Ford v. Elliott*, 4 Exch. 78.

Cases like the present have also occurred in Maryland, in which the declarations of the grantor were introduced to impeach the deeds: *Duvall v. Waters*, 1 Bland, 588 [18 Am. Dec. 350]; *Birely v. Staley*, 5 Gill & J. 432 [25 Am. Dec. 303]; *Strike v. McDonald*, 2 Har. & G. 206. In the latter case, one of the grantors was also examined for that purpose. The court of appeals did not pass upon the question, although the point was made. However, the chancellor, in *Duvall v. Waters*, *supra*, appears to have relied on the grantor's declarations as evidence of the alleged fraud.

But there is a class of decisions in England, as well as here,

so analogous that it seems to us they should be governed by the same rules of evidence. We allude to cases in bankruptcy and those arising under our insolvent laws, in which deeds and transfers of property have been held to be good or bad, according to the intent of the party in making them. In both these classes of cases, the quality of the act depends upon the same principle. "In questions respecting acts of bankruptcy, the intention is almost always the very point in issue, and this is commonly to be collected from the conversations importing the existence of those apprehensions which give a character and quality to the concomitant actions:" 2 Evans' Pothier, 247, Appendix No. 16, sec. 11; 1 Phill. Ev., tit. Hearsay; *Kolb v. Whitely*, 3 Gill & J. 188. In *Bateman v. Bailey*, 5 T. R. 512, a declaration of the debtor made the day after the act was held admissible; and the established doctrine in England now is, that the court will, in each case, consider whether the declaration proposed to be received does or does not come within a reasonable time of the disputed act. As, if the question arise whether a security were given by way of fraudulent preference, the material inquiry will be, what was the situation, conduct, and language of the bankrupt with reference to the whole transaction: Broom's Maxims, 441; *Ridley v. Gyde*, 9 Bing. 352, 355; and this doctrine is fully recognized in *Kolb v. Whitely*, *supra*, as applicable to cases under the insolvent laws. There certain entries in the books of the insolvents, and the declarations of one of the firm made a few days before the property was delivered to the appellant, were received to show that at the time of the transfer the parties contemplated becoming insolvent debtors.

The rule stated is, that "where it is necessary in the course of a cause to inquire into the nature of a particular act, and the intention of the persons who did the act, proof of what the person said at the time of doing it is admissible evidence for the purpose of showing its true character." And "in general, where the evidence is offered as a mere fact which is connected with the matter in dispute, and not with a view to affect the party otherwise than as the actual existence of the fact affects the nature of the transaction itself, then, although it was a transaction between others, yet as a mere fact and part of the *res gestæ*, it is evidence." We do not understand the court as having admitted the evidence, as might be inferred from the last clause of the opinion, because there was no reason for supposing that the insolvent had made the declarations under sinister

motives, or as having designed to qualify the general rule announced; but rather as using those remarks in answer to the argument of the appellant's counsel. It is true that generally the declarations of a party under whom another claims are received, when made against his own interest and at a time when he had no motive to misrepresent the truth; but we apprehend that the doctrine of *res gestæ* is not governed by this principle. Greenleaf states the general rule, but he adds: "No reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the declarant's title or otherwise qualifying his possession, if made in good faith, should not be received as part of the *res gestæ*; leaving its effect to be governed by other rules of evidence:" Greenl. Ev., sec. 109. Indeed, such declarations are admissible in some cases where the party has a manifest interest at the time, as where an entry is made to take advantage of a forfeiture, to defeat a disseisin, or to foreclose a mortgage, or the like: Id., sec. 108. For the same reason, in actions by bailor against bailee, for loss by negligence, the declarations of the latter contemporaneous with the loss were held to be admissible in his favor, to show the nature of the loss: Story on Bailments, sec. 339. The explanations or admissions of bankrupts are received, no matter in whose favor they may operate in the suit in which they are offered; but we have not found a case in which the question of their admissibility was determined with reference to any supposed considerations of interest of the debtor at the time of making them. If they may fairly be regarded as resulting from the contemporary motives acting on his mind and influencing his conduct, they may be received: 2 Evans' Pothier, 248.

Several cases have occurred in this court under the insolvent laws. It appears by the record in *Dulaney v. Hoffman*, 7 Gill & J. 170 [28 Am. Dec. 207], that one of the insolvents was examined, and his declarations were also offered in evidence to show that the assignment was fraudulent in view of these laws, and the case was decided on this proof. In *Hickley v. Farmers' and Merchants' Bank*, 5 Id. 377, and in *Davis v. Beatty*, 9 Gill, 211, the grantors were examined; and in *Powles v. Dilly*, Id. 229, the conversations and declarations of the debtor were received to show the true character of the acts alleged to be void as against creditors. The court held that the declarations and conversations, though occurring some time before, were part of the *res gestæ*, concomitant with the principal act, and served to explain the motives and circumstances surrounding the assignment.

The transfer was also assailed as void under the statute of Elizabeth.

If, as in the three cases last cited, the declarations or evidence of the debtor may be invoked as proof of an honest purpose, why may not the party who denies the validity of the act resort to the same source for evidence of his intent, when the act is done with an illegal purpose? The rule being that wherever the nature and quality of the act depend on the intent of the parties, contemporaneous statements may be taken to show the intent, there appears to be no stronger reason for receiving such evidence in one case than in the other.

The same doctrine has been applied to assignments under the act of 1829, chapter 51. In *Crawford v. Brooke*, 4 Gill, 213, the assignor of a chose in action was called by the defendant in an action by the assignees to show that he had made the assignment for the purpose of qualifying himself as a witness to establish the claim, and to take it without the statute of limitations, by proving a promise on the part of the debtor within three years. His testimony was admitted, because an assignment so made could not be regarded as *bona fide* within the meaning of the act of 1829, and was liable to be assailed on the ground of the fraudulent character of the transaction, and that the assignor was a competent witness to discover the motives that governed him in making the transfer.

Under the statute of Elizabeth, the insolvent laws, and the act of 1829, chapter 51, transfers of property or choses in action are void or not according to the intent of the parties, in view of their provisions respectively. If the grantor or assignor may be called or his declarations given in evidence to impeach his own act, in cases within these acts of assembly, there is not perceived any reason for excluding them when offered to ascertain his motive in a transaction denounced as fraudulent under the statute.

The doctrine that "in questions of fraud or *bona fides* an adequate judgment can in general only be formed by having a perfect view of the whole transaction, which of course includes the conversation which forms a part of it, and according to the phrase usually applied to this subject, the language which is used on any occasion forms a part of the *res gestæ*," 2 Evans' Pothier, 247, equally applies to this as any other case of fraud; and upon the authorities, as well as analogies of the law, we feel warranted in receiving the declarations of Osborne, made before the execution of this deed, as given in evidence.

It was argued that there is danger in admitting such proof, because of the temptations it holds out to grantors to arm themselves in advance with testimony, by making such declarations as will defeat their own act. All rules of evidence are liable to abuse, and not unfrequently fail to accomplish their real object, the ascertainment of the truth. The objection, however, can not apply here. It must be observed that in cases like the present the grantor is bound by the deed, and has no interest in setting it aside. What does not go to the creditors remains in the grantee. The declarations or explanations made at the time of the act can not avail the grantor in any controversy between him and his grantee involving the title. As between them, the deed is conclusive, except it be different in terms from that which the parties intended it should be. In which cases relief is granted on the ground of accident, mistake, or fraud. But as to strangers assailing the deed, the principle is different: *Crawford v. Brooke*, 4 Gill, 220. This case is not varied by Osborne's statement of an agreement on the part of the defendant to execute a writing for the reconveyance of the property. If this was really so, the fraud is established. On the other hand, we can not assume that the sale was *bona fide* on the part of Goldsmith, and that she made the declarations for the purpose of fabricating testimony for the recovery of the property, without ascribing to her a degree of ignorance that the law does not impute to any one, for she knew, in legal contemplation, that her own statement that such an agreement existed could not have that effect. In addition to this, the declarations, when admitted, do not *per se* establish the fraud as against the grantee. They are only part of the case to be considered in connection with the rest, and to be governed as to their effect by other rules of evidence. Fraud shrouds itself in mystery. Parties may seek to protect themselves by various subterfuges and pretenses which it is impossible to detect and expose by direct evidence, though when all the circumstances are combined and considered together, they may be such as to show that both parties to the deed were influenced by the same illegal purpose. Upon a careful consideration "of all the facts and circumstances of the case, and drawing such inferences as a jury might reasonably make," *Birely v. Staley*, 5 Gill & J. 450 [25 Am. Dec. 303], we think there can not be a well-founded doubt that the parties to this deed designed to hinder and delay the creditors of the grantor. Independently of the suspicion that surrounded the dealings between them, as disclosed by the answer itself, the evi-

dence shows that Osborne was under great apprehensions lest her creditors would press for settlements and take her property; and that this fear was excited by Goldsmith; and that he advised the transfer to him as the only means of saving her property. He informed Spurrier that she would call and give directions about a deed, and her declarations made at that time, when the fraud was in course of being perpetrated, *Cross v. Black*, 9 Gill & J. 211, show that this was her understanding of the transaction. We can not exclude the testimony of these witnesses. Spurrier is not impeached, nor is McGee's veracity directly assailed. Some portions of her evidence may be inconsistent with other portions, but the whole is not to be rejected on this account alone.

In narrating transactions long passed, the memory of a witness may be at fault as to some particulars and be correct as to others, and especially where they were such as the witness had no reason to suppose he would be called upon to explain afterwards. She had no interest in misstating the transactions between Osborne and Goldsmith, nor any motive, as far as we can discover, for testifying on one side rather than on the other. In the main points of the case, bearing on the question of fraud, she is corroborated by other proof in the record. It is urged that she should be discredited because she states the deed to have been executed in January, 1841, when it bears date in February, 1844. But she does not state this positively; she expresses her belief of the time, and though in error as to the date of the transaction she may remember that it occurred, and recollect the principal facts connected with it. The question is whether the circumstances stated by her took place with this particular instrument.

The interrogatories on both sides and her answers relate to the deed of 1844. She speaks of declarations and acts of the parties in connection with a deed executed when certain creditors (the complainants among them) were demanding payment of their claims. It so happens that these complainants were creditors in 1844, and not in 1841 or 1842, when the other deeds were executed; and this is shown, not by this witness, but by their causes of action. The identity of this instrument as the one referred to by her is also sustained by its relation in point of time to the declarations of Osborne as proved by Spurrier, and to the period of her removal to New York, which occurred in the year 1844. It may be that the defendant paid his money as a consideration for this deed; but we can not believe, from

the whole case, that it was a *bona fide* purchase, and not designed to defraud the creditors of the grantor. If it was actual and *bona fide*, and Goldsmith can not explain the transaction in the face of the evidence offered by the creditors, it was his error if not fault to have carried on for a number of years large dealings with an illiterate woman, without the guards and precautions generally observed in business with such persons, as well for his own protection as hers. Upon the whole case, we think the decree of the chancellor was correct and must be affirmed on both appeals, and that the case should be sent to the circuit court of Baltimore city to carry the same into effect.

Decree affirmed and cause remanded.

ECOLESTON, J., dissented in part, and delivered the following opinion: The deed of the fourteenth of July, 1841, is not now in controversy. I concur with the chancellor in his views respecting the mortgage deed dated the fifth of November, 1842, and the decree passed by Baltimore county court for a sale of the mortgaged property, and therefore unite with my brethren in affirming so much of the chancellor's decree as dismisses the bill without prejudice, in regard to the deed of 1841 and the mortgage of 1842. But I do not concur with the majority of this court in the propriety of affirming that portion of the decree which vacates the deed bearing date the twenty-first of October, 1844.

STATUTE OF LIMITATIONS IS BAR TO IMPLIED BUT NOT TO EXPRESS TRUSTS: *Shelby v. Shelby*, 5 Am. Dec. 686; extended note to *Decouche v. Savetier*, 8 Id. 491; *Edwards v. University*, 30 Id. 170; *Haynie v. Hall's Ex'r*, 42 Id. 427; *Dow v. Jewell*, 45 Id. 371; *Lexington etc. R. R. Co. v. Bridges*, 46 Id. 528; *Conyers v. Kenan*, 48 Id. 226; *Commonwealth v. Molta*, 51 Id. 499; *Tarleton v. Goldthwaite's Heirs*, 58 Id. 296, and notes to same, in addition to the one cited. That statute of limitations does not apply to trusts, see *App v. Dreisbach*, 21 Id. 447.

CASES OF FRAUD ARE WITHIN STATUTE OF LIMITATIONS: *Shelby v. Shelby*, 5 Am. Dec. 686; *Wallace v. Duffield*, 7 Id. 660; *Kane v. Bloodgood*, 11 Id. 417; *Frame v. Kenny*, 12 Id. 367, and exhaustive note; *Finney v. Cochran*, 37 Id. 450; *Ferris v. Henderson*, 51 Id. 580, and note thereto; *Thrower v. Cureton*, 53 Id. 660, and other notes to same. *Contra*: *App v. Dreisbach*, 21 Id. 447.

INDORSEMENT WITHOUT DATE IS PRESUMED TO HAVE BEEN MADE BEFORE MATURITY OF NOTE: *Hutchins v. Flintge*, 47 Am. Dec. 659; *Colburn v. Averill*, 50 Id. 630; *Mobley v. Ryan*, 56 Id. 488, and notes thereto.

AS TO WHEN DECLARATIONS OF GRANTOR CONCERNING FRAUDULENT CONVEYANCE ARE ADMISSIBLE, see *Beach v. Catlin*, 4 Am. Dec. 221; *Barrett v. French*, 6 Id. 241; *Reichart v. Castator*, Id. 402; *Bridge v. Eggleston*, 7 Id. 309; *Dorsey v. Dorsey*, 6 Id. 506, and note citing the principal case; *Guidry*

v. Grivot, 14 Id. 193, and note; *Osgood v. Manhattan Co.*, 15 Id. 304; *Martin v. Reeves*, Id. 154; *Chess v. Chess*, 21 Id. 350; *Foster v. Hall*, 22 Id. 400; note to *Pettibone v. Phelps*, 35 Id. 92; *Carpenter v. Hollister*, 37 Id. 612; *Tenney v. Evans*, 40 Id. 194; *Padgett v. Lawrence*, Id. 232; extended note to *Horton v. Smith*, 42 Id. 628; *Riddle v. Dixon*, 44 Id. 207; *Bird v. Smith*, 34 Id. 483; note to *Stovall v. Farmers' and Merchants' Bank*, 47 Id. 90; *Darling v. Bryant*, 52 Id. 162; *Crump v. U. S. Mining Co.*, 56 Id. 116; *Batton v. Watson*, 58 Id. 504, and notes to same, in addition to those cited.

POSSESSION BY GRANTEE UNDER FRAUDULENT CONVEYANCE ACQUIRES NO TITLE AGAINST GRANTOR'S CREDITORS, HOWEVER LONG CONTINUED IT MAY BE: *Beach v. Catlin*, 4 Am. Dec. 221; *Reichart v. Castator*, 6 Id. 402, and notes thereto.

DECLARATIONS OF PARTY, WHICH ARE DISCREDITED IN HIS OWN ANSWER, ARE NOT ENTITLED TO ANY WEIGHT IN DETERMINATION OF CASE: *Jones v. Hardesty*, 32 Am. Dec. 180, and notes thereto.

CONDUCT OF PARTIES TO FRAUDULENT SALE OF LAND, BEFORE AND AFTER AS WELL AS AT THE TIME OF SALE, MAY BE INQUIRED INTO FOR THE PURPOSE OF ASCERTAINING WHETHER OR NOT SUCH SALE WAS *bona fide*: *Reels v. Knight*, 19 Am. Dec. 184.

THE PRINCIPAL CASE WAS APPROVED in *Williams v. Banks*, 11 Md. 198; and relied upon in *Boulden v. Lanahan*, 29 Id. 211; and cited in *Baltimore O. P. R. R. Co. v. Sewell*, 35 Id. 255.

BOWIE v. STONESTREET.

[6 MARYLAND, 418.]

HUSBAND'S DECLARATIONS TO THIRD PERSONS, WITHOUT HIS WIFE'S PRESENCE, AND NOT PART OF *RES GESTÆ*, ARE INADMISSIBLE AGAINST HIS CREDITORS to establish a specific equitable lien in wife's favor upon portions of his land which he agreed to give her, if she would unite with him in a sale of lands owned by her before marriage, and sold for the purpose of paying his debts.

SETTING UP OF SECRET EQUITIES BETWEEN HUSBAND AND WIFE, IN DIRECT OPPOSITION TO SPIRIT AND DESIGN OF REGISTRY LAWS, can not be established by proof of husband's declarations, not made in wife's presence, or forming a part of the *res gestæ*, in order to sustain wife's claim to a specific equitable lien in opposition to creditors through the agency of such declarations made during coverture.

EQUITY WILL ENFORCE CONTRACT BETWEEN HUSBAND AND WIFE, where he agrees to transfer property to his wife for a *bona fide* and valuable consideration coming from her.

EVIDENCE FAILING TO ESTABLISH CONTRACT BETWEEN HUSBAND AND WIFE may, however, show circumstances justifying a court of equity in decreasing compensation to extent of purchase money paid and value of lasting improvements, where husband agrees to give his wife an equivalent for her property which she unites with him in selling for the payment of his debts.

ADMISSIONS OR DECLARATIONS IN FAVOR OF ONE'S CLAIM must be received if those adverse to his claim are admitted.

THERE IS NO STATUTE OF LIMITATIONS TO BAR WIFE'S EQUITABLE CLAIM AGAINST HER HUSBAND which she can not enforce against him during his life in a court of law, and equity will not allow less than twenty years to bar it upon the rule as to lapse of time.

WIFE IS NOT GUILTY OF GROSS LACHES IN PROSECUTING HER RIGHTS, or of unreasonable acquiescence in the assertion of adverse rights, in declining to promptly sue her husband to enforce her equitable claims against him.

HUSBAND DURING HIS LIFE IS ENTITLED TO RENTS, ISSUES, AND PROFITS OF HIS WIFE'S ESTATE.

WIFE CAN CLAIM COMPENSATION ONLY FOR VALUE OF LAND WITH INTEREST FROM HER HUSBAND'S death where he has agreed to give her an equivalent for her land which she united with him in selling for the payment of his debts. To that extent she will be regarded as a general creditor of the estate.

APPEAL from the equity side of the circuit court for Prince Georges county. Robert W. Bowie died in January, 1848, and this bill was filed, in the summer of 1848, for the sale of his real estate to pay his debts. His widow, Mrs. Bowie, the appellant, was made a defendant to the bill. In December, 1848, she filed her answer setting up a claim to a portion of said real estate, which was rejected by the court below, and from that decision she appealed. The other facts are stated in the opinion.

Thomas G. Pratt and Thomas S. Alexander, for the appellant.

John M. S. Causin and C. C. Magruder, for the appellees.

By Court, **ECOLESTON, J.** The claim against the estate of Robert W. Bowie, deceased, by his widow, Catharine Bowie, as a creditor, has been rejected by the decision of the circuit court for Prince Georges county, and from that decision this appeal is taken. Mrs. Bowie's claim is set out in her answer, in which she alleges that at the time of her marriage she was possessed of a valuable tract of land in her own right, which she inherited from her father. That some years after the marriage, her husband, being largely indebted, frequently importuned her to consent to a sale of her land for the payment of his debts, which she refused to do until he solemnly promised and agreed that he would convey to her other real estate of equal value with hers; that he designated the land held by him, called Con-nick's farm, as the land which he would convey in lieu of hers. The answer also states that, overcome by the importunities of her husband, and confiding in his promise and agreement, she did consent to join him in the sale of her real estate, which was sold and conveyed accordingly; that the proceeds of the sale were received by her husband and applied to the

payment of his debts, but that he never conveyed to her the Connick's farm, or any other land in conformity with his promise. And she claims that the agreement of her husband, in consequence of which she consented to sell her land, constitutes an equitable lien upon the lands of her husband to the extent of the value of her land so sold and applied to the payment of his debts; or that in virtue of the agreement, she is entitled to have the Connick's farm conveyed to her. She also claims dower in the real estate of her husband. On the tenth of February, 1830, for the consideration of nine thousand dollars, Mrs. Bowie and her husband executed a deed to Robert Ghiselin for the purpose of conveying to him the farm or parcel of land called Enfield chase, which descended to Mrs. Bowie from her father. To establish the lien claimed under the alleged agreement, the appellant relies upon the testimony of Dr. James Harper, Ellen Harper, J. H. Waring, Mary Leonard, and Mary Ghiselin. Dr. Harper speaks of conversations between himself and Mr. Bowie for some two or three years before the sale of Enfield chase, in which Mr. Bowie said he had agreed to give his wife Connick's farm if she would agree to join with him in a sale of her land. Mr. Bowie was the first person who informed the witness that Mrs. Bowie had agreed to sell Enfield chase upon condition that he would give her Connick's farm. The doctor, in a confidential conversation with Mrs. Bowie, advised her not to sell. Either then or at some other time, Mrs. Bowie informed the witness that she had agreed with her husband to sell Enfield chase, and he was to give her in lieu of it Connick's farm. The doctor told her it was the worst thing she ever did.

Ellen Harper testifies that Mr. Bowie made a proposition to his wife to unite with him in a sale of her land for his use, offering to her Connick's farm in exchange, but that she did not accept the offer. This offer, the witness says, was made frequently during the years 1828 and 1829. J. H. Waring says that between 1832 and 1835 he had frequent conversations with R. W. Bowie, in which he promised to convey to his wife some property in compensation for Enfield chase, which she had sold with him for his use, but he did not mention what particular property he would convey. On other occasions Mr. Bowie said he would not carry out what he had promised, because he thought Mrs. Bowie's dower in his estate was worth more than he got by her.

Mary Leonard's testimony is that Mr. Bowie made an offer

of property to induce Mrs. Bowie to consent to the sale of Enfield chase. The witness believes Mrs. Bowie sold Enfield chase with the understanding that she was to receive an equivalent from her husband. This information was received from Mrs. Bowie, but the witness can not undertake to say she ever heard Mr. Bowie say so. Mrs. Bowie was advised by the witness not to part with her land unless at the same time she got an equivalent for it. After the deed for Enfield chase was executed, Mrs. Bowie said her husband had promised to give her an equivalent for her land, but the witness does not recollect that Mrs. Bowie told her what property in particular she was to have under the agreement. Mary Ghiselin states that the day on which the deed for Enfield chase was executed, Mr. and Mrs. Bowie went in a carriage to Nottingham for the purpose of executing the deed. The witness accompanied them; and on the road Mr. Bowie promised to give his wife something (witness thinks it was land) that would be equivalent to the amount that Mrs. Bowie's land had been sold for. Mrs. Ghiselin can not say what land was specified as intended to be conveyed in lieu of Enfield chase. Several times after the execution of the deed Mr. Bowie repeated the promise, and certainly within six years prior to the examination of the witness, which was on the sixteenth of November, 1849.

From an examination of the proof, it will readily appear that to establish the claim for a specific lien or the right of the appellant to have Connick's farm conveyed to her, the declarations of Mr. Bowie must be relied upon; and such declarations as can not be viewed in the light of *res gestæ*, or as having occurred when the alleged agreement was made, but such as took place in the absence of the appellant. Indeed, the chief reliance must be on the declarations stated by Dr. Harper. It is true that Ellen Harper proves an offer by Mr. Bowie of Connick's farm in lieu of Enfield chase, but it was refused. The witness speaks of this offer as having been repeated frequently during the years 1828 and 1829, without saying, however, that it was accepted. In the conversations spoken of by Dr. Harper, Mr. Bowie told him he had agreed to give Mrs. Bowie Connick's farm if she would join him in the sale of Enfield chase. And Mr. Bowie was the first person who informed the doctor that Mrs. Bowie had agreed to the sale of her land upon condition of her receiving Connick's farm in lieu of it. But no witness except Ellen Harper and Dr. Harper speaks of any offer, promise, or agreement to convey Connick's farm, or any other land or prop-

erty in particular. The declarations of Mrs. Bowie, made out of the presence of Mr. Bowie, have been brought into the record as evidence in her favor. Exceptions to these, and also to the declarations of Mr. Bowie, have been filed by the appellees. Hers were not relied upon in argument, and it is unnecessary to notice them further than to say they can not be used in support of her own claim. In regard to Mr. Bowie's declarations, it is to be recollected they are not introduced as evidence to sustain a claim against his heirs at law, or against volunteers claiming through or under him, but the rights of creditors are involved. And the effort is to establish the claim of a wife to a specific equitable lien in opposition to creditors through the instrumentality of the husband's declarations, made, not in the wife's presence, not part and parcel of the alleged agreement, but made to a third person, and simply stating what agreement had been made between himself and his wife. To sustain this claim by proof of such admissions of the husband during the coverture would establish an exceedingly loose and dangerous mode of setting up secret equities between husband and wife.

We have seen no adjudged case in which it has been done. And considering this another effort, in direct opposition to the spirit and design of our recording statutes, to open still wider the door which by them was intended to be closed, and which has been opened quite wide enough, if not too wide already, we are indisposed to sustain it. Whilst we feel bound by the principles of adjudged cases, so far as to apply them to cases strictly analogous, we are not inclined so to construe those principles as to increase the difficulties and mischiefs intended to be guarded against by the registry laws. By the act of 1785, chapter 72, section 11, where a deed has been executed, the recording of which is made necessary by law, if without any fraudulent design the party claiming under it shall omit having it put upon record according to law, upon application to a court of equity, such court, when satisfied that the party claiming under the deed has a fair and equitable claim to the premises, may order the deed to be recorded; and when done, it is to have, as against the party making the deed, his heirs, executors, and administrators, the same effect and consequences, to all intents and purposes, as if the deed had been recorded within the time prescribed by law. But ample provision is made for protecting against such deed purchasers without notice, and also creditors who may have trusted the grantor after the date of the deed. If it was proper to afford protection to creditors under such

circumstances, by legislative enactment, why should it not be right to allow their claims to exert an influence in a case like the present where the wife is seeking to establish a specific lien upon the land of her husband, not by virtue of a deed unrecorded, but depending for its support upon his parol declarations, made not even in her presence, not to a third person authorized to act for her as trustee or agent, but merely in conversations with her relatives or friends? Another important consideration is, that during the husband's life, and up to the time of his decease, so far as his creditors had any possible means of judging, he was the real and *bona fide* owner of this very property. He made efforts to sell it; and from the testimony of Fielder Bowie, it appears Mrs. Bowie was anxious that Connick's farm should be sold for the payment of her husband's debts. She requested the witness to urge two different persons to purchase it. And in these conversations with him, which occurred within a year prior to her husband's decease, she made no claim whatever to the property. Entertaining these views, we do not think the proof sufficient to give the appellant a lien or any specific claim upon Connick's farm. Whether she has a right, in the character of a general creditor against the estate of her husband, for compensation on account of the sale of Enfield chase, is a different question. A contract which a court of equity can enforce may be entered into by a husband for the transfer of property to his wife, for a *bona fide* and valuable consideration coming from her: *Livingston v. Livingston*, 2 Johns. Ch. 539; *Atherley on Marriage Settlements*, 160, 161, 163, in 27 Law Lib.; see also *State v. Reigart*, 1 Gill, 1 [39 Am. Dec. 628].

We have seen that whilst on the road to Nottingham, for the purpose of executing the deed for Enfield chase, a promise was made, in the presence of Mrs. Ghiselin by Mr. Bowie, that he would give his wife something (Mrs. Ghiselin thinks land) which would be equivalent to the amount that Mrs. Bowie's land had been sold for. Although this proof may not be sufficiently definite and explicit to establish such a contract, in regard to what property the husband was to give or transfer to his wife, as would authorize a court of equity to decree a specific performance, nevertheless we think it shows an agreement which calls for compensation, for the value of the land conveyed by the appellant in performance of her portion of the contract.

The circumstances will justify this species of relief under the principle recognized in 1 White and Tudor's Leading Cases in

Equity, 527, where it is said: "When the specific execution of a parol agreement can not be decreed in consequence of the uncertainty in the terms, or of the statute being relied on, the court will, if there is no remedy at law, or it is uncertain or embarrassed, or under circumstances of special equity, decree compensation to the extent of the purchase money paid, and the value of lasting improvements." See the cases there cited, and also *King's Heirs v. Thompson*, 9 Pet. 218; *Shepherd v. Bevin*, 9 Gill, 41.

The claim of the appellant is resisted on the ground that the sale of her land was not because of an anticipated and understood consideration to be paid to her by her husband, but was owing entirely to his importunities. There is no proof to sustain this view, unless it is to be found in the answer and declarations of the appellant. It will be seen, however, that in the answer, and in her conversations with the several witnesses, whenever she speaks of the importunities of Mr. Bowie, and her consenting to the sale, she invariably either says he promised to give or was to give her Connick's farm or some equivalent. If her admissions or declarations are to be used for a purpose adverse to her claim, those made at the same time which are in her favor must be also received. And looking at the case in this view, we see no sufficient reason for supposing Mrs. Bowie consented to the sale of her land, merely because she was urged and importuned to do so, and not in consideration of the promise by her husband that she should have an equivalent. The appellees also insist upon limitation or lapse of time as a bar to the claim.

The wife's claim being purely an equitable one, which she could not enforce against her husband during his life in a court of law, there is no statute of limitations which can operate as a positive bar. Nor do we think the appellant's right can be defeated, under the rules by which courts of equity are governed in relation to lapse of time or the staleness of claims. Less than twenty years, at all events, should not be sufficient under the circumstances of this case. To say that because a wife does not institute proceedings promptly against her husband to enforce against him her equitable claim, she is to be considered as guilty of such gross laches in prosecuting her rights, or of such long and unreasonable acquiescence in the assertion of adverse rights, that equity will refuse to interfere in her behalf, is to establish a principle but little calculated to preserve the peace and harmony which should exist between husband and wife. What is said in 1 Story's Eq. Jur., sec. 1520, in regard to the effect of

lapse of time or the staleness of claims in a court of equity, we do not think is properly applicable to such a case as this. A wife declining to sue her husband can not, with propriety, be said to be guilty of gross laches in prosecuting her rights, or of unreasonable acquiescence in the assertion of adverse rights.

In *Dugan v. Gittings*, 3 Gill, 161-164 [43 Am. Dec. 306], it was insisted that by the lapse of more than three years the claim for rents was barred; but this defense was not sustained, because the claim was purely an equitable one, and could not be enforced at law. On page 164 the court say: "But we place our opinion on the ground that as the bill was instituted by the appellees within less than twenty years from the period at which their right of action accrued, and as their claim for an account and payment of the rents was incidental to and consequent upon their assertion of title to the property, they are not barred by either limitations or laches." Whatever may be the rule elsewhere, we think the decision in *Dugan v. Gittings*, *supra*, sanctions the view we have taken in this case, as the wife certainly could have no means of enforcing her claim against her husband in a court of law during his life. Under the doctrine of compensation, the appellant can claim but nine thousand dollars, with interest thereon from the death of her husband. According to the evidence, he was only to give her an equivalent for the sale of her land. As he was entitled during his life to the rents, issues, and profits of that estate, if under the agreement he had conveyed or transferred property to his wife, it would have been no violation of the terms of that contract, but perfectly consistent with them, if he had reserved to himself for life the income thereof, securing to her the enjoyment of the property itself at his decease. Her land sold for nine thousand dollars, and there is no proof showing it was worth more at the decease of Mr. Bowie. Equitable compensation, therefore, for the sale of her land can entitle her to no more than nine thousand dollars, with interest from the decease of her husband. To that extent she is to be considered as a general creditor against the assets of the estate. The right of the appellant to claim compensation as a general creditor has been resisted on the ground that her answer for such a purpose is to be considered as a bill, and it does not make or present such a claim. In *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273, the bill prayed for the specific execution of an alleged agreement. Chancellor Kent thought the contract was not sustained by proof sufficiently explicit to authorize a decree for specific performance,

but nevertheless he passed an order for the purpose of making an allowance to the complainants for beneficial and lasting improvements made by them upon the land. See also *Watt v. Grove*, 2 Sch. & Lef. 492, 513. Thinking it proper, however, to send this case back for further proceedings, we deem it unnecessary to decide whether the answer is defective in the particular alluded to, because if it is so, under the act of 1854, chapter 230, it would be proper for the circuit court to allow the appellant to amend her answer. And that would not only delay her without benefiting the appellees, but would operate to their prejudice, and likewise to the injury of all other creditors, by procrastinating the final distribution of the assets, which we presume the appellees would not desire. The order of the court below is right so far as it directs an allowance in favor of the appellant for dower out of the proceeds of the land called Connick's farm. Without reversing or affirming, we will remand this case under the act of 1832, chapter 302, for further proceedings, that the principles announced in this opinion may be carried into effect; for which purpose a decree will be signed by this court.

Cause remanded.

MASON, J., dissented.

WHERE EQUITY WILL REFUSE RELIEF BECAUSE OF LACHES: See extended note to *Smith v. Thompson*, 54 Am. Dec. 130. That law will not impute laches to omission of *feme covert* during her coverture to seek redress against a judgment, and wrong inflicted by her husband, see *Caldwell v. Walters*, 55 Id. 592, and note thereto.

EQUITY WILL ENFORCE HUSBAND'S CONTRACT TO TRANSFER PROPERTY TO HIS WIFE, UPON VALID CONSIDERATION MOVING FROM HER: See extended note to *Warren v. Brown*, 7 Am. Dec. 196, and cases cited therein.

RENTS, ISSUES, AND PROFITS OF WIFE'S REALTY BELONG TO HUSBAND: See note to *Thomas v. Folwell*, 30 Am. Dec. 233.

THE PRINCIPAL CASE WAS AFFIRMED in *Stockett v. Holliday*, 9 Md. 498, settling the question that a contract which can be enforced in a court of equity may be entered into between a husband and wife, for the transfer of property from the former to the latter for a *bona fide* and valuable consideration. To same effect, see *Jones v. Jones*, 18 Id. 468. The principal case was referred to in *Calvert v. Carter*, Id. 107. Its principles were recognized in *Green v. Drummond*, 31 Id. 86. In *Mayfield v. Kilgour*, Id. 244, it is cited to the point that the right exists to prefer creditors, where the preference is unaccompanied by fraud. It was considered in *Drummond v. Green*, 35 Id. 153. It was recognized in *Oswald v. Hoover*, 43 Id. 369, showing that where the wife has no remedy against her husband in a court of law upon a claim of an equitable nature against him, neither limitation nor lapse of time, certainly short of twenty years, could operate as a bar to the demand; and in

Powell v. Young, 45 Id. 497, supporting the proposition that "when the specific execution of a parol agreement can not be decreed, in consequence of the uncertainty in its terms, or of the statute being relied on, the court will, if there be no remedy at law, or it is uncertain or embarrassed, or under circumstances of special equity, decree compensation to the extent of the purchase money paid and the value of beneficial and lasting improvements."

ELLICOTT v. MARTIN.

[6 MARYLAND, 509.]

POSSESSION OF ACCOMMODATION DRAFT IS PRIMA FACIE EVIDENCE OF CONSIDERATION AND TITLE, in an action by the indorsee against the acceptor.

ONUS PROBANDI IS CAST UPON DEFENDANT TO PROVE WANT OF CONSIDERATION in an action by indorsee upon an accommodation acceptance.

ONUS PROBANDI IS UPON PLAINTIFF TO AFFIRMATIVELY PROVE CONSIDERATION, if fraud or illegality in the inception of the paper is relied upon as a defense to an action brought by the indorsee upon a bill of exchange.

EVIDENCE OF FRAUD IN INCEPTION OF ACCOMMODATION PAPER is not shown by the fact that drawer did not place defendant, the acceptor, in funds or goods to meet the draft upon its maturity, as he promised to do.

PLAINTIFF'S PRIMA FACIE TITLE FROM POSSESSION OF DRAFT CAN NOT, IN ABSENCE OF MALA FIDES, BE REBUTTED BY EVIDENCE that the title is in some other party.

MALA FIDES MUST BE ALLEGED IN ACTION UPON BILL OF EXCHANGE, where plaintiff has it in his possession, before a court will inquire whether the party sues for himself or as trustee for another, or into the right of possession.

EACH DISTINCT EXCEPTION WHICH EMBRACES INDEPENDENT PROPOSITION OF LAW should be signed and sealed by the court below before it can be regarded as a valid exception.

SIGNING AND SEALING LAST EXCEPTION TO SERIES OF RULINGS SUCCESSIVELY EXCEPTED to does not make the whole one continuous exception properly certified to. Each separate exception must be signed and sealed.

ONE EXCEPTION PROPERLY TAKEN AND EXECUTED WILL EMBRACE WHOLE SERIES of rejected or modified requests for instructions, as this is but one act.

ASSUMPSIT. Appeal from the superior court of Baltimore city. Action brought by appellees against appellants as acceptors of a draft drawn by Edwin Farrar of Richmond, Virginia, on them for seven hundred and fifty dollars, payable to the order of T. & B. Crouch, by whom it was indorsed. Plaintiffs offered in evidence the draft and protest, which stated that the defendants, in reply to demand of payment, said: "No funds placed in hands of drawer, as promised." It also came out in evidence that it was an accommodation acceptance. Defendants proved by Joseph C. Grant, whose testimony was taken subject to exception, that plaintiffs did not own the draft, but that it be-

longed to Davenport & Co. of Richmond, Virginia. They also proved that they had given notice in writing to plaintiffs to prove the consideration of the draft at the trial; and that plaintiffs' indorsement, written on said draft, had been erased by their counsel at the trial table after the swearing of the jury. Several prayers were offered by defendants and refused by the court. To each refusal defendants excepted, but had only the last ruling signed and sealed as their bill of exceptions. Verdict and judgment for plaintiffs, from which defendants appealed.

Grafton L. Dulany, for the appellants.

T. K. Howard and S. T. Wallis, for the appellees.

By Court, MASON, J. Whether the action of the court below, in regard to its refusal to receive the defendants' prayers, was in conformity with its rules upon the subject, and whether those rules were passed in the due and proper exercise of the legal functions of the court, are questions we need not decide on this appeal. If all the defendants' prayers had been duly submitted and considered by the court, they should not have been granted upon the case as made by the proof. This is an action against the acceptors of a bill of exchange accepted for the accommodation of the drawer, and which by indorsement has passed into the hands of the plaintiffs. The plaintiffs now maintain that the possession of the draft is *prima facie* evidence of consideration and title; while the defendants insist that they having given notice to the plaintiffs to prove the consideration of the draft in question, the *onus* has thereby been thrown upon them to show affirmatively that they did give value for it. As a general proposition, it may be true that where a plaintiff has not given value for a bill of exchange for which no consideration had been previously obtained, he can not recover upon it. But the question is, Upon whom is the *onus* of proving the want of consideration in such a case thrown? The answer to this question has been given in a number of cases. In the case of *Arboun v. Anderson*, 1 Ad. & El. 503, Lord Denman says: "We must hold that the owner of a bill is entitled to recover upon it, if he has come by it honestly; that that fact is implied *prima facie*, by possession." And in the case of *Mills v. Barber*, 1 Mee. & W. 425, the court say: "If a man comes into court without any suspicion of fraud, but only as the holder of an accommodation bill, it may fairly be presumed that he is a holder for value;" and it is added, "in such cases the *onus pro-*

bandi is cast upon the defendant." It is true, a contrary doctrine was at one time held, but the cases upon which it rested have been overruled. We may safely say that the law is now well settled that evidence of want of consideration, as between the original parties to a note or bill, will not shift the burden of proof in an action by an indorsee, nor put him to show that he is a holder for value. Otherwise, however, when the defense relied on is fraud or illegality in the inception of the paper, and not merely that it was given or accepted for the accommodation of the payee or drawer: *Knight v. Pugh*, 4 Watts & S. 445 [39 Am. Dec. 99]; *Munroe v. Cooper*, 5 Pick. 412; *Whiteford v. Burckmyer*, 1 Gill, 145 [39 Am. Dec. 640]; *Renwick v. Williams*, 2 Md. 356.

The only ground for alleging fraud in the inception of the present bill was the circumstance that the drawer had not placed the defendants in funds or goods to meet the draft upon its maturity, as he had promised to do. We presume that in every case of an accommodation acceptance the same pledge is made, and the fact that suit is afterwards brought is presumption that the pledge was not kept; and if such a defense be good, it would follow that an action could rarely ever be maintained against the acceptor or maker of an accommodation paper. The evidence of the witness Grant is insufficient to defeat the right of the plaintiffs to recover. The *prima facie* case which is made in favor of the plaintiffs by possession of the draft can not be rebutted, under such circumstances, by evidence that the title to the draft was in some party other than the plaintiffs. In the case of *Whiteford v. Burckmyer*, *supra*, this court have said that courts of justice will never inquire, where the party suing is in possession of the bill, whether the party sues for himself or as trustee for another, nor into the right of possession, unless on an allegation of *mala fides*. No *mala fides* having been alleged or proved in this case, the testimony of Grant becomes of no avail. Although we have decided this case on other grounds, yet we deem it proper to express an opinion upon another question raised by the record, which relates to the sufficiency of the exceptions—a question frequently presented, and of considerable importance in practice, but as yet not decided by this court. It has been supposed by some that where the court in the progress of the trial makes several rulings which are successively excepted to, but which are not severally signed and sealed, notwithstanding, they should be considered and decided in the appellate court, provided the last ruling is signed

and sealed; in other words, that the whole should be considered as one continuous exception, sufficiently certified by the last signing and sealing. We can not concur in this view of the law, but are of opinion that each distinct exception, which embraces an independent proposition of law, should be signed and sealed by the court below, before it can be regarded as a valid exception.

This remark does not apply to a series of consecutive prayers offered by the counsel. In such a case, the ruling of the court in either granting, rejecting, or modifying the prayers may be regarded as a single act, and one exception, if properly taken and executed, may embrace the whole. There are cases in the Maryland reports which might favor the idea that a different practice has to some extent prevailed in this court. In all those cases we think it will be found upon examination that a strict compliance with the law was not insisted upon. We have been able to find no case where the practice has been expressly decided to be regular and proper, but on the contrary, wherever the question has been distinctly presented, this court has adhered to the strictness which we have herein pointed out as necessary: *Davis v. Wilson*, 2 Har. & J. 345; *Milburn v. State*, 1 Md. 13.

The same practice prevails in the supreme court of the United States of requiring each exception to be signed and sealed by the court below: *Scott v. Lloyd*, 9 Pet. 442. We refer to this case to illustrate more particularly our meaning in reference to the signing and sealing of the different exceptions.

Judgment affirmed.

POSSESSION OF NEGOTIABLE INSTRUMENT IS PRIMA FACIE EVIDENCE OF OWNERSHIP, AND HOLDER AS PLAINTIFF IS NOT BOUND TO PROVE CONSIDERATION UNLESS CIRCUMSTANCES OF SUSPICION APPEAR: *Oruger v. Armstrong*, 2 Am. Dec. 126; *Conroy v. Warren*, Id. 156; *Beltzhoover v. Blackstock*, 27 Id. 330; note to *Morgan v. Yarborough*, 33 Id. 554; *Bacon v. Smith*, 46 Id. 549; *Snyder v. Riley*, 47 Id. 452; *Schaub v. Clark*, Id. 554; *Squier v. Stockton*, 52 Id. 583; and other notes to same. But as to special indorsement, see *Mitchell v. Fuller*, 53 Id. 594; and *Morgan v. Yarbrough*, *supra*.

INDORSEE, WITHOUT NOTICE AND BEFORE MATURITY, NEED NOT SHOW CONSIDERATION FOR PROMISSORY NOTE IN SUIT THEREON AGAINST MAKER: *Hascall v. Whitmore*, 26 Am. Dec. 738; *Knight v. Pugh*, 39 Id. 99; and want of consideration is no defense in such action: Id.; *contra: Snyder v. Riley*, 47 Id. 452. But fraud may be shown in defense: *Mulford v. Shepherd*, 33 Id. 432; *Knight v. Pugh*, 39 Id. 99; and evidence of indorsee's notice of fraud is admissible against him: *Fisher v. Leland*, 50 Id. 805; *contra: Prouty v. Roberts*, 52 Id. 761.

WHO ARE BONA FIDE HOLDERS, AND THEIR RIGHT TO RECOVER ON NEGOTIABLE INSTRUMENTS: Note to *Sims v. Lyles*, 26 Am. Dec. 156; note to *Russell v. Haddock*, 44 Id. 698.

DAVIS v. STATE.

[7 MARYLAND, 151.]

ENACTMENT OF ONE LAW IS AS MUCH REPEAL OF ALL INCONSISTENT LAWS as if those inconsistent laws had been repealed by express words. This rule prevails even under article 3, section 17, Maryland constitution, which provides that "no law or section of law shall be revived, amended, or repealed by reference to its title or section only."

UNDER PROVISIONS OF CONSTITUTION WHICH REQUIRE THAT EVERY ACT shall embrace but one subject, and that that shall be expressed in its title, if the act relates to a subject so expressed, and to others inseparably connected therewith, it is constitutional. It could hardly be urged against a law that its title did not embrace the whole subject to which the law relates.

CONSTITUTIONAL PROVISION WHICH REQUIRES THAT EVERY ACT of the legislature should embrace but one subject, which should be expressed in its title, was passed for the purpose of preventing local and selfish provisions from being ingrafted upon acts of great public benefit and being adopted with them, and to prevent foreign matter from being incorporated into the law in the haste and excitement incident to the close of the sessions of the legislature.

IF ACT OF LEGISLATURE CONTAINS MINOR MATTER NOT REFERRED to in the title, such matter alone is void; but if the act be composed of a number of discordant and dissimilar provisions, so that no one could be pronounced as the principal one, the whole act is void.

THAT SECTION OF CONSTITUTION WHICH PROVIDES THAT GOVERNOR SHALL APPOINT ALL OFFICERS "whose appointment or election is not otherwise herein provided for, unless a different mode of appointment be prescribed by the law creating the office," simply means that he shall fill all offices, however created, unless the act creating them provides otherwise. If the act creating the office provides how it shall be filled, it must be filled in that manner, but if it fails to make such direction, the governor shall appoint by virtue of the above provision.

SAME AUTHORITY WHICH CONFERRED POWER UPON GOVERNOR TO MAKE APPOINTMENT TO OFFICE CAN TAKE IT AWAY. An office of legislative creation can be modified, controlled, or abolished by the same power, or the mode of appointment thereto can be changed.

CONSTRUCTION OF STATUTE, TAKING OUT LICENSE.—The act of 1821, chapter 77, provided for the appointment of an inspector of bark. The act of 1854, chapter 200, provided that any free white citizen could act as such inspector, but must first take out a license, and pay one hundred dollars therefor: *held*, that whether the act of 1854 abolished the office as it previously existed or not, the inspector appointed by the governor must take out a license.

CIRCUIT COURT OF CITY OF BALTIMORE HAS JURISDICTION TO GRANT WRITS OF ERROR.

THE act of 1821, chapter 77, entitled "An act to provide for the inspection of ground black-oak bark intended for exportation," provided that a person should be annually appointed by

the governor and common council to act as such inspector; and further, enumerated his duties and provided for the payment of his fees, and the amount thereof. An act was passed in 1854 (acts 1854, chapter 200), entitled "An act to regulate inspections in the city of Baltimore." This act, which was to go into effect May 1, 1854, provided that from that date any free white citizen of the state, upon application to the clerk of the court of common pleas, and upon the payment of a fee of one hundred dollars, should be entitled to act as an inspector of bark. The law further provided that any person who acted as an inspector without having taken out a license should be fined in an amount double the cost of the license. At the time this law was passed plaintiff in error was the duly appointed inspector of bark, acting under commission from the governor. His term expired on the first Monday in May, 1854, and he was reappointed by the governor. He duly qualified under this new commission, and continued to act as inspector without taking out any license. To an indictment for so doing he filed a general demurrer for the purpose of testing the validity of the act of 1854. This demurrer was overruled, and a fine of two hundred dollars entered against him, and he then sued out this writ of error.

Thomas and McLean, for the plaintiff in error.

Gwinn and Brune, for the state.

By Court, MASON, J. We did not understand the counsel for the appellant as contending that the legislature had no power to amend, modify, or even repeal the act of 1821, chapter 77, creating the office of inspector of bark. We understand that while they clearly admit the power, they insist that the legislature in passing the act of 1854, chapter 200, entitled "An act regulating inspections in the city of Baltimore," have exercised that power in a mode not warranted by the constitution, and that therefore the law is of no avail.

Under our former constitution there could have been no doubt that as the act of 1854 was inconsistent with that of 1821, the last act would operate as a repeal of the former, in so far as they were repugnant to each other. It is supposed that under article 3, section 17 of our new constitution, which provides that "no law or section of law shall be revived, amended, or repealed by reference to its title or section only," there can be no repeal of a pre-existing law by the implication resulting from a subsequent inconsistent or contradictory legislative enactment. We do not so understand the new constitution.

The particular clause to which we refer was evidently inserted in the constitution for the purpose of preventing incautions and fraudulent legislation, and to enable members to act knowingly upon all subjects, and to guard them from the contingency of voting for the repeal or revival of laws, through mistake or accident, under the deceptive language often employed in the title of acts. Under our former system of legislation, a good or a bad provision might slumber in the body of a law, of which the title gave no intimation, and hence members of the legislature might suppose from the title of the law that they were voting for one thing, when in fact they were unwittingly voting for another directly the opposite; at least, the title afforded often little or no information as to what was contained in the body of the law, which was its office to have done. Not so, however, with an independent act of the legislature, establishing a new or reversing some previous policy of the state. The very fact of establishing a particular rule of conduct for the public presupposes an intention on the part of the legislature that a contrary rule should not prevail, and therefore the enactment of one law is as much a repeal of all inconsistent laws as if those inconsistent laws had been repealed by express words. It could never surely have been the intention of the framers of the constitution that a positive enactment by the legislature upon a subject within their legitimate powers was to be defeated because a previous law, not in terms repealed, was inconsistent with it. If this strict test were required, many wholesome laws would be rendered wholly inoperative, because of the inability or neglect of members to search thoroughly the statute-books for laws which might be inconsistent or repugnant—a work in many cases of so great difficulty as to amount almost to impossibility.

The next objection urged to the validity of the act of 1854 is, that if its purpose was to create a new system of inspections, and to repeal the act of 1821, then the subject of the law is not sufficiently described by its title, as required by article 3, section 17, of the constitution. The language of the constitution is: "Every law enacted by the legislature shall embrace but one subject, and that shall be described by the title." We think the act of 1854, chapter 200, has sufficiently been made to conform to these requirements. The law relates to inspections, and to such other matters only as are inseparably connected with it, and to none other; and therefore can be said to embrace but a single subject. It could hardly be successfully urged against a law that it does not embrace and dispose of the whole subject to

which it relates. If it could be, few laws, if any, could stand such a test.

The object of this constitutional provision is obvious and highly commendable. A practice had crept into our system of legislation, of ingrafting upon subjects of great public benefit and importance, for local or selfish purposes, foreign and often pernicious matters, and rather than endanger the main subject, or for the purpose of securing new strength for it, members were often induced to sanction and actually vote for such provisions, which, if they were offered as independent subjects, would never have received their support. In this way the people of our state have been frequently inflicted with evil and injurious legislation. Besides, foreign matter has often been stealthily incorporated into a law during the haste and confusion always incident upon the close of the sessions of all legislative bodies; and it has not unfrequently happened that in this way the statute-books have shown the existence of enactments that few of the members of the legislature knew anything of before. To remedy such and similar evils was this provision inserted into the constitution, and we think wisely inserted. We are not prepared to say that a whole law, otherwise constitutional, would be rendered void by the introduction of a single foreign or irrelevant subject into it, and where such subject was not indicated in the title. In such a case the irrelevant matter would be rejected as void, while the principal subject of the law would be supported if properly described in the title. But if an act of assembly be composed of a number of discordant and dissimilar subjects, so that no one could be clearly recognized as the controlling or principal one, the whole law would be void.

The appellant, in the next place, contends that the law of 1854 is unconstitutional and void, inasmuch as it seeks to take from the governor the appointment of the inspector; and article 2, section 11, of the constitution is relied on to support this position. That section provides that the governor shall appoint all officers "whose appointment or election is not otherwise herein provided for, unless a different mode of appointment be prescribed by the law creating the office." In few words, we think this provision means, simply, that the governor shall have the power to fill all offices in the state, whether created by the constitution or by act of assembly, unless otherwise provided by the one or the other. When, therefore, and the legislature has created an office by act of assembly, the legislature can designate by whom and in what manner the person who is to fill the office shall be

appointed. If the source of appointment is not thus designated, the governor, by virtue of the above section, makes the appointment, the same as if he had been specially authorized by the act to do so. The act of 1821, chapter 77, authorizes the governor to make the appointment of inspector, and the same power that conferred this authority upon the governor can take it from him. The office we are now considering is one of legislative creation; and by the legislature it can be modified, controlled, or abolished, and within these general powers is embraced the right to change the mode of the appointment to the office. We have only to add, that as the legislature has the power to withdraw the authority to appoint from the governor, the mode pointed out by the act of 1854, by which inspectors under that act are to be designated and qualified, was a constitutional exercise of legislative power, and we need not say whether the inspectors under the act of 1854 are technically officers in point of law or not.

This leads us to the consideration of another question raised by the record. Conceding the act of 1854 to be in all respects constitutional, and that the mode pointed out for designating or appointing the inspectors under it was legal and valid, still is that act so far repugnant to the act of 1821, and to the other acts relating to the inspection of bark, as to operate as a total repeal of them?

A majority of the court are of opinion that whether the act of 1854 abolishes the office as it formerly existed or not, it nevertheless must be construed to require the inspector who might be appointed by the governor to take out a license as any other person; and in deciding this point, they have said enough to dispose of the case as made by the record.

Upon this point the judge who delivers this opinion thinks differently. In the first place, there is no attempt at an express repeal, and a repeal by implication can only result from a clear palpable conflict between the last and the previous law. The true test by which we are to ascertain whether such conflict or repugnancy exists is, Can the two laws stand together and be executed at one and the same time? By the act of 1821, no one could inspect bark but the officer appointed by the governor. This provision is clearly repealed, because, by the act of 1854, any one can do so who takes out a license as directed by the act. The privilege, however, is not extended to any other than to those who take out a license, and any person who may attempt to exercise the privilege without such license is subjected to a penalty, and in this way it is supposed that the act is made by im-

plication to exclude from the right to inspect the duly commissioned officers appointed by the governor under previous laws, unless they take out a license. I do not so construe the law of 1854. Its object simply was to permit other persons, upon certain conditions, to exercise the privilege of inspecting in common with the commissioned officers.

I do not understand the act of 1854 as affixing a new condition to the exercise of the right to inspect under the act of 1821, but as merely extending the rights or privileges of that act to all private citizens who may think proper to take out a license. If, therefore, the inspectors appointed by the governor be not subject to the penalty—and I think they are not—there can be no doubt that they might, concurrently with the licensed inspectors, continue to discharge the duties of their office as formerly, subject only to the changes and modifications made in the system by the act of 1854. Their doing so would in no way bring them in conflict with the licensed inspectors, and their powers could not therefore be said to be repugnant to each other.

By the act of 1821, chapter 77, section 7, it was obviously the design of the legislature to empower the inspector of bark for Baltimore city to exercise his office beyond the limits of Baltimore should occasion call for it, though perhaps he might not have been required to do so. So far from the act of 1854 repealing this provision, it clearly by implication recognizes it. I can not read the latter act without clearly discovering that the legislature contemplated that inspections were still to be made outside the limits of Baltimore. It provides that "no license shall authorize any inspector to act as such out of the limits of the city in which the same may have been granted;" and the act grants no authority to any one else than the clerk of the court of common pleas of Baltimore to issue such license. Who, then, is to make inspections of bark out of Baltimore? Certainly not the inspectors created by the act of 1854, and unless they are made by the appointee of the governor, they could not be made at all. From this circumstance, so far from discovering a purpose to destroy the office as it originally stood, I find a manifest recognition of it by leaving certain duties to be discharged exclusively by its incumbent. We do not perceive in the act of 1854 anything so repugnant to good morals and public policy as to render it void.

The remaining question relates to the jurisdiction of the circuit court of the city of Baltimore to issue writs of error. In the case of *Manly v. State*, 7 Md. 135. we have said that the su-

perior court of Baltimore has the power to grant writs of error by virtue of its general equity jurisdiction conferred by the constitution. The constitution authorizes the creation by the legislature of the circuit court, and in the exercise of that power, in the passage of the act of 1853, chapter 122, "concurrent jurisdiction with the superior court of Baltimore city, in all cases in equity," and generally such cases "as have heretofore been conferred on the chancellor of this state, so far as regards the fifth judicial circuit," has been given to the circuit court of Baltimore city. This jurisdiction is ample enough to warrant the issuing of writs of error.

Judgment affirmed

MASON, J., dissented in part.

THE PRINCIPAL CASE HAS BEEN RELIED UPON AS AUTHORITY in a number of succeeding Maryland decisions, and has been cited in each of the following cases: In *Keller v. State*, 11 Md. 525, where the court hold that the title, "An act to raise additional revenue to pay the debts of the state by increasing the rates of license to ordinary keepers and traders," is sufficiently comprehensive to support a provision requiring vendors of lager beer manufactured by themselves to take out licenses. The constitutional provision under which this decision was rendered provides that "every law shall embrace but one subject, and that shall be described in the title." It is also cited in *Parkinson v. State*, 14 Id. 184; *Hardesty v. Taft*, 23 Id. 513-525; *Mayor of Annapolis v. State*, 30 Id. 112-118; *County Com'rs of Wash. Co. v. Franklin R. R. Co.*, 34 Id. 159, where the court discuss the constitutionality of different legislative enactments, under the above-quoted section of the constitution. It is cited in *Mayor of Hagerstown v. Dechert*, 32 Id. 369-384, to the point that a statute may be good in part while other parts are invalid, and if a portion be unconstitutional, the court is not authorized for that reason to declare the whole void. In *Albert v. White*, 33 Id. 297, the court held that a certain act of the legislature had been repealed by implication, by another act inconsistent with it, and cited the principal case as sustaining their position. It is again cited in *Warfield v. County Com'rs of Baltimore Co.*, 28 Id. 84, to the point that "where an office is of legislative creation, the legislature can modify, control, or abolish it;" and in *Mayor of Baltimore v. State*, 15 Id. 376, to the point that, under the Maryland constitution, the legislature creating an office may designate the officers to fill it.

ACT OF LEGISLATURE TO EMBRACE BUT ONE SUBJECT, WHICH SHALL BE EXPRESSED IN ITS TITLE. A number of the states in their constitutions have adopted provisions similar to that of the Maryland constitution referred to above. In Minnesota (art. 4, sec. 27), Kansas (art. 2, sec. 16), Kentucky (art. 2, sec. 37), Nebraska (art. 2, sec. 19), and Ohio (art. 2, sec. 16), their several constitutions provide that "no law shall embrace more than one subject, which shall be expressed in its title." In Michigan (art. 4, sec. 20) and New Jersey (art. 4, sec. 7, par. 4) the provisions are the same as above, except that the word "object" is used instead of "subject." The constitutions of South Carolina (art. 2, sec. 20), Alabama (art. 4, sec. 2), Tennessee (art. 2, sec. 17), and Arkansas (art. 5, sec. 22) are the same as those of Kentucky and

other states first above mentioned. The constitution of California was formerly the same: Const. 1863, art. 4, sec. 25; but the new constitution of that state provides, in addition to the above rule, that "every act shall embrace but one subject, which shall be expressed in its title," that "if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." This latter condition is contained also in the constitutions of Texas (Const. 1870, art. 3, sec. 35), Indiana (art. 4, sec. 19), Iowa (art. 3, sec. 29), and Oregon (art. 4, sec. 20). The provision contained in the first sentence of the sections of the three last-mentioned states differs from similar provisions in other states in that it reads: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." Similar provisions are made in the constitutions of Illinois (art. 4, sec. 13), Nevada (art. 4, sec. 17), Pennsylvania (art. 11, sec. 8), Colorado (art. 4, sec. 24), Virginia (art. 5, sec. 15), West Virginia (art. 6, sec. 30). The New York and Wisconsin constitutions provide that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title:" N. Y. Const., art. 3, sec. 16; Wis. Const., art. 4, sec. 14.

OBJECT OF THIS CONSTITUTIONAL PROVISION.—The New Jersey constitution, in the same paragraph in which it requires this unity of object and index of title, gives the reason for it as follows: "To prevent improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one subject, and that shall be expressed in the title:" Art. 4, sec. 7, subd. 4. "The purpose intended to be effected by this section was to prevent the incorporation into one bill, of provisions of a nature totally diverse and without necessary connection, with a view to effect a general combination of the particular friends of each measure, and thereby secure their enactment, when some or all of them would likely fail of becoming laws if left to stand upon their own merits; and also the entrapping of legislators into the support of a bill into which by dexterous management some insidious provision had been inserted, of which the title gave no intimation:" *Albrecht v. State*, 8 Tex. App. 216. These provisions were adopted to prevent the legislature from passing what are commonly known as "omnibus bills:" *Fletcher v. Oliver*, 25 Ark. 299. The object of this provision, according to the court of appeals of New York, was "that neither the members of the legislature nor the people should be misled by the title:" *Sun Mutual Ins. Co. v. Mayor etc. of New York*, 8 N. Y. 239. In Iowa, the supreme court say: "The intent of this provision of the constitution was to prevent the union in the same act of incongruous matters, and of objects having no connection, no relation. And with this it was designed to prevent surprise in legislation by having matter of one nature embraced in a bill whose title expressed another:" *State v. County Judge*, 2 Iowa, 280. Mr. Justice Lumpkin, while discussing the provision of the Georgia constitution upon the question under consideration, in the case of *Mayor etc. of Savannah v. State*, 4 Ga. 26, at page 38 says: "I would observe that the traditional history of this clause is, that it was inserted in the constitution of 1798, at the instance of General James Jackson, and that its necessity was suggested by the Yazoo act. That memorable measure of the seventeenth of January, 1795, as is well known, was smuggled through the legislature under the caption of an act 'for the payment of the late state troops,' and a declaration in its title of the right of the state to the unappropriated territory thereof 'for the protection and support of its frontier settlements.'"

Judge Cooley in his excellent work thus sums up the reasons and causes which led to the adoption of these provisions, by the different states: "It may therefore be assumed as settled that the purpose of these provisions was: 1. To prevent hodge-podge or log-rolling legislation; 2. To prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and 3. To fairly apprise the people through such publication of legislative proceedings as are usually made of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire." Const. Lim. 173. The arguments used by the above eminent authorities appear to be conclusive of the wisdom, necessity, and policy of these constitutional requirements. The same reasoning has been employed in a large number of cases: See *City of St. Louis v. Tiesel*, 42 Mo. 578-590; *State v. Silver*, 9 Nev. 227; *Connor v. Mayor etc. of New York*, 5 N. Y. 293; *Indiana Central R. R. Co. v. Potts*, 7 Ind. 681; *Hingle v. State*, 24 Id. 28; *People v. Institution etc.*, 71 Ill. 229; *State v. Ah Sam*, 15 Nev. 27; *Harrison v. Supervisors etc.*, 51 Wis. 645; *Phillips v. Covington and Cincinnati Bridge Co.*, 2 Metc. (Ky.) 221; *Shields v. Bennett*, 8 W. Va. 74-83; *Ex parte Upshaw*, 45 Ala. 234; *Kurtz v. People*, 33 Mich. 279; *Allegheny County Home's Appeal*, 77 Pa. St. 77.

THESE PROVISIONS ARE TO BE LIBERALLY CONSTRUED. In considering the constitutionality of statutes generally, it is a cardinal rule that nothing but a clear violation of the constitution will justify the court in overruling the legislative will. Every act is presumed to be constitutional, and every intendment is in favor of its validity: *People v. Parks*, 58 Cal. 635. Statutes which are questioned as violating the constitutional provision under discussion are no exception to this rule. While such constitutional regulations were adopted for the purpose of remedying the evils referred to above, and should therefore be given such construction as would be necessary to render them effectual in accomplishing the object for which they were designed, still they should not be so construed as to restrict legislation to such an extent as to render different acts necessary, where the whole subject-matter is connected, and may be properly embraced in the same act. This constitutional inhibition should receive, not a technical construction, but a reasonable one; and looking to the evils intended to be remedied, it should be applied to such acts of the legislature alone as are obviously within its spirit and meaning. "There has been a general disposition to construe the constitutional provision [the one under discussion] liberally, rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted:" Cooley's Const. Lim., 5th ed., 176; *Phillips v. Covington and Cincinnati Bridge Co.*, 2 Metc. (Ky.) 219; *People v. Parks*, 58 Cal. 635; *State v. Harrison*, 11 La. Ann. 722; *State v. Kinsella*, 14 Minn. 524; *Allegheny County Home's Appeal*, 77 Pa. St. 77; *Mills v. Charleston, Treasurer, etc.*, 29 Wis. 400-410; *Shields v. Bennett*, 8 W. Va. 85; *State v. County Judge*, 2 Iowa, 280; *Ex parte Upshaw*, 45 Ala. 236; *Kurtz v. People*, 33 Mich. 279. "This constitutional restriction must be liberally construed. A strict adherence to its letter would seriously interfere with the practical business of legislation, and would frequently nullify laws not repugnant to its spirit or meaning:" *State v. Gut*, 13 Minn. 341-349. All the cases involving a discussion of this constitutional restriction are guided by this generous principle of liberal construction. While in a large number

of decisions this doctrine is not announced, their tenor and effect show that the court in rendering them were controlled by its overshadowing influence.

THESE PROVISIONS ARE MANDATORY. In Ohio and California, whose constitutions, as we have seen, contain a provision that no law shall embrace more than one subject, which shall be expressed in the title, the courts have held in effect that the provision was merely directory to the members of the legislature, and operated only on their consciences, and that a failure to comply with it did not nullify laws so passed in violation of it: *Pim v. Nicholson*, 6 Ohio St. 176; *Washington v. Page*, 4 Cal. 388; *Pierpont v. Crouch*, 10 Id. 315; *Steamboat Northern Indiana v. Milliken*, 7 Ohio St. 383; *Lehman v. McBride*, 15 Id. 575-604; *State v. Gano*, 4 West. Law Gazette, 337-340. California, by her new constitution, changed this rule, and her organic law now provides that "the provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Const. 1879, art. 1, sec. 22; *People v. Parks*, 58 Cal. 635. The early ruling of the California, and the present attitude of the Ohio, courts show that their apprehension of mischief from the provisions in question was so strong as to influence them to disregard the fundamental principle generally recognized and applied, that whatever is prohibited by a constitution, if in fact done, is ineffectual. In the pithy language of Mr. Justice McKee: "When a statute is challenged as in conflict with the fundamental law, a clear and substantial conflict must be found to exist to justify its condemnation, but when found, courts must not hesitate to condemn. The constitution is the voice of the people speaking in their sovereign capacity, and it must be heeded. When it speaks in plain language with reference to a particular matter it must have effect as the paramount law of the land;" *People v. Parks*, *supra*. In pursuance with this generally recognized doctrine of the pre-eminence of the constitution, and of its solemnity as the supreme law of the land, the courts of the different states, as far as we have been able to find, with the exception of the two above mentioned, have universally construed this provision to be mandatory in its character. In one of the first cases which arose under this provision in the Texas constitution, the court use the following strong language—strong in being positive, and strong in being what one would regard as a correct exposition of a constitutional provision: "It would be irrational to suppose that this provision of the constitution is merely a directory one, which may be obeyed or disregarded at the will and caprice of the legislature. Under such construction, it would be shorn of its strength and efficacy; would be a dead letter—a mere excrescence in the constitution;" *Cannon v. Hemphill*, 7 Tex. 184-208. The decision in this case was reaffirmed in *Tadlock v. Eccles*, 20 Id. 782; *City of San Antonio v. Gould*, 34 Id. 49-74; *State v. McCracken*, 42 Id. 383. The rule in Missouri is equally pronounced. In a comparatively recent case in that state (1870) the court, after discussing the "directory" doctrine of California and Ohio, say: "But we take a different view of the subject, and consider it [the constitutional provision under discussion] equally obligatory and mandatory with any other provision in the constitution; and where a law is clearly and palpably in opposition to it, there is no other alternative but to pronounce it invalid;" *State v. Miller*, 45 Mo. 492-498. This question as to whether this provision was directory or mandatory came squarely before the court in the Alabama case of *Weaver v. Lapsley*, 43 Ala. 224, and the court were unanimous in their opinion that the section is imperative and mandatory, and that a law contravening its provisions would be null and void. The rule is the same in Tennessee: *Cannon v. Mathes*, 8 Heisk. 504; and in West Virginia: *Shields v. Bennett*, 8 W. Va.

85; Kentucky: *Phillips v. Covington and Cincinnati Bridge Co.*, 2 Metc. (Ky.) 221; and Colorado: *Central & G. Road Co. v. People*, 5 Col. 39. All of the cases in the different states, with the exception of the two above mentioned, recognize the propriety of so construing this provision. Indeed, it would seem difficult to see how they could do otherwise. The expedient of applying the directory doctrine of construction to a constitutional provision is one rarely resorted to. The provisions of a constitution upon any subject are almost always mandatory in their character, and "the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution:" Cooley's Const. Lim., 5th ed., 93. The same learned judge and author makes some very forcible remarks upon this question: Id. 181.

In West Virginia, as we have seen, the constitution provides: "No act hereafter passed shall embrace more than one object, and that shall be expressed in its title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof as shall not be so expressed:" Art. 6, sec. 30. The court, in discussing the mandatory character of this act, make the following rather refined distinction: "The provision in this constitution, in effect that if any object shall be embraced in an act that is not expressed in the title the act shall be void as to so much as embraces such object—but as to that only—implies the important declaration that the prohibition to embrace more than one object in the same act is merely directory; and that though an act embraces several objects, if all or any of them be expressed in the title, the act, otherwise properly passed, shall be valid as to the objects expressed:" *Shields v. Bennett*, 8 W. Va. 85. This appears to be an artificial construction, and one the application of which would be as pernicious in its results as the directory doctrine of California and Ohio which this same court, in this same case, condemn in strong and well-selected language. The application of this construction would result in the defeat of at least one of the purposes which led to the adoption of these constitutional provisions, to wit, preventing the joining of two opposite and unconnected measures in the same law for the purpose of procuring the friends of each to vote for the joint bill.

SO MUCH OF ACT AS IS EXPRESSED IN TITLE IS VALID, REMAINDER VOID. As we have above seen, a number of the states have provided in their constitutions, after adopting the clause under discussion, that "if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed:" Constitutional Provisions, *supra*. This provision would seem to be unnecessary in the light of the general rule requiring courts to sustain the validity of so much of an act as is not in plain violation of the constitution. The ordinary constitutional provisions which declare that every bill shall contain but one subject, to be expressed in the title, do not expressly or by fair intendment declare that provisions the subjects of which are expressed shall be void. "That the valid part should be upheld is not only in accordance with elementary principles, but is sustained by authority. It is a universal rule that where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void, unless the provisions are so connected together in subject-matter, meaning, or purpose that it can not be presumed the legislature would have passed the one without the other:" *People v. Briggs*, 50 N. Y. 553-565; Cooley, in his valuable contribution to constitutional learning, lays down the following rule: "If, by striking from the act all that relates to the object not indicated by the title, that which is

left is complete in itself, sensible, capable of being executed, and wholly independent of that which is rejected, it must be sustained as constitutional:" Const. Lim., 5th ed., 178. This construction has been almost universally placed upon this provision as well by the states whose constitutions do not expressly command such construction as by those that do. This will be seen by an examination of the cases involving this point: *Whited v. Lewis*, 25 La. Ann. 568, where the court say: "Where portions of a law come within the reasonable intendment of its title, and others do not, the latter alone are unconstitutional, provided they can stand alone;" and in *Mayor etc. of Savannah v. State*, 4 Ga. 26-88: "The true interpretation of this clause has become too well settled by the usage and practice of every department of the state government; it is, that so much only of a statute is void as contains matters different from what is expressed in the title. Such has been the uniform construction put upon this provision by the state courts separately and of the judges in convention:" Id., *per Lumpkin, J.*; *State v. Ah Sam*, 15 Nev. 27; *Wilkins v. Miller*, 9 Ind. 100; *State v. Squires*, 26 Iowa, 341; *City of San Antonio v. Gould*, 34 Tex. 49; *People v. Briggan*, 50 N. Y. 553; *Van Riper v. North Plainfield*, 43 N. J. 349; *Central & G. Road Co. v. People*, 5 Col. 39; *Foley v. State*, 9 Ind. 363; *Kuhns v. Kronnis*, 20 Id. 490; *Grubbs v. State*, 24 Id. 296; *State v. Young*, 47 Id. 150; *Wisner v. Monroe*, 25 La. Ann. 598; *Tecumseh v. Phillips*, 5 Neb. 305; *Williams v. Payson*, 14 La. Ann. 7; *Weaver v. Lapsley*, 43 Ala. 224; *Walker v. State*, 49 Id. 329; *Boyd v. State*, 53 Id. 601; *Ex parte Moore*, 62 Id. 471; *Dorsey's Appeal*, 72 Pa. St. 192; *Allegheny County Home's Appeal*, 77 Id. 77; *Matter of Van Antwerp*, 56 N. Y. 261; *People v. O'Brien*, 38 Id. 193; *In re Metropolitan Gas Light Co.*, 85 Id. 526; *State v. Bankers' Association*, 23 Kan. 499; *Rader v. Union*, 39 N. J. 509; *Jones v. Thompson*, 12 Bush, 394; *Lockport v. Gaylord*, 61 Ill. 276; *Middleport v. Ins. Co.*, 82 Id. 562; *Welch v. Post*, 99 Id. 471.

The only state, so far as we have been able to find, which has not adopted this rule of construction is Tennessee. In that state the court hold that if an act contains more than one subject, and only one subject is expressed in the title, the whole act is a nullity: *State v. McCann*, 4 Lea, 1. Cooley says: "The principal question in each case will therefore be, whether the act is in truth broader than the title; and if so, then whether the other objects in the act are so intimately connected with the one indicated by the title that the portion of the act relating to them can not be rejected, and leave a complete and sensible enactment which is capable of being executed." Const. Lim., 5th ed., 179.

WHEN STATUTES ARE CONSTITUTIONAL OR UNCONSTITUTIONAL UNDER THIS PROVISION.—It is obviously impossible to state a general rule which would control the constitutionality of any particular statute under this provision. When a statute is challenged as violating the provision under discussion, the question for the court to consider in each instance is, Does this particular act relate to but one subject, which is expressed in its title? In arriving at their conclusion, they are necessarily restricted to determining, Does this particular title embrace and express all the objects of this particular act? In discussing this question, the court has the assistance of many cases often analogous, but never identical. However, from an examination of the cases, the general principle will be found to be that the mandate of this provision is satisfied when the law has but one general object, which is fairly indicated by its title. The title need not be an index to the bill, but a brief statement of the object of the act. The constitution is satisfied when the particular subject expressed in the title, fairly construed, embraces every part of the subject-matter of the

law. The subject to be contained in a bill may be as broad and comprehensive as the legislature may choose to make it. It may include innumerable minor subjects, provided all those minor subjects are capable of being so combined as to form only one grand and comprehensive subject; and if the title to the bill containing this grand and comprehensive subject is also comprehensive enough to include all those minor subjects as one subject, the bill, and all parts thereof, will be valid: *Division of Howard Co.*, 15 Kan. 194-214; and "when the principal object of an act is expressed in the title, and the act embraces, with such principal object, other auxiliary objects, the act, if not otherwise objectional, is valid, not only as to the principal, but likewise as to the auxiliary objects:" *Shields v. Bennett*, 8 W. Va. 74-86. "If the title fairly gives notice of the subject of the act, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary:" *Allegheny County Home's Appeal*, 77 Pa. St. 77-80. "The construction placed upon the clause [the one under discussion] is that the details of a legislative act need not be specifically stated in the title, but matter germane to the subject, and adapted to the accomplishment of the object in view, may properly be included:" *State v. Silver*, 9 Nev. 227. "None of the provisions of a statute should be regarded as unconstitutional where they all relate directly or indirectly to the same subject, have a natural connection, and are not foreign to the subject expressed in its title:" *Phillips v. Covington and Cincinnati Bridge Co.*, 2 Metc. (Ky.) 219-222.

It is not allowable, for the purpose of invalidating a law, to sit in judgment upon its title, to determine with critical acumen whether it might not have been more explicit and so drawn as more clearly and definitely to indicate the nature of the legislation covered by it. The legislature is not subject to judicial control in respect to the form or mode in which the 'subject' of a bill shall be 'expressed.' If it is expressed, the constitution is satisfied:" *People v. Banks*, 67 N. Y. 568-572. These and similar expressions will be found contained in all the cases, and the doctrine as therein laid down will be the criterion according to which the constitutionality of any legislative enactment will be determined: See *Walker v. State*, 49 Ala. 329; *Martin v. Broach*, 6 Ga. 21; S. C., 50 Am. Dec. 306; see also note to this case; *Belleville etc. R. R. Co. v. Gregory*, 58 Id. 589; *Prothro v. Orr*, 12 Ga. 36; *Wheeler v. State*, 23 Id. 9; *Hill v. Commissioners etc.*, 22 Id. 203; *Jones v. Columbus*, 26 Id. 610; *Denham v. Holeman*, 26 Id. 182; *Allen v. Tison*, 50 Id. 374; *Ex parte Conner*, 51 Id. 571; *Brieswick v. Mayor of Brunswick*, Id. 639; *Railroad Co. v. Whiteneck*, 8 Ind. 217; *Wilkins v. Miller*, 9 Id. 100; *Foley v. State*, Id. 363; *Gillespie v. State*, Id. 380; *Mewherter v. Price*, 11 Id. 199; *Reed v. State*, 12 Id. 641; *Henry v. Henry*, 13 Id. 250; *Igoe v. State*, 14 Id. 239; *Sturgeon v. Hutchens*, 22 Id. 107; *Laner v. State*, Id. 461; *Central Plank R. Co. v. Hannaman*, Id. 484; *Garrigus v. Board of Com'rs*, 39 Id. 66; *McCaslin v. State*, 44 Id. 151; *Williams v. State*, 48 Id. 306; *Jackson v. Reeves*, 53 Id. 231; *People v. McCann*, 16 N. Y. 58; *Williams v. People*, 24 Id. 405; *People v. Allen*, 42 Id. 404; *Huber v. People*, 49 Id. 132; *People v. Rochester*, 50 Id. 525; *Wessler v. People*, 58 Id. 516; *People v. Dudley*, Id. 323; *People v. Quigg*, 59 Id. 83; *Harris v. People*, Id. 599; *In re Flatbush*, 60 Id. 398; *People v. Willsea*, Id. 507; *In re Metropolitan Gas Light Co.*, 85 Id. 526; *Belleville etc. R. R. Co. v. Gregory*, 15 Ill. 20; *Fireman's Association v. Lonsbury*, 21 Id. 511; *Ottawa v. People*, 48 Id. 283; *Prescott v. City of Chicago*, 60 Id. 121; *People v. Brislin*, 80 Id. 523; *McAunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 338; *State v. Squires*, 26 Id. 340; *Chiles v. Drake*, 2 Metc. (Ky.) 146; *Chiles v. Monroe*, 4 Id. 72; *Hind v. Rice*, 10 Bush, 528; *Cannon v. Hemmhill*, 7 Tex. 184; *Battle*

v. *Howard*, 13 Id. 345; *Robinson v. State*, 15 Id. 311; *City of Antonio v. Gould*, 34 Id. 49; *Ex parte Hogg*, 36 Id. 14; *State v. Shadle*, 21 Id. 404; *State v. McCracken*, 42 Id. 383; *Lacson v. Dufoe*, 9 La. Ann. 329; *State v. Harrison*, 11 Id. 722; *Bossier v. Steele*, 13 Id. 433; *Williams v. Payson*, 14 Id. 7; *Wisner v. Monroe*, 25 Id. 598; *Whited v. Lewis*, Id. 568; *State v. Lafayette Co. Ch.*, 41 Mo. 221; *State v. Miller*, 45 Id. 495; *State v. Gut*, 13 Minn. 341; *State v. Kinsella*, 14 Id. 524; *Mills v. Charleston*, 29 Wis. 400; *Evans v. Sharp*, Id. 564; *Single v. Supervisors of Marathon*, 38 Id. 363; *Harrison v. Supervisors*, 51 Id. 645; *People v. McCullum*, 1 Neb. 182; *Smails v. White*, 4 Id. 353; *Cullip v. Sheriff of Calhoun County*, 3 W. Va. 588; *Tuscaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Weaver v. Lapsley*, 43 Id. 224; *Ex parte Upshaw*, 45 Id. 234; *Lockhart v. Troy*, 48 Id. 579; *Walker v. State*, 49 Id. 329; *Simpson v. Bailey*, 3 Or. 515; *Cannon v. Mathes*, 8 Heisk. 504; *State v. McCann*, 4 Lea, 1; *Keller v. State*, 11 Md. 525; *Parkinson v. State*, 14 Id. 184; *Ryerson v. Ulry*, 16 Mich. 269; *People v. Denahy*, 20 Id. 349; *People v. Hurlbut*, 24 Id. 44; *Kurtz v. People*, 33 Id. 279; *Dorsey's Appeal*, 72 Pa. St. 192; *Allegheny County Home's Appeal*, 77 Id. 77; *Morton v. Comptroller General*, 4 S. C. 430; *State v. Gurney*, Id. 520; *Norman v. Curry*, 27 Ark. 440; *Davis v. Woolnough*, 9 Iowa, 104; *Mosier v. Hilton*, 15 Barb. 657; *People v. Mahaney*, 13 Mich. 481; *Morford v. Unger*, 8 Iowa, 82; *Whiting v. Mt. Pleasant*, 11 Id. 482; *Mayor of Annapolis v. State*, 30 Md. 112; *State v. Union*, 33 N. J. 350; *Humboldt Co. v. Churchill Co. Com'rs*, 6 Nev. 30; *Albrecht v. State*, 8 Tex. App. 216. It would be a violation of the letter and spirit of this constitutional safeguard, if such a construction should be placed upon it as would forbid the incorporation into a law of everything needful to the proper operation of the one subject to which it is limited: *Ex parte Upshaw*, 45 Ala. 234.

The subject of an act to incorporate a town or city, or an act to establish a charter for a town or city, is "the charter of incorporation." Such an act may contain a grant of all the powers intended to be conferred on the corporation, and whatever is necessary for that end: *Lockhart v. Troy*, 48 Id. 579-584. The title to such an act need not be an index, nor need it state a catalogue of all the powers intended to be bestowed: Id. The subject of an act in its most general sense is defined in *Morton v. Comptroller General*, 4 S. C. 430-442, to be "some right, obligation, or power, either public or private, created, modified, or destroyed for the purpose of attaining some end, either of public or private advantage, which constitutes the object of the statute."

The one subject of an act entitled "An act to prohibit the sale of intoxicating liquors in the city of Annapolis, or within five miles thereof, to minors and persons of color," is to prohibit the persons therein named from obtaining intoxicating liquor; consequently this title is sufficiently broad to sustain a provision in the body of the act making it unlawful to give liquor to the persons therein named within the prescribed bounds: *Parkinson v. State*, 14 Md. 184-195. The general subject of an act entitled "An act to fix the state tax on property" is revenue, and it is not objectionable as relating to "two subjects," because one section provides for a tax on property, and another for a tax on privileges. Neither is the title defective, as it fairly gives notice of the contents of the bill, and is not calculated to mislead: *Cannon v. Mathes*, 8 Heisk. 504; a provision for the organization and sitting of courts in new counties is properly connected with the subject of the formation of such counties: *Brandon v. State*, 16 Ind. 197; and the title to an act which recites that it is "An act to establish a home of refuge for the correction and reformation of juvenile offenders" is sufficient to support a provision requir-

ing that certain real estate should be sold, and the proceeds applied towards the purchase of the grounds and the erection of suitable buildings for the institution; *McCaslin v. State*, 44 Id. 151-180. But a statute entitled "An act concerning promissory notes and bills of exchange," which provides "that all promissory notes, bills of exchange, or other instruments," etc., is void, so far as it relates to "other instruments;" *Mewherter v. Price*, 11 Id. 199; and a provision authorizing the board of supervisors to sell county property at Arnoldsburg, in an act entitled "An act locating the county seat of Calhoun county," is another and different object from that stated in the title, and in consequence unconstitutional: *Cutlip v. Sheriff of Calhoun County*, 3 W. Va. 588. In Louisiana slaves and free colored persons embrace two classes which it is impossible to confound in legal parlance, and in consequence, an act entitled "An act relative to slaves and free colored persons" violates the constitutional command that every act shall embrace but one subject: *State v. Harrison*, 11 La. Ann. 722.

A provision in an act entitled "an act relating to the liens of mechanics, materialmen, and laborers, upon leasehold estates," etc., which extends the liens to freeholds, is unconstitutional, as freeholds were not expressed in the title, and the title mentioning leaseholds, which mention excluded estates of a higher grade, was calculated to mislead: *Dorsey's Appeal*, 72 Pa. St. 192. The title, "An act to restrict the sale of personal property in certain cases," is not sufficient to support a provision which declares the willful destruction of personal property on which there is an unsatisfied mortgage lien, given by the person so destroying it, punishable as a misdemeanor: *Walker v. State*, 49 Ala. 329. An act which provides for the expenditure of certain highway taxes on two distinct state roads, and for the location and construction of a third state road, and for the expenditure of certain other taxes upon that, is unconstitutional, as embracing more than one object: *People v. Denahy*, 20 Mich. 349; and an act entitled "An act to declare void certain judgments, and to grant new trials in certain cases therein mentioned, and to repeal sections 2876 and 2877 of the revised code of Alabama," is another such law: *Weaver v. Lapeley*, 43 Ala. 224. Under the constitutional provisions under discussion, it is not competent for the general assembly to enact a law incorporating three separate and distinct corporations, or revive by name three charters which had become obsolete: *Ex parte Conner*, 51 Ga. 571. An act the title to which related to the incorporation of a city, and for other purposes, can not constitutionally contain a provision validating and confirming all the ordinances of said city heretofore passed. "It was just such legislation as this which the constitution intended to prohibit when it excluded more than one subject-matter from being embraced in the same law:" *Brienswick v. Mayor of Brunswick*, Id. 639. In the recent well-considered California case of *People v. Parks*, 58 Cal. 624, the title, "An act to promote drainage," was held insufficient to support an act the paramount object of which appeared to be the storage of *débris* from mining and other operations.

The use of the words "and for other purposes," which had formerly been resorted to in so many instances as a sort of "cure-all," is now, in the light of more recent adjudication, of no effect: *Town of Fishkill v. Fishkill & Beekman Plank Road Co.*, 22 Barb. 634; *Ryerson v. Utley*, 16 Mich. 269; *St. Louis v. Trefel*, 42 Mo. 578. The constitution of New York applies the provision under discussion only to "private and local" bills. It has been held that the placing by the legislature in a private or local bill of matter

of public or general law does not render the act, so far as the matter of public or general law is concerned, obnoxious to this section of the constitution: *People v. McCann*, 16 N. Y. 58-60; *Williams v. People*, 24 Id. 405. But in such a case, the private part is void. "We * * * are not disposed to concede that the joining of two subjects in a bill, one public or general, and one private or local, will save the private matter of the bill from conflicting with that clause of the section of the constitution which prohibits a private bill from embracing more than one subject:" *People v. Supervisors of Chautauqua*, 43 Id. 10-13, per Folger, J.

WILDEY v. COLLIER.

[7 MARYLAND, 273.]

WHEN PRIVATE RIGHTS CONFLICT WITH CONSIDERATIONS OF PUBLIC POLICY the former must yield.

MORTGAGE EXECUTED UPON CONSIDERATION THAT MORTGAGEE SHOULD OBTAIN from the governor, even by fair means, a *nolle prosequi* to be entered in a prosecution pending against a third party, and in the dismissal of which the mortgagors were interested, is against public policy, and void.

IT IS NO ANSWER TO OBJECTION OF "PUBLIC POLICY," to an agreement to obtain a writ of *nolle prosequi* from the governor, that he had a right to issue such writ.

CONSPIRACIES TO DEFRAUD AFFECT PUBLIC INTEREST so CLOSELY that any compromise by which a *nolle prosequi* is entered in a prosecution for such offense has never been allowed.

IF PARTY IN PURSUANCE OF AGREEMENT TO OBTAIN NOLLE PROSEQUI in a criminal prosecution resorted to only fair means to obtain such writ, the *onus* of showing such fact is upon him.

ON the nineteenth day of October, 1849, Collier and wife mortgaged certain of the wife's property to Wildey to secure the payment of five promissory notes, which were drawn by John M. Slaney in favor of Collier, and indorsed by him. In 1852 the mortgage was duly foreclosed and the property sold. The appellees now object to the confirmation of the sale for different reasons, principally that the consideration of the mortgage was that Wildey was to procure a *nolle prosequi* from the governor, in a proceeding in which an indictment had been found against Slaney and his son for fraudulently conspiring to obtain money from Wildey. Collier had been a partner in the transaction with the younger Slaney, and he was threatened with a similar prosecution, hence his desire to have the proceedings dismissed. The evidence showed that after the indictment had been found the parties agreed upon a compromise, by which, in consideration of the execution of the above mortgage, Wildey was to obtain the *nolle prosequi* from the governor. The mort-

gage was delivered to Collier's agent, to be delivered to Wildey after he had obtained the writ, and it was delivered to him accordingly. It was also shown that Mrs. Collier was acquainted with all the circumstances of the case, and executed the mortgage with full knowledge of them. The exceptions to the confirmation of the sale were sustained by the court below, and the complainant appealed.

Pitts, for the appellant.

McLean, for the appellees.

By Court, TUCK, J. We suppose that the money claimed in this case was due to the appellant, and that his object in taking the mortgage was to secure his debt, without any design to obtain a *nolle prosequi* by improper means. It is quite apparent that Mrs. Collier, not being indebted to the appellant, became a party to the mortgage for the sole purpose of inducing him to use his efforts in obtaining the *nolle prosequi*, making her property responsible for a debt not her own. This, it is true, a *feme sole* may do; but the question here is whether this deed is not avoided by the law, for the reasons assigned in the record.

Courts of justice are generally open to suitors for the recovery of just claims, but considerations of public policy are often deemed paramount to private rights, and where they are opposed, the latter must yield. There is no doctrine better settled than that agreements to obtain executive clemency, by means of pardons or writs of *nolle prosequi*, can not be enforced. The reasons are obvious. They are designed to protect the exercise of this power from abuse through the intervention of designing persons, and although in the particular instance no improper influences may have been resorted to, the public interest in such questions requires that the principle should be enforced in all cases. It may sometimes, as between the parties, be unjust to a claimant who has rendered valuable services for another in his distress, but rules of law, founded on public policy and the safety of society, will not be set aside to sustain such individual demand. Without going into these doctrines at length, it may suffice to refer to the following authorities, where the subject is fully discussed: *Collins v. Blantern*, 2 Wils. 341; *Smith's Lead*. Cas. 154; 1 Ch. Crim. L. 4; *Wallace v. Hardacre*, 1 Camp. 45; Ch. Cont., ed. 1851, 571, 582; Story on Cont., sec. 202; Parsons on Cont. 365, 380; *Keir v. Leeman*, 51 Eng. Com. L. 308; S. C., 58 Id. 371; *Marshall v. Baltimore & Ohio R. R. Co.*, 16 How. 334.

It is true, as argued by the appellant's counsel, that the party here only undertook to apply to the governor for what the executive had authority to grant, and that there was nothing illegal in his making efforts to obtain the *nolle prosequi*. But it does not follow that the case is relieved thereby from the objection taken on the part of the appellee. The executive is still liable to be misled, and induced to act upon considerations suggested by a party having an interest to produce false impressions on his mind; and to shield that department of the government and protect the community against the improvident exercise of its prerogatives, the law has declared that a recovery can not be had on such undertakings. The same reason applies with equal force in support of claims for obtaining the passage of laws by the legislature. We do not say that services of that kind may not be compensated when publicly rendered by advocates disclosing their true relation to the subject, but certainly not when the character in which they solicit is unknown. And yet in all such instances, the legislature most probably would be asked to do only what there was ample power to grant.

There is much danger of abuse in the exercise of the pardoning power and in granting writs of *nolle prosequi*, arising from the manner in which such applications are generally presented. They were, before the adoption of the present constitution, preferred and acted on *ex parte*, the governor necessarily relying on the imperfect, not to say false, lights that such circumstances might afford. It is easy to perceive that this danger is greatly increased where the party urging the application is unknown to the executive, the paid agent of the accused, or is acting under the strongest inducements to varnish or misrepresent the facts by reason of his own interest in the success of the measure. No class of cases presents a more striking illustration than that to which the presentment mentioned in this record belongs. If it be understood as the law of the state that such compromises are binding and may be enforced, we may anticipate an increase in number of presentments for raising money under false pretenses, and for conspiracies to defraud, found at the instance of persons defrauded, hoping thereby ultimately, as here expected, to secure the payment of their claims against the offenders. Although there may be cases in which compromises have been allowed, there are none, as far as we are informed, for arresting prosecutions by obtaining a *nolle prosequi*, or otherwise, in cases affecting the public interest as closely as offenses like that charged against Slaney. We take the rule as laid down by Lord Eldon in *Nor-*

man v. Cole, 3 Esp. 253, where one Tunstall being under sentence of death, the plaintiff was prevailed upon to lodge thirty pounds in the hands of the defendant, to be applied to the purpose of procuring him a pardon. The plaintiff, being held to strict proof of the means employed to obtain the pardon, stated that Tunstall was a man of good character before his conviction; that one Morland, being a person of good connections and having access to persons of interest, the money was to be given to him for so using his interest, by representing in favorable terms the case and character of Tunstall. Lord Eldon would not let the cause proceed, saying: "Where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money; the doing an act of that description should proceed from pure motives, not from pecuniary ones. The money is not recoverable." We suppose that the appellant who undertook to obtain the *nolle prosequi* could not have expected to succeed by means less exceptionable than those condemned by Lord Eldon.

The same principle was recognized in *Hatsfield v. Gulden*, 7 Watts, 152, where the plaintiff sued to recover compensation for services rendered the defendant in procuring his pardon. The court there remarked upon the means employed by the plaintiff, as showing that he was not actuated by pity or friendship, or a sense of justice, but for his own gain and emolument. It is true, the means resorted to by Wildey do not appear; and we are not to infer, in this particular case, that the power was unwisely exercised in consequence of the representations made by him to the governor; but it is quite plain that motives of interest instigated his exertions in behalf of the accused, and if the manner in which his part of the engagement was performed could affect the case—which, however, we deem wholly unimportant—the *onus* was certainly on him to show the means by which the governor had been induced to act favorably upon the application.

We perceive nothing in the case to exempt it from the operation of the principles upon which the law reprobates contracts of this character, and concurring with the judge below in his view of the transaction, we must affirm the decree; but we do not consider it a case for costs.

Decree affirmed.

COMPOUNDING MISDEMEANOR IS ILLEGAL CONSIDERATION for a note, and avoids it: *Jones v. Rice*, 29 Am. Dec. 612; and a bond, part of the consideration of which is an agreement not to prosecute for malicious mischief, is

void as against public policy: *Cameron v. McFarland*, 6 Id. 566. So suppression of a criminal prosecution or of the evidence necessary to support it is illegal in a private individual, and is not good as a consideration: *Plumer v. Smith*, 22 Id. 478. An agreement to grant certain privileges in consideration of the withdrawal of opposition to the passage of an act by the legislature is void as against public policy: *Pingry v. Washburn*, 15 Id. 676. So is preventing competition in bidding for government contracts: *Gulick v. Ward*, 18 Id. 389; or at execution sales: *Jones v. Caswell*, 2 Id. 134.

CONTRACT WHOSE CONSIDERATION IS AGREEMENT TO COMPOUND OR STIFLE CRIMINAL PROSECUTION: See an extensive discussion of this question in notes to *Town of Hinesburgh v. Semner*, 31 Am. Dec. 598, and *Shaw v. Spooner*, 32 Id. 348, where such contracts are declared void. For a discussion of the rights of parties to an illegal or fraudulent transaction, see *Boyd v. Barclay*, 34 Id. 762, and note. See also note to *Clippinger v. Hepbaugh*, 40 Id. 525. The principal case is cited in *Gottwalt v. Neal*, 25 Md. 334, 346, where the court say: "The law is well settled that contracts made in violation of law can not be enforced." The court go on to say that after such a contract has been enforced, equity will refuse to grant relief by ordering repayment, etc., as the parties are in *pari delicto*.

FARMERS AND PLANTERS BANK v. MARTIN.

[7 MARYLAND, 342.]

SALES IN CHANCERY ARE MADE SUBJECT TO INCUMBRANCES WHICH ARE ON PROPERTY, unless expressly stipulated to the contrary by the terms of sale. The interest and estate of the parties is the only thing sold, and the doctrine of *caveat emptor* applies.

BURDEN OF PROOF IS ON PURCHASER AT CHANCERY SALE to show that he made the purchase free from all incumbrances.

WHERE PURCHASER AT CHANCERY SALE FAILS TO COMPLY WITH TERMS OF SALE, and a resale is ordered, the trustee making sale is allowed his commissions on the amount of the sale, and his legal fee for filing the petition. He will not be allowed additional commission for the collection of the money.

WHEN RESALE IS ORDERED, TRUSTEE IS ALLOWED his legal fees and commission on the proceeds of the second sale; but where he proceeds at law by suit upon the purchaser's notes or bonds, he is not allowed a double commission, and consequently he is awarded an attorney's fee.

THIS is an appeal from the decision of the chancellor in this case, rendered in July term, 1852, in the high court of chancery of Maryland, and reported in 3 Md. Ch. 224. The chancellor in his decision states the facts as follows: "The questions in controversy arising upon the exceptions to the report of the auditor in this case relate to the allowance to William W. McClellan, the first purchaser, of the sum of one hundred and sixty-one dollars and twenty-five cents, for arrears of ground-rent and interest thereon, due at the time

of his purchase, and to the allowance to the trustee of a commission of five per cent on the amount due upon the first sale, as a compensation for his services as solicitor, the trustee being a solicitor conducting the cause. The first purchaser being in default, proceedings were instituted against him for a resale, under the act of 1841, chapter 216, and a resale at his risk being ordered, the court, in ratifying the second sale by an order passed on the thirtieth of January, 1850, in addition to the commission allowed the trustee according to the course of the court, directed that he should be allowed a commission of five per cent on the amount due upon the first sale when collected, 'as compensation for his services as solicitor.' " This appeal is taken to the decision of the chancellor in overruling certain exceptions to the auditor's report. The remaining facts appear from the opinion.

Charles F. Mayer, for the appellants.

Grafton L. Dulany, for the appellees.

By Court, *LE GRAND*, C. J. The questions which we are called upon to decide on this appeal arise out of exceptions filed by the complainant and by Mr. William W. McClellan to the auditor's report and account B. It appears from the proceedings that the exceptant, McClellan, became the purchaser at a sale ordered by the court of chancery, and that this sale was duly reported by the trustee and ratified by the chancellor. The amount of the sale was one thousand four hundred and fifty dollars. The purchaser failing to comply with the terms of sale, proceedings were instituted for a resale under the act of assembly of 1841, chapter 216, and a resale was directed at the risk of the first purchaser, the exceptant McClellan. The property was resold for the sum of one thousand six hundred and twenty-five dollars. In the statement of the account B, of the proceeds, the auditor allowed to the exceptant the sum of one hundred and sixty-one dollars and twenty-five cents, which he claimed on the ground that when he made his purchase it was an incumbrance on the lot in form of rent due, and that inasmuch as he was compelled to pay it to the landlord, he ought to be allowed the amount as a credit on his purchase. Although in some instances trustees, in effecting sales under decrees, do so free from the incumbrance of taxes and ground-rent—making the latter payable out of the proceeds—yet in the case now before us we agree with the chancellor, that the purchaser made his purchase on the express understanding that he was to pay

the taxes and ground-rent due on the premises, of which he had full and due notice. The testimony of the trustee is positive as to the notification to this effect, given to the company assembled at the place of sale, and especially to the agent of the purchaser who made the purchase for him. This is substantially admitted by the agent. Under these circumstances, it would be unjust to allow him the amount of the ground-rent. It is but fair to presume, the property being sold subject to this incumbrance, that it sold for a sum less that amount. But, independently of this consideration, chancery sales like the one in this case, unless it be expressly stipulated to the contrary by the terms of sale, are made subject to the incumbrances which are on the property. The only thing sold is the interest and estate of the parties to the proceeding; the doctrine of *caveat emptor* applying: *Brown v. Wallace*, 4 Gill & J. 479. This being so, it is incumbent on the purchaser to show his purchase was made free from all or particular incumbrances before he can be allowed for any such.

We dissent, however, from the opinion of the chancellor, so far as it relates to the allowance of five per cent to the trustee, in addition to his commissions on the second sale. The case to which he refers, that of *Post v. Mackall*, 3 Bland, 486, does not sustain the view taken by him. We have had access to the original papers in the register's office, and find that the allowance of five per cent in that case was for attorney's fees in the prosecution of claims at law. When a resale is had, the trustee is allowed his legal fee for filing the petition and commissions on the amount of the proceeds of sale, and this, in our judgment, is a sufficient allowance to be made out of the purchase money. There is no reason why the trustee should be allowed more on a resale than on the original. There is, however, a reason for the allowance of counsel fees where the original purchase money is sought to be recovered by suits at law; for, in this latter case, the trustee receives nothing in the form of commissions, except on the amount of the original purchase. When a party fails to comply with his contract of purchase he may be coerced in three different modes: 1. By attachment; 2. By suits at law on his notes or bonds; and 3. By a resale: *Richardson v. Jones*, 3 Gill & J. 163; *Anderson v. Foulke*, 2 Har. & G. 346; Act of 1841, c. 216. When the latter is resorted to, he is allowed his legal fee and commissions on the proceeds of the second sale; but where he proceeds at law, he is not allowed double commissions, and therefore it is but

proper he should be awarded an attorney's fee as a compensation for his services. Entertaining these views, we affirm in part and reverse in part the order of the chancellor.

Order affirmed in part and reversed in part.

PURCHASER UNDER JUDGMENT acquires all the rights of the judgment debtor in the premises: *Sweet v. Green*, 19 Am. Dec. 442.

DOCTRINE OF CAVEAT EMTOR APPLIES TO JUDICIAL SALES: *Sackett v. Twinning*, 57 Am. Dec. 599, and note.

THE PRINCIPAL CASE IS CITED IN *Slothower v. Gordon*, 23 Md. 9, where the court say: "There is no relation of confidence and trust between trustee and purchaser; on the contrary, the doctrine of *caveat emptor* applies to all sales by trustees acting under decrees of courts of equity." Again, in *Downin v. Sprecher*, 35 Id. 483, in speaking of a sale under a decree of court, the court say: "The sale under that decree passed only the title of the parties to the cause, and the purchaser took their interests only. In all such cases the doctrine of *caveat emptor* applies;" and the principal case is cited. The principal case is cited in *Farmers' Bank of Maryland v. Thomas*, 37 Id. 257, to the point that at a sale under a decree of court the purchaser acquires only the right, title, and interest of the parties to the suit. It is again cited in *Mealey v. Page*, 41 Id. 185, where the court discuss resales of property which was once sold, but the purchase of which was not concluded.

McTAVISH v. CARROLL.

[7 MARYLAND, 352.]

MAN CAN NOT SUBJECT ONE PART OF HIS PROPERTY TO ANOTHER by easement, for a man can not have an easement in his own property.

IF MAN WHO OWNS LARGE TRACT OF LAND UPON WHICH IS SITUATED MILL, mill-race and dam, and a road along the race, conveys by deed of gift that part of his estate upon which the dam, race, and road are situated to one person, and afterwards conveys the part upon which the mill is situated to another (both subject to his own life estate), it would seem but reasonable that the first grantee should be considered as having taken her portion of the estate subject to all such mill rights as were in use at the date of the conveyance to her, and which continued to be used subsequently, and which were absolutely necessary to continue the mill in operation.

WHERE MAN OWNS LARGE TRACT OF LAND UPON WHICH IS SITUATED MILL, mill-race, and dam, and a road along the race to be used in repairing the same, conveys by deed of gift that part of his estate upon which the dam, race, and road are situated to one person, and afterwards conveys the part upon which the mill is situated to another (reserving to himself a life estate in each case), the owner of the mill should have the privilege of using the dam, race, and road, upon the principle of legal necessity.

WAY BY NECESSITY.—If the owner of a tract of land conveys a part of his land to another, if the latter has no other right of way out, he has a way by necessity over the remaining lands of his grantor.

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NO INFERENCE OF FACT CAN BE MADE where the action comes before the court upon a case stated.

OUR EARLY LEGISLATION IN REGARD TO MILLS shows that they are of great public utility.

OWNER OF TRACT OF LAND WHO HAS EASEMENT IN MILL-RACE, DAM, and a roadway along said race to repair the same, has not got a private right of way for ordinary purposes over said road, but only a right to use it as occasion might require to repair the race and dam.

OWNER OF LAND SUBJECT TO EASEMENT has all the rights of owner, subject only to a reasonable use of the easement. Consequently where such owner builds a fence across a road, to which another person has an easement for occasional use, if the owner offers to and is willing to take down the fence every time the person having the right desires to pass, he occasions such latter person no damage which can be recovered in an action.

EASEMENT TO TRAVEL ALONG ROAD RUNNING ALONG MILL-RACE, FOR PURPOSE OF REPAIRING SAME, is not necessarily obstructed by "plowing and cultivating" the road, the sort of cultivation not being mentioned. There are different modes of cultivation, some of which in particular stages of it would create no such obstruction as could prevent carts and wagons from being used with convenience in repairing the dam and race.

PLAINTIFF'S PRAYER FOR INSTRUCTION, BASED UPON HIS OWN EVIDENCE, CAN NOT BE GIVEN, when the proof of the defendant, if believed by the jury, would establish any proposition inconsistent with the theory of such prayer. Plaintiff must assume or admit the truth of all the defendant's proof on the subject.

THIS is an action of trespass on the case, brought by Carroll against Mrs. McTavish, for obstructing a way, to which the plea of *non cul.* was entered. In plaintiff's instruction, set out in full in the opinion, his evidence is sufficiently stated. Defendant substantially proved that the fence complained of was a temporary structure, a common rail fence which could be moved from place to place, and was put up as if to be taken down at any time. He also showed that if the rails were taken down the posts would not interfere with travel upon the road, and that he had often informed plaintiff and his manager that they could take down the rails whenever it became necessary for them to pass over the road; and that if they did not desire to do so, if they would inform defendant or his agent, they would take the rails down for them. It was further shown that the fence was necessary to complete the inclosure of defendant's field. Plaintiff then offered his prayer, which was granted by the court below, and defendant took his first exception. The remaining facts appear from the opinion.

Dorsey and Alexander, for the appellant.

Pitts and Dulany, for the appellee.

By Court, EGGLESTON, J. This is an action on the case, brought by C. Carroll, the appellee, against C. C. McTavish, the appellant, for obstructing a road running from the mill of the appellee to his mill-dam, which dam and the obstructed portion of the road are on the land of the appellant. The declaration alleges that the appellee was possessed of an ancient mill, with the right to use the water from a stream on the close of McTavish, through a race running over said close, from the mill-dam to the mill, and to the use of a road running from the mill to the dam, immediately along the bank of the said race, for the purpose of passing with wagons, etc., as occasion required, to clean out and repair the race; and that the appellant placed a fence along the bank of the race, between the race and the road, whereby the road was obstructed and the appellee deprived of the use thereof, and prevented and hindered from repairing his race, and his mill was rendered entirely useless.

At the instance of the plaintiff, the court instructed the jury: "If they find the deeds offered in evidence by the plaintiff and defendant, and that the plaintiff, on the death of said Charles Carroll, on the fourteenth of November, 1832, came into the full possession of all the property conveyed to him by the deed of the twenty-eighth of July, 1832, and so continued in possession until this day; and if the jury find that there was a mill on said property, which had been erected thereon some time before the death of said Carroll, and a considerable time or period before the execution of any of the deeds aforesaid, which still remains thereon; and if the jury further believe, from the proof, that there was a race with a road or way upon its western bank or margin, to be used for the reparation of the banks of said race, leading from a dam upon the land of said defendant, which was conveyed to him or them under whom he claims, by said Carroll, who, during his life-time, and for a long period before his death, used and possessed said race and road or way in connection with said mill; and if the jury further find that from the death of said Carroll the plaintiff has been in the quiet and peaceable possession of the land conveyed to him, as aforesaid, with the said mill, and also from the time last aforesaid did use and enjoy the said race and road or way through the lands of the defendant, to and with the said mill, until the twenty-sixth of March, 1852; and if the jury should also believe that the defendant, on or about the day last aforesaid, erected a post-and-rail fence on the western bank of said race, over and along said road or way, and extended poles across the same

near to said dam, and also at a greater distance therefrom, as stated by the witnesses, and that said defendant did also plow up the bed of said road, and reduce the same to cultivation—then the plaintiff is entitled to recover.”

The correctness of this instruction is denied by the appellant, upon the ground that Charles Carroll of Carrollton, being the owner of the land on which the dam was erected and the race and road passed over, and also of the land where the mill stood, having conveyed the land on which the dam and race were, with the appurtenances, to Mrs. McTavish, subject to his own life estate, without any other reservation or exception whatever, his subsequent conveyance to the appellee gave him no right to use the dam, race, or road, and consequently the obstructions to the road complained of could not entitle the plaintiff to a verdict. Inasmuch as the elder Mr. Carroll owned both parts of the estate whilst he used the mill and its appurtenances, notwithstanding the great length of time he so used the same, it is true he did not thereby acquire or enjoy a right to the dam, race, and road, as easements, strictly speaking; for a man can not subject one part of his property to another by an easement, because he can not have an easement in his own property, as the same object is obtained by him through the exercise of the general right of property. Nevertheless, under the peculiar circumstances of these transactions, it seems but reasonable that Mrs. McTavish should be considered as having taken her portion of the estate subject to all such mill rights as were in use at the date of the conveyance to her, and which continued to be used subsequently, and were actually necessary to continue the mill in operation. A different view of the subject would necessarily have placed the use of the mill entirely at the will and pleasure of Mrs. McTavish, or those claiming under her, immediately upon the decease of her grandfather. Such, we think, never was the intention of the grantor or the expectation of the grantee. Nor do we consider ourselves bound to give such a construction to the conveyance. It was not a sale, but a gift, of one thousand acres of land, part of a large estate containing some six or seven thousand acres. The balance, with the exception of a few acres, was subsequently conveyed to the appellant. And on this portion of the estate the mill-house stood. The mill, therefore, was a kind of property peculiarly valuable to the owner of such an estate. And yet without the right to use the dam and race which have been spoken of, the

mill is entirely useless. In the deed to the mother of the appellant provision is made for securing to her the use of "all the roads, whether private or public," which were then used in going to or from the premises, "and particularly the road leading therefrom to the mill, the private turnpike, and the road leading by Mike's quarter." This provision in regard to the road to the mill, to say the least of it, furnishes no evidence of a design on the part of the grantor to destroy the mill by that conveyance. But we think the privilege of using the dam, race, and road may be sustained, upon the principle of legal necessity. There are cases where necessity has been held sufficient to secure rights in some degree analogous to those claimed by the appellee.

Where a man owns two closes, A. and B., with a road from A. over B., to the highway, and sells close B. without reserving in the deed any right of way, if he has no other road he may use the one over B. as a way of necessity. There was at one period some conflict of authority on this point, but we think it may now be considered settled as we have stated it: 3 Kent's Com. 420.

Under the title of "Easements of Necessity," this subject is fully examined by Gale and Whatley in their *Law of Easements*, pages 71-85. See also *Pinnington v. Galland*, 20 Eng. L. & Eq. 561. Under the title, "Acquisition of Easements by Implied Grant," at page 49 of *Law of Easements*, it is said: "Upon the severance of a heritage a grant will be implied: 1. Of all those continuous and apparent easements which have been used by the owner during the unity, though they have had no legal existence as easements; and 2. Of all those easements without which enjoyment of the several portions could not be fully had." The authors of this work enter very fully into the consideration of rights acquired by implied grants, and refer to numerous cases on the subject. At page 56 will be found that of *Nicholas v. Chamberlain*, Cro. Jac. 121. There "it was held by all the court, upon demurrer, that if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterward sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary and quasi appendant thereunto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case requires." If in such a case, upon

the ground of necessity, the law would permit the owner of the house to retain his right to the conduit, notwithstanding he sold the land through which it passed, and would also continue or give a right of way to a man over land which he had conveyed, without any express reservation of such a right, it would seem to be a very just conclusion that under the circumstances of this case the appellee is entitled to the use of the dam, race, and road in the manner they were used by the elder Mr. Carroll.

In opposition to the claim of the appellee, reference has been made to the case of *Spencer v. Spencer*, 2 Ired. L. 95. There the defendant claimed the right to flow the water falling upon his land down into and through a ditch situated on the land of the plaintiff. Both tracts were originally owned by Edward Spencer, who conveyed them to his two sons, Jones and Tucker. The plaintiff claimed under the former, and the defendant under the latter. The deed to Jones bore date the twelfth of May, 1797, and the other the day after. The first, after describing the land, contained these words, "a privilege of two leading ditches to Tucker Spencer excepted." Nothing was said in regard to the ditches in the second deed. Judgment was given in favor of the plaintiff, and denying the right of the defendant to use the ditches. In giving the opinion of the court, Chief Justice Ruffin considered the defendant's claim as resting upon the exception contained in the first deed, and said: "Without stopping to consider whether the provision quoted can be regarded as a condition merely, it may be admitted, most strongly against the plaintiff, that the words amount to a grant to Tucker Spencer, the defendant's father. Still there is nothing to annex the grant to the upper tract of land, and transmit it, with the land, to an assignee. Indeed, the deed to Tucker Spencer was not made until the day after, as is to be inferred, *prima facie*, from the dates of the deeds. The grant was, therefore, personal to Tucker Spencer, and the right to the easement expired, at all events, with his life, and did not come to his son and heir, the defendant."

It is evident the decision in that case rested exclusively upon the proper construction of the particular exception referred to. And such an exception being in the deed, the court may have considered it as precluding any further or more extensive right, by implied reservation or exception, because *expressio unius est exclusio alterius*. Moreover, it seems the case came before the court upon an agreed statement of facts; in which statement, so far as can be ascertained from the report, there was nothing to

show, unless it be by inference only, that it was not merely convenient, but actually necessary, for the land owned by the defendant to be drained through those ditches. And as in this state, on a case stated, the court can make no inference of fact, we must suppose the same rule to exist in North Carolina, in the absence of anything to show the contrary. If so, there was no such necessity before the court as would authorize them to have held that the defendant was entitled, under an implied reservation, or exception, or grant, to use the ditches, even assuming such an implication was not precluded by virtue of the express exception contained in the deed.

Burr v. Mills, 21 Wend. 290, is a case much relied on in behalf of the appellant. Prior to the date of the deed under which the plaintiff claimed, a dam had been erected and was standing when the deed was executed; which dam caused the water to flood part of an acre of the land included within the lines of the conveyance to the party under whom the plaintiff claimed. To recover damages for thus causing the land to be flooded the suit was instituted, and the plaintiff obtained a judgment. The controversy also involved alleged injuries to other property, but the questions decided in reference to them have no material bearing upon the case before us. Because the land in dispute was included within the lines of the deed, the court held that notwithstanding the existence of the dam at the date of the deed, and although the land was then, and had been long before, covered with water in the same manner it was at the institution of the suit, still there could be no implied reservation or exception in favor of the grantor which would relieve him, or those claiming under him, from a claim for damages on account of flooding the land.

It will be seen, however, that the learned judge who delivered the opinion of the court rested the decision, in part at least, and we rather think mainly, upon the ground that if a man has a road from one portion of his estate over another to the highway, and sells the part where the road passes without reserving it in the deed, the road is gone. And if, in such a case, the road is lost to the grantor by virtue of the deed, so likewise did the deed take from the grantor all right to continue to flood the land. In this reference to the case of a road, we understand it as one where the party has no other way from the portion of the estate retained by him, and if so, the denial of his right to use the road because such a right would be inconsistent with his deed, is certainly at variance with the opinion of Chancellor Kent and

the other authorities to which we have already referred on this subject. But supposing the judge did not allude to a case where the party has no other road, then the principle of law in reference to rights of necessity, it is fair to infer, was not under consideration, either in regard to the supposed or to the principal case. And in truth, although the lowering of the dam so as to prevent the flooding of so inconsiderable a quantity of land might have produced a trifling diminution of the water power, still the facts disclosed by the report do not justify an inference that, after so reducing the height of the dam, the water power might not have been profitably used by the grantor in the deed and those claiming under him. But in the case before us, the adoption of the principle insisted upon by the appellant will render the mill of the appellee useless forever. The principle which allowed a way of necessity, in such instances as we have spoken of, was adopted because it would be not only a private inconvenience, but also to the prejudice of the public weal, that the land should be unoccupied. Mills are also of great public utility. Our early legislation in regard to them shows they have been so considered here. And if the law of necessity will apply to private ways, we think it but reasonable it should also be applicable to the present case.

The appellant's position is said to be sustained by the decision in *Preble v. Reed*, 17 Me. 175. The court there say: "The situation of the parties would then be that of the proprietors flowing their own lands, and afterwards, while thus flowed, granting the thousand acres to Ford, without reserving the right to flow. And upon such a supposed state of facts, an instruction was given in the case of *Hathorn v. Stinson*, 10 Me. 224, which seems to have met the approbation of the whole court, that 'if no such right is reserved, he purchases it with the right to recover damages for such flowing.' It is where the owner sells the dam and mills, retaining the lands, that he conveys as an essential part of them the right to flow, not where he retains the mills and chooses to sell the land without reserving the right." The portion of the opinion in *Hathorn v. Stinson*, *supra*, referred to in support of the doctrine here stated, relates to the third "request" or prayer of the respondent, which is that the court would instruct the jury "that if the dam and mills and land, and No. 49, were owned by the same person or persons, and such owners conveyed the dam and mills and land, and privileges and appurtenances, and afterwards conveyed No. 49, the grantee of No. 49 would have no right to

claim damages for keeping up the water by the dam, as it had been before the conveyance of No. 49." This instruction, as requested, was not given; but the presiding judge in the lower court gave, in his own language, his views of the law to the jury. In reference to the first branch of which instruction, the appellate court say: "Of the correctness of this instruction there can be no doubt. The statement of facts upon which it was given supposes an express reservation to the grantor of the right to flow, in which case the grantee would clearly have no right to compensation for injury occasioned by flowing." Then follows the second branch of the instruction, in which it is stated the principle relied upon in *Preble v. Reed, supra*. To this the court say: "We are not disposed to question the correctness of this part of the charge, but it is predicated on a different state of facts from those supposed in the request under consideration, and which the defendant contends he had proved. The facts assumed in the charge are that the grantor conveyed the premises flowed, but retained the mill and dam. The facts claimed to have been proved, and on which the instruction was requested, are that the grantor conveyed the mill, dam, privileges, and appurtenances, but retained a portion of the tract flowed. In the latter case we think it right to keep the dam to the same height it was continued by the grantor, and of course to flow, passed as an incident to the mill, necessary for its useful enjoyment, and that the grantee acquired an easement in so much of the grantor's land as would be flowed by continuing the head of water at the mill at its usual height. But the grantor's rights in the former case would depend upon a very different principle, which it is not necessary should be discussed or decided at the present time, as the facts proved do not require it."

We have made these large quotations for the purpose of showing, as we think they do very clearly, that the principle extracted from this case in *Preble v. Reed, supra*, was a mere *dictum* of the judge below, and so considered by the court above. For although they remark that they are not disposed to question this part of the charge, yet they speak of it as predicated upon facts not presented in the request, or by the proof. And they consider it unnecessary to discuss or decide what would be the rights of the grantor under the facts supposed in the charge, because the facts proved did not require such discussion or decision. Moreover, we find it stated to be no ground for disturbing the verdict, if the instruction was properly withheld, or

substantially given; and a new trial is granted, because the instruction was properly requested, and was neither expressly nor substantially given.

We therefore do not consider that case as an authority for the doctrine which in *Preble v. Reed*, *supra*, it is supposed to have established. Nor was there any necessity for deciding the point in the latter case; the court having previously said: "The title by which the Farnham dam and mills were built appears to have been that of a tenant in common, who entered upon a portion of the common estate and built a dam and mills upon it, and occupied, perhaps exclusively, such portion of the common estate. He could not rightfully change the character of the estate, or do an injury to other portions of it. He would acquire no right as against his co-tenants to flow." This was a sufficient denial of the defendants' pretensions, without saying more. Afterwards a further denial of their claims is based upon the principle considered by the court as established in *Hathorn v. Stinson*, *supra*. A circumstance worthy of some consideration as distinguishing the present case from those referred to by the appellant is, that the two deeds from the elder Mr. Carroll gave to both grantees the right of possession at the same time, the decease of the grantor, he having reserved a life estate to himself in both parcels of land.

The appellant's second point, raising a further objection to the instruction given, is that "if the right of way existed, the owner of the land had all the rights of owner, subject to the reasonable enjoyment of the easement." Under this point it was contended that the road could not be used by the appellee for any other purpose than to repair the dam or race, and that if the road was obstructed at other times, yet if, whenever there was occasion to repair the race or dam, the appellant was ready and willing to remove the obstructions, and so informed the appellee, then the plaintiff was not entitled to a verdict; and although the obstructions enumerated in the prayer may have been put upon the road, yet in the face of the defendant's proof the instruction should not have been given.

It is certainly true that when the proof of the defendant, if believed by the jury, would establish any proposition inconsistent with the theory of the plaintiff's prayer, which is based upon his own evidence, such prayer can not be given, because it must assume or admit the truth of all the defendant's proof on the subject. Although the defendant may have put upon this road the obstructions mentioned in the prayer, still the plaintiff

was not entitled to a verdict, if the jury believed the truth of the defendant's evidence in regard to the manner in which the road had been used, and in reference to the nature, character, and structure of the obstructions, and the willingness and readiness of the defendant to have the obstructions removed whenever the plaintiff had occasion to repair the dam and race, and that the plaintiff was informed of such readiness and willingness, and that he or his agents might remove them if he or they thought proper to do so; which obstructions were so constructed as to be easily removed. Looking to the very special nature of this easement, and viewing the proof in defense, we do not think the prayer should have been given. This is not a private right of way for ordinary purposes, but one to be used only as occasion might require to repair the race and dam; the right of property over the same in the defendant being abridged to that extent only.

In Angell on Watercourses, section 165, may be seen how strictly are to be construed secondary easements pertaining, from necessity, to water rights. It is there said: "But the doctrine in its application to water rights must be understood as applying to such things only as are incident to the grant, and directly necessary for the enjoyment of the thing granted. If, for instance, a person grant to another the fish in his pond, the grantee can not cut the banks to lay the ponds dry, for he may take the fish by nets or other engines." And again: "A way of necessity to a watercourse would be therefore limited to the necessity which created it, and when such necessity ceases, the right of way will also cease." In the following section the writer treats of the difference between what is necessary and what is merely convenient or desirable, and shows that the former is the ruling principle, and not the latter. If, in view of the defendant's proof, so much of the plaintiff's prayer was erroneous as based his right to recover upon the erection of the fence, and extending poles across the road, the prayer was not rendered proper, because of the ground taken therein in reference to plowing and cultivating the road. The sort of cultivation is not mentioned. And there are different modes of cultivation; some of which, in particular stages of it, would create no such obstruction as could prevent carts and wagons from being used with convenience in repairing the dam and race.

A reversal upon the first exception requires the case to be sent back again under a *procedendo*; but we did not deem it necessary to decide the other questions presented by the record,

because, considering the relation in which the parties stand toward each other, and inasmuch as this decision settles the important questions in regard to their rights, we hope the case may now be adjusted without further controversy.

Judgment reversed and *procedendo* awarded.

OWNER OF LAND CAN NOT HAVE EASEMENT IN HIS OWN ESTATE: *Rüger v. Parker*, 54 Am. Dec. 744; *Pearce v. McClenaghan*, 55 Id. 710; *Stuyvesant v. Woodruff*, 44 Id. 156.

AS TO EXISTENCE AND CHARACTER OF EASEMENT IN MILL-RACE as appurtenant to a mill, see *Johnson v. Jordan*, 37 Am. Dec. 85, and especially the cases referred to in the note to that case. See also *Prescott v. White*, 32 Id. 266.

WAY BY NECESSITY.—Where a grantor conveys lands to which there is no access except over other lands of his, the grantee will have a right of way by necessity over such other lands: *Collins v. Prentice*, 38 Am. Dec. 61, and cases in note. See also *Kimball v. Cochecho R. R. Co.*, 59 Id. 387.

NOTHING PASSES AS INCIDENT TO GRANT OF RIGHT OF WAY over land of another, except what is necessary for its reasonable and proper enjoyment: *Maxwell v. McAtee*, 48 Am. Dec. 409, and the grantee of such a right takes it subject to all the restrictions which the grantor has imposed, and can use it for no other purpose than that provided in the grant: *French v. Martin*, 57 Id. 294. An easement claimed in derogation of another's right is viewed with jealousy by the law, and must be strictly confined within prescribed limits. As to what is an improper use of an easement, see *Van O'Linda v. Lothrop*, 32 Id. 261, and note. Where the parties to an action make an agreed case, which they submit to the court for decision, the consideration of the court is restricted to the facts admitted in the case: *Crandall v. Amador Co.*, 20 Cal. 73.

THE PRINCIPAL CASE HAS BEEN CITED a number of times in the succeeding Maryland reports. It was cited *arguendo* in *Williams v. Woods*, 16 Md. 220-256, by the court, while discussing the question of proper instructions. It is also cited in the same manner in *Adams v. Capron*, 21 Id. 186-206; *Crawford's Adm'r v. Beall's Ex'r*, Id. 209-237; *Winner v. Penniman*, 35 Id. 163; *Walsh v. Taylor*, 39 Id. 592; *Hanes v. Pearce*, 41 Id. 221-234; *Newman v. McComas*, 43 Id. 70-81. The principal case is also cited in *DuVal v. DuVal*, 21 Id. 149, while discussing the question of easements.

MARTIN v. MARTIN.

[7 MARYLAND, 368.]

ASSIGNEE OF REVERSION IS ENTITLED TO RENT FALLING DUE after the assignment, where there is no reservation of the rent, as rent is incident to the reversion and passes with it.

PURCHASER AT SHERIFF'S SALE must be deemed an assignee in law.

LESSOR CAN NOT CLAIM RENT FALLING DUE after eviction of the tenant by a purchaser at sheriff's sale, under a judgment entered before the commencement of the tenancy.

PURCHASER UNDER JUDGMENT RENDERED BEFORE EXECUTION OF LEASE is entitled to the rent falling due after his title has accrued. This right is not affected by the lessor's drawing orders upon the tenant on account of the rent not yet due, which orders had been accepted by the tenant.

RENT CAN NOT BE APPORTIONED IN RESPECT TO PART OF TIME except as provided by statute 11 Geo. II., c. 15, sec. 19; and the party holding the reversion when the rent falls due is entitled to the entire amount. The lessor, in case of a judicial sale of his property during the term of a lease, gets compensation for such rent as had accrued up to date, by the increased price his property will bring at the sale.

AFTER JUDGMENT HAS BEEN RENDERED AGAINST DEFENDANT, BINDING HIS LAND, he can not create liens thereon to the prejudice of the plaintiff to such action. If any rights are acquired by third persons in dealing with the defendant in relation to said land, they are in subordination to such judgment.

PURCHASER AT SHERIFF'S SALE OF LANDS UNDER LEASE is substituted in the place of the landlord, not only as to the time of the sale, but as to his title and interest at the date of the judgment. He is substituted by law in the place of the judgment creditor.

AFTER CONSTRUCTIVE AND TEMPORARY EVICTION, IF TENANT RETURNS and occupies the premises, the right to the rent, once suspended, is restored, and there are authorities which hold that such would be the case even after an actual ouster.

ENTRY WITHOUT EXPULSION OF LESSEE will not produce a suspension of the rent.

THIS was an agreed case submitted to the court below, between appellant as plaintiff and the appellee as defendant. The statement showed substantially the following facts: That defendant leased a farm from Martin Goldsborough for two years (1851 and 1852), and agreed to pay as rent one half of the crop raised thereon. In January, 1852, after defendant had paid the first year's rent, and before any part of the second year's rent was due, Goldsborough drew two orders upon the defendant in favor of plaintiff, payable out of the coming year's rent. Defendant accepted both of these orders. In May, 1852, Goldsborough's farm was sold by the sheriff under a judgment obtained against him long prior to the execution of the lease under which defendant held. John W. Martin was the purchaser at such sale. Defendant afterwards acknowledged him as his landlord, and paid him the rent for the year 1852, minus the amount paid upon the orders above mentioned. The question in this case was, Should he have paid the entire amount of rent for 1852, notwithstanding such payments? The court below decided that he should so pay, and he appealed, as he had reserved the right to do.

Martin and Carmichael, for the appellant.

Hambleton and Chambers, for the appellee.

By Court, TUCK, J. We can only decide the question submitted to the court below upon the agreement on which the case was tried, and that is, whether Thomas O. Martin, the tenant, was liable to Martin, the purchaser of the land, for the whole rent for the year 1852, notwithstanding the orders and acceptances set out in the record. There can be no doubt that the assignee of a reversion is entitled to the rent falling due after the assignment, where there is no reservation of the rent; "the reason whereof is, that the rent is incident to the reversion, and passeth away by the grant of the reversion:" Co. Lit., secs. 215, 348; Shep. Touch. 89; Gilbert on Rents, 67. And according to the fifth rule in *Spencer's Case*, 3 Co. 16, Smith's Lead. Cas. 22, the purchaser at a sheriff's sale must be deemed an assignee in land. It is there said: "The same law is of tenant by statute merchant or statute staple, or *elegit* of a term, and he to whom a lease for years is sold by force of any execution shall have an action of covenant in such a case as a thing annexed to the land, although they come to the term by act in law:" Comyns on Land. & Ten. 250. There seems to be as good reason for regarding the purchaser of the reversion also as assignee and entitled to all incidents of the landlord's estate which he may have bought under the execution, and it has been so adjudged.

It is clear, upon the authorities, that the lessor can not claim the rent falling due after eviction of the tenant by a purchaser at sheriff's sale, under a judgment entered before the commencement of the tenancy. This was expressly decided in *Day v. Austin*, Cro. Eliz. 398, where to an action of debt for rent, the defendant pleaded, that before the lease a judgment had been given against the landlord, and that after the lease the land was extended and delivered in execution by *elegit*, before which extent there was nothing in arrear, and on demurrer the plea was sustained: See also *Playne's Case*, Id. 47. These cases are cited in most of the elementary works on this subject as authority for the doctrine that eviction of the tenant, by title paramount, will, as between the lessor and lessee, discharge the liability for rent falling due afterwards, for the reason that the enjoyment of the land being the consideration for the rent, when the tenant is removed the obligation to pay rent ceases, though he shall be responsible for any part that may have been due and payable before the eviction: Gilbert on Rents, 145; Comyns on Land. & Ten. 523; Crabbe on Real Prop. 202-209; *Hemphill v. Eckfeldt*, 5 Whart. 274.

But the question here is, whether the purchaser, under a judgment rendered before the lease, is entitled to the rent falling due after the accrual of his title. Upon this point we think there can be no ground for doubt. The purchaser's right was expressly affirmed in the case of *Bank of Pennsylvania v. Wise*, 3 Watts, 394, where the judgment against the landlord was obtained after the commencement of the lease. The only other points of difference between the cases is that in the one before us the tenant had excepted the orders of the landlord drawn on the rent when due. The case is fully discussed and the authorities referred to, for the purpose of showing that assignees in law, as well as those in deed, are entitled to the rent as incident to the reversion and goes with it: Co. Lit. 215 b. It is considered as following the reversion and belonging to it until actually and completely payable, and on this ground it is that where the lessor dies before the rent becomes due, it goes to the person entitled to the estate out of which it issues; but if he dies afterwards, the executor or administrator is entitled to it: Comyns on Land. & Ten. 226; Crabbe on Real Prop. 199. Rent can not be apportioned in respect to part of the time, except as provided by statute 11 Geo. II., c. 15, sec. 19, which does not apply to this controversy: *Clun's Case*, 10 Co. 128; Comyns on Land. & Ten. 129; Crabbe on Real Prop. 223; 3 Kent's Com. 469.

In Delaware, however, a different rule prevails, under an act of assembly: *Stayton v. Morris*, 4 Harr. (Del.) 224. The consequence of the common-law doctrine is, that in cases not within the statute of George, *supra*, when the title of the landlord expires, the tenant is liable to pay no person at all for the previous time, unless a claim can be enforced in behalf of the assignee of the reversion. That this may be done where the claimant is a purchaser at sheriff's sale, under a judgment rendered after the lease, we have seen; and if the same result does not follow a purchase under a judgment obtained before the lease, so as to give the whole rent to the purchaser, he would take the land and the profits from the day of sale, and the landlord would get no compensation for the previous occupation of the premises by the tenant. It results, then, that by allowing the purchaser to take all the rent becoming due after the sale, it adds so much to the value of the lessor's interest in the land at the time of sale, and secures to him the benefit of the partial rent, not due at that time, in the only way that it can be done consistently with established rules of law.

We are next to inquire whether the circumstance that the tenant accepted the orders of the landlord for part of the rent, before it was payable, takes the case without the operation of the principles above stated. We do not perceive that the plaintiff, as assignee of so much of the rent, occupies any better position, as against the purchaser, than the landlord himself would if these orders had not been given. He must be presumed to have had knowledge of the judgment, and of its legal consequences if enforced. The defendant, in a judgment binding his land, can not create liens to the prejudice of the plaintiff. All persons dealing with him in reference to the land acquire rights, if any, in subordination to the judgment lien. It can not be maintained that a debtor so situated may, by making a lease and anticipating the payments of the rent, affect the value of the plaintiff's security for his debt. If such an arrangement were made for the purpose of defeating the recovery of the plaintiff's claim, the fraud would avoid it. But such a lease might be made in good faith. The defendant might deem himself—nay, he might in fact be—able to pay the judgment debt, and design to satisfy it out of other means, and fail in his honest and reasonable expectations. Fraud could not be predicated of such a case; but would the lease stand against the judgment lien? Surely not. The principle is the same whether the tenant is in under a long lease, or renting from year to year.

We think that the argument on the part of the appellant overlooks the interest of the judgment creditor, and his relation to the matter in controversy. It is true that the sheriff's sale substitutes the purchaser in the place of the landlord; but as of what time? Not only as of the time of the sale, but as to his title and interest at the date of the judgment. He is substituted by law in the place of the judgment creditor: *Spindler v. Atkinson*, 3 Md. 423 [56 Am. Dec. 755], and cases cited. Whatever the creditor may lawfully sell, under his *fi. fa.*, another may buy and obtain title to; and if the defendant can not, by a sale or by acknowledging junior liens, affect the creditor's security, how can the same result be produced by leasing the premises? We agree that the right to alien is not lost by the operation of the judgment, and that the right to let is less than the right of sale; but it does not follow that the party may lease what he can not sell, without subjecting his vendee to the consequences of the judgment, as a prior incumbrance. If this were so, then indeed the power to let would be superior to the right of sale, and a creditor's judgment, practically, would be of no use to him in

any case where the debtor thought proper to rent out the land, and assign the rent in advance. If he may lease in the manner suggested, why may he not sell the land? The answer is the same in both instances. Because either act would affect the disposition of property over which he can exert no control, to the prejudice of parties having a prior claim upon it.

The payment of rent in advance, even if these orders and acceptances are to be taken as payment *pro tanto*, will not protect the tenant from the effect of the execution and sale. The purchaser is entitled to possession, notwithstanding the payment. He may turn him out and disaffirm the lease, in which event the tenant, as we have seen, will go free altogether, by reason of the eviction under a superior title. But here there was no eviction: *Salmon v. Smith*, 1 Wm. Saund. 205, and note; *Bennet v. Bittle*, 4 Rawle, 339. The arrangement between the tenant and the purchaser was not an ouster or expulsion of the latter. If it was constructively an eviction, it was only temporary, and there are authorities to show that where the tenant returns and occupies the premises, even after an actual ouster, the right to the rent, once suspended, is restored: *Hunt v. Cope*, Cowp. 243; 1 Selw. N. P. 432, 500; *Cibels v. Hill*, 1 Leon. 110. It was held in *Bennet v. Bittle*, *supra*, as the result of an unbroken chain of authorities, that an entry, without expulsion of the lessee, will not produce a suspension of the rent. Here the lessee remained on the land, and acknowledged the purchaser as his landlord, without any intermission whatever.

The principles of apportionment, particularly as applicable to rent, are discussed, and the authorities collected, in the notes to *Smyth's Case*, 1 Swans. 337. We consider the rule established that, with the exception of cases arising under the statute of George, *supra*, rent can not be apportioned as to time, and that the person entitled to the estate when the rent falls due must have the entire amount payable at that time. Even in a case within the equity of the statute, where the rent had been actually paid by an under-tenant to his lessor, a tenant for life, on the day it became due, and the lessor died on the same day, his executor was held to account with the remainderman for what was so paid to his testator, on the ground that the lessor had no remedy before his death to compel payment, and the rent, therefore, passed to the next owner of the estate: *Lord Rockingham v. Penrice*, 1 P. Wms. 177; *Lord Rockingham v. Oxenden*, Salk. 578; *Smyth's Case*, *supra*. The decree in that case declared that, as to the tenant who had paid the rent before it became due, it was a

good payment, because the lessor lived until the rent-day, and that his executor must make the same good to the person entitled in remainder. It follows that if the lessor had died before the rent-day, the payment to him would not have discharged the tenant, on the principle that the lessor's interest must continue until the rent falls due to entitle him to receive and retain it. We must presume that the purchaser in this case bought the land with reference to and in reliance upon the obligations of the tenant, and his own rights as vendee, and in accordance with what we take to be the rules of law by which these are to be ascertained, the judgment must be affirmed.

Judgment affirmed.

RIGHT TO RENT RESERVED PASSES ON CONVEYANCE OF LAND TO GRANTEE: *Gibbons v. Dillingham*, 50 Am. Dec. 233; *Childs v. Clark*, 49 Id. 164, and note.

RENT RESERVED ON LEASE FOR YEARS, but not due at the time, passes with the reversion to the purchaser of the lessor's interest at an execution sale, and can not afterwards be subjected to the payment of the debts of the lessor: Note to *Deaver v. Rice*, 34 Am. Dec. 390; *Casey v. Gregory*, 56 Id. 581, and note. Rent is incident to the reversion: *Mussey v. Holt*, 55 Id. 234; *Burden v. Thayer*, 37 Id. 117, and note.

WHEN EVICTION IS DEFENSE TO CLAIM FOR RENT: See note to *Giles v. Comstock*, 53 Am. Dec. 378.

APPORTIONMENT OF RENT.—Rent may be apportioned between landlord and purchaser at sheriff's sale: *Moore v. Turpin*, 40 Am. Dec. 589. In the note to this case, the cases upon the subject of the apportionment of rent, generally, are collected.

CREDITOR ACQUIRES BY JUDGMENT A LIEN UPON ALL REAL ESTATE to which his debtor had the legal title: *Unknown Heirs v. Kimball*, 58 Id. 638. Such lien binds the estate of the judgment debtor against any subsequent act of the latter, but he acquires no interest or estate in the property: *Davis v. Ownsby*, 55 Id. 105, and note.

THE PRINCIPAL CASE IS CITED in *Dalley v. Grimes*, 37 Md. 440, to the point that a purchaser at sheriff's sale, as an assignee at law, is entitled to the rent which accrues or becomes payable after the day of sale, provided the possession is not surrendered to him. It is cited to the same point in *Gatzendafer v. Caylor*, 38 Id. 283, and in *Ahern v. White*, 39 Id. 409-418, where the court also refer to its doctrine, that a defendant, in a judgment binding his land, can not create liens upon it to the prejudice of the judgment, and that all persons dealing with him with reference to the land acquire rights, if any, in subordination to the judgment lien, as well settled. It is again cited to this latter point in *Manton v. Hoyt*, 43 Id. 254. It is referred to *arguendo* in *Abrams v. Sheehan*, 40 Id. 446-450.

SHIPLEY v. RITTER.

[7 MARYLAND, 408.]

IT IS SETTLED LAW OF MARYLAND THAT ALTHOUGH EQUITY WILL NOT INTERFERE BY INJUNCTION to restrain a trespasser merely as such, yet it will interfere where the injury about to be committed would be irreparable, or where the legal remedy would be insufficient, or where the trespass goes to the destruction of the property as it had been held and enjoyed, or to prevent a multiplicity of suits.

INJUNCTION WILL BE GRANTED TO RESTRAIN DESTRUCTION OF TIMBER, ORNAMENTAL, AND FRUIT TREES, as the destruction of such would be a case of great and irremediable mischief for which compensation could not be made in damages, as it reaches to the very substance and value of the estate, and goes to the destruction of it, in the character in which it is enjoyed.

EACH CASE MUST BE CONSIDERED WITH REFERENCE TO NATURE, CHARACTER, AND CONDITION of the property to be protected, where an injunction is asked to restrain trespass for destroying such property.

INJUNCTION WILL BE GRANTED WHEN IT APPEARS THAT COMPLAINANT IS OWNER OF PIECE OF LAND UPON WHICH is situated his dwelling, and part of which is grown to timber, particularly valuable as such, which timber protects his dwelling, and is ornamental to his farm, if it appears that defendants have cleared part of said timber land, and have laid it waste, and converted it into pasture, and that they are continuing their depredations upon the timber left standing, and are cutting it down, and are converting it into pasture; as such acts constitute an irremediable and irreparable damage, loss, and injury.

EQUITY WILL INTERFERE AS MUCH TO PROTECT NATURAL TREES NEAR WHICH PARTY HAS BUILT his dwelling as ornamental and shade trees planted by him. The jurisdiction of equity does not depend on the worth of the trees merely as wood or timber, but on their location as part of an estate.

THIS bill was filed by the complainant, and shows that he is seised in fee simple of a two-hundred-and-forty-acre tract of land in Carroll county, which he has been in the peaceable possession of for more than thirty years, and that it constitutes his residence. A portion of this tract of land is covered with timber, such as oak, chestnut, hickory, and other growth common to that part of the country. That this timber land was particularly valuable to complainant, and that its destruction would cause him great and irreparable injury. This timber was so situated with reference to his house that it sheltered it from storms and shaded it from the sun, and was ornamental to his grounds. The bill then charges that defendants upon frivolous pretenses, and without plaintiff's consent, entered upon the grounds and commenced to fell, cut down, destroy and waste this timber land, and converted the wood so cut to his own

use. The bill concludes with a prayer for subpoenas to defendants to answer for an injunction restraining them from committing further waste on any part of the ground, and for an account for timber already destroyed, and for general relief. Defendants demurred to this bill, and the court below sustaining it, complainant appealed.

Miller and Raymond, for the appellant.

Maulsby and Palmer, for the appellees.

By Court, TUCK, J. The doctrines of equity applicable to cases like the one now before us are so fully considered in the reported decisions of this court, and the authorities there referred to, that we deem a review of them altogether unnecessary. We consider it the settled law of this state, that although an injunction will not be granted to restrain a trespasser merely because he is a trespasser, yet equity will interfere where the injury is irreparable, or where full and adequate relief can not be granted at law, or where the trespass goes to the destruction of the property as it had been held and enjoyed, or where it is necessary to prevent multiplicity of suits. This power has been exerted to restrain the destruction of timber, ornamental, and fruit trees, on the ground that these are cases of great and irremediable mischief, which damages could not compensate, because it reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed: *White v. Flannigan*, 1 Md. 544 [54 Am. Dec. 668]; *Jerome v. Ross*, 7 Johns. Ch. 315 [11 Am. Dec. 484]. According to Mr. Justice Story: "If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, they were extremely reluctant to interfere at all, even in regard to repeated trespasses. But now there is not the slightest hesitation, if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If, indeed, courts of equity did not interfere in cases of this sort, there would be a great failure of justice in the country:" 2 Story's Eq. Jur., sec. 928. See also *Amelung v. Seckamp*, 9 Gill & J. 468; *Hamilton v. Ely*, 4 Gill, 34; *Canal Co. v. Young*, 3 Md. 480; *Green v. Keen*, 4 Id. 98.

We do not understand the counsel to differ as to the principles governing cases of this description. The point of contest is whether the present bill of complaint shows a state of facts

entitling the appellant, who was the complainant below, to the relief he seeks. In deciding this part of the controversy, little aid can be drawn from adjudged cases, as they rarely if ever present the same state of facts, and each must be considered with reference to the nature, character, and condition of the property to be protected: *White v. Flannigain, supra*.

Unlike most of the cases referred to, there is no dispute here as to the facts on which the alleged equity rests. But the argument on the part of the appellee is, that the bill does not state a case to satisfy the conscience of the court that the charge and apprehension of irremediable injury is well founded, according to the cases of *Amelung v. Seekamp*, 9 Gill & J. 468; *Hamilton v. Ely*, 4 Gill, 84. Upon this point, however, we think there is no reasonable ground for doubt.

The averments admitted by the demurrer show, substantially, that the land belongs to the complainant, and is occupied by him as his dwelling plantation; that a portion of the estate was in timber, particularly valuable as such, as well as for the protection of the dwelling, besides being ornamental; that the defendants, without authority, have cleared part of that timber land, and converted it into waste and pasture land, and that they are continuing to cut down the timber, and to convert the rest of the timber land into waste and pasture land, destroying the forest trees that served to shelter his dwelling from the inclemency of the winter season, and to afford shade to his family in summer, depriving the owner of the use of all the timber on the farm by its utter destruction, to his great and irreparable damage, loss, and injury.

We see by the bill that the timber is of descriptions, though common to that section, particularly valuable and indispensable to farms in every part of the state; without which they can not be worked, except at great and constantly recurring inconvenience and expense to the proprietors; and the whole of the timber land on this plantation is the subject of these continued acts. If such grievances do not furnish a strong case of trespass, going to the destruction of the inheritance, where the mischief is remediless: *Amelung v. Seekamp*, 9 Gill. & J. 474; if they do not necessarily reach the very substance and value of the estate, and go to the destruction of it in the character in which it is enjoyed: *Jerome v. Ross*, 7 Johns. Ch. 815 [11 Am. Dec. 484]; if they do not impair the just enjoyment of the property, in future, as a dwelling plantation: 2 Story's Eq. Jur. 938—it is difficult to imagine a case of trespass in which equity should

interfere. To deny relief under such circumstances would be to declare that the destruction of all the timber on a farm, and the conversion of the land into waste and pasture land, thereby permanently injuring its value as a farm, and impairing the comfortable occupancy of the dwelling and out-houses, by removing shade and ornamental trees, is an ordinary trespass to be compensated in damages at law—a position which we think can not be maintained. If the trees had been planted for shade or ornament, we suppose that according to adjudged cases, the question would be too clear for argument. What difference, in principle, can there be between such trees and others so situated in reference to the dwelling as to afford the same convenience and enjoyment to the proprietor and his family? A man has a right to select his building site near to or in the midst of a wood, for the benefit of the protection afforded by the trees, with as just a claim, in equity, to have them preserved as if they were costly exotics transplanted for shade or ornament only. The grievance is more to be complained of where the land is peculiarly valuable by reason of its standing timber, as essential to its profitable enjoyment.

The jurisdiction of equity does not depend on the worth of the trees merely as wood or timber, but on their location as part of an estate, rendering it more valuable by reason of the uses to which they are or may be devoted, the destruction of which would materially impair the enjoyment of the property as held and occupied at the time of the trespass. It is true that actions at law might be maintained, and exemplary damages perhaps would be awarded but we hold that in such cases there is something to be regarded beyond the mere pecuniary value of the trees and the punishment of the trespasser by the verdict of a jury. The owner of property is entitled to be protected in its just and reasonable enjoyment, or to have full and complete remuneration for being disturbed therein; and whenever the court can see that the acts complained of are of a character necessarily to affect permanently such use, and do not admit of perfect pecuniary compensation, that "the enjoyment of the estate will be so affected by the destruction of the trees, as to make the alleged damage irreparable," *Green v. Keen*, 4 Md. 106, it would a denial of justice not to stay the hand of the destroyer, who, in pleading, admits himself to be a wrong-doer, invading the possessions of another, and perpetrating acts of intolerable outrage on property to which he sets up no right, and has no pretense of title.

For these reasons, we think that the decree of the court below dismissing the bill should be reversed, and the cause remanded, with liberty to the appellees to answer and have the case presented on its merits: *Tolson v. Tolson*, 8 Gill, 376. Whether the complainant will be entitled to the five pounds fine, under the act of 1785, chapter 72, section 28, will depend on subsequent proceedings in the court below.

Decree reversed, and cause remanded, with costs of the appeal.

ECOLESTON, J., dissented.

INJUNCTION WILL BE GRANTED AGAINST TRESPASS producing mischief which reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed: *White v. Flannigan*, 54 Am. Dec. 668. In the note to this case the prior decisions in this series upon the question of enjoining trespass, are collected.

INJUNCTION MAY BE GRANTED TO PREVENT THREATENED TRESPASS and waste, where the defendant is insolvent, and the injury to the complainant's property would be otherwise irreparable. To authorize the issuance of an injunction in such a case, it is not necessary that the acts threatened should have been committed; it is quite sufficient if the party insists on his right to do them, and especially if he makes advances towards their commission: *Lyon v. Hunt*, 46 Am. Dec. 216. In *Smith v. Pettingill*, 40 Id. 667, and note, the question of injunction to prevent trespass is treated of.

FEIGLEY v. FEIGLEY.

[1 MARYLAND, 537.]

WHERE PLAINTIFF, WHO HAS FILED ORIGINAL BILL FOR DIVORCE, afterwards files a supplemental bill reaffirming the charges made in the original bill, without objection from defendant, it is properly a part of the case, and evidence of acts supportive of the plaintiff's case, which occurred after the filing of the original bill, but prior to the filing of the supplemental one, are admissible in evidence.

IN PROCEEDING FOR DIVORCE, WHERE PLAINTIFF SEEKS ALSO TO HAVE DEED from defendant to his sister set aside, and for that purpose makes the sister a party, if the sister answers without objection, she must be considered as having submitted her rights under that deed for adjudication in such proceeding.

TO CERTAIN EXTENT WIFE STANDS IN RELATION TO HER HUSBAND, in reference to her claim upon him for support or for alimony, in the same attitude that a creditor stands towards his debtor. This is so under the statute of Elizabeth.

DIFFERENCE BETWEEN CONVEYANCE IN FRAUD OF CREDITORS AND IN FRAUD OF WIFE is this: A creditor's claim upon his debtor's estate is such that the debtor can not, even by a *bona fide* gift of any part of his property to a third person, impede a creditor in the collection of his debt. Such

transfer would be voluntary, and void as against creditors. But in the case of a wife, the husband having the free and unlimited right to alienate his property at will, if the conveyance is not made with the actual intent of defrauding the wife, the transfer will be sustained, although the wife is thus left without the means of subsistence.

INADEQUACY OF CONSIDERATION, IN ORDER TO AVOID DEED, must be so glaringly so as to stamp the transaction with fraud and to shock the common sense of honesty. The sale of property worth eight hundred dollars for two hundred dollars does not amount to such.

ANSWER IN CHANCERY, WHEN RESPONSIVE TO BILL, IS CONCLUSIVE, unless contradicted by two witnesses, or one witness and corroborating circumstances.

IF HUSBAND HAS NO ESTATE, NO ALIMONY CAN BE ALLOWED, as alimony is an allowance out of the husband's estate.

LIT PENDENS HAS NO APPLICATION TO ACTION FOR DIVORCE and petition for alimony; but is a proceeding directly relating to the thing or property in question.

This is a proceeding for divorce brought by Elizabeth Feigley against Isaac Feigley. The original bill was filed February 7, 1846. The complainant afterwards obtained leave of court to file a supplemental or amended bill, which bill they filed September 23, 1848. This supplemental bill reiterated all the charges made in the original bill, and repeated the prayers therein made, to wit, charged defendant with having abandoned and deserted his wife, with having failed to support her, and with leading an indolent and idle life; alleged that he was entitled to a future interest in the estate of his deceased father, and prayed for a divorce *a vinculo*, for support for herself and children out of defendant's estate, for the care and guardianship of such children, and for an injunction restraining defendant from disposing of his property until the further order of the court. The supplemental bill further charges that for the purpose of defeating complainant's claim for alimony, defendant confederated and colluded with Mary Ann Feigley, his sister, and on the twenty-eighth of October, 1847, conveyed to her all his expectant interest in his said father's estate for an inadequate, pretended, and trifling consideration of two hundred dollars. That said consideration was merely formal, and that Mary Ann had full knowledge of complainant's bill, and was so notified by complainant, and warned not to pay the consideration. The bill further charges that defendant Isaac absents himself from the state, but having recently returned, he has declared his intention of again leaving the state. The bill then requires Mary Ann to answer if she has paid the above-mentioned pretended consideration, and if so, when and how, and prays that this

deed may be declared void. It further prays for support for herself and children, for provision to enable her to carry on this proceeding. Isaac Feigley's answer to both the original and amended bills denies all the matters charged as ground for a divorce, admits a partial separation and non-intercourse, but justifies it because of the bad conduct of his wife; he admits having failed to provide for his family, but alleges his inability to do so; he admits the execution of the deed to his sister, but alleged that it was *bona fide* in every particular. The answer of Mary Ann Feigley makes a like denial and alleges that the deed was executed and accepted in entire good faith. The testimony of the witnesses went to show that the alleged acts of abandonment and desertion were true, but it went to show that said acts were committed and took place after the filing of the original but prior to the filing of the amended bill. The court below in its judgment divorced the parties *a mensa et thoro*, awarded to plaintiff the custody of her children, and an allowance of one hundred and fifty dollars per annum out of defendant's estate, and vacated the deed to Mary Ann Feigley. The remaining facts appear from the opinion.

Schley, for the appellants.

Spencer, for the appellee.

By Court, MASON, J. The supplemental bill having been received without objection on the part of the defendants, we must treat it as properly a part of the case. It having reaverred the substantial allegations of the original bill as to the conduct of the husband, which constituted the ground of the plaintiff's application for her divorce, we must treat the facts deposed to by the several witnesses as supportive of the plaintiff's case, although most of those facts occurred subsequent to the filing of the original bill, but prior to the filing of the supplemental bill. The testimony, we think, under those circumstances, fully sustains the plaintiff's case, and entitles her to her divorce *a mensa et thoro*. So much therefore of the decree as grants the divorce is affirmed. The defendant, Mary Ann Feigley, having answered the supplemental bill, so far as the same relates to the conveyance under which she claims without objection, must be regarded as having submitted her rights under that deed for adjudication under the present proceedings. The supplemental bill, among other things, seeks to vacate the deed from Isaac Feigley to his sister Mary Ann, upon the ground of its having been made fraudulently, to defeat the marital rights of the complainant.

The first objection taken by the defendant to this bill is, that there does not subsist such a relation between a husband and wife as would entitle the latter to assail her husband's conveyances upon the ground of fraud, as might be done in the case of an ordinary creditor at common law, or under the statute of Elizabeth, who finds himself hindered, delayed, or defrauded by means of such a conveyance. In other words, does the wife stand in relation to her husband, in reference to her claim upon him for a support, or for alimony, in the same attitude that a creditor stands towards his debtor? We think to a certain extent she does. The language of the statute of Elizabeth is surely broad enough to embrace such a case. It provides "that all and every grant, etc., for the intent or purpose to delay, hinder, and defraud creditors and others of their just and lawful actions, etc., shall be void," etc. The statute seems to design to embrace others than those who are strictly and technically creditors; and if under such a comprehensive clause as "creditors and others," a wife who has been made the victim of her husband's fraud is not to be included, we are at a loss to ascertain to whom else it was designed to relate. We do not wish to be understood as carrying this doctrine to an extent which would impose any restraint upon the husband in the free and unlimited exercise of his right to alienate his property at will, even though in the exercise of this right he strips himself of all means of supporting or maintaining his wife, provided he does so *bona fide*, and with no design of defrauding her of her just claims upon him and his estate. The fraudulent intent in all such cases being the true test of the validity of the transaction: *Bicketts v. Bicketts*, 4 Gill, 105. There is this difference between the claim of the wife upon her husband's estate and that of a creditor upon the estate of his debtor: in the latter case, a debtor can not, even by a *bona fide* gift of the whole or a part of his property to a third party, impede his creditor in the collection of his debt. Under such circumstances, such a transfer would be voluntary, and as against a *bona fide* creditor, void in point of law. Not so as respects the gifts or voluntary transfers by a husband of his property in relation to the rights of his wife. If not made with the actual intent of defeating the rights of his wife, they will be sustained, although they leave her without the means of a subsistence.

The next inquiry then is, Was the deed from Isaac to his sister, Mary Ann Feigley, of the twenty-eighth of October, 1847, void upon the principles announeced above? Was it a *bona fide*

transaction? or was it the result of a deliberate purpose to defraud the wife of her claim to alimony? From the nature of such an issue as is thus presented, we could hardly expect that any direct testimony could be brought to bear upon it. Resting, as the transaction did, between a brother and sister, dependent in no way upon the participation or concurrence of others, secret, locked up in the bosoms of the two actors themselves, we must look for the motives and designs of the parties in the surrounding circumstances attending the transaction, and must call to our aid every fact, however remote and trivial it may be, which can throw light upon the subject.

In reference to the defendant Isaac Feigley, the court have no doubt that the deed in question was executed in fraud of the rights of his wife. The original bill for the divorce carried to him notice of the complainant's purpose to subject his estate, if possible, to liability for alimony. It contained a prayer for an injunction to restrain him from alienating it. He was also no doubt impressed with a conviction that his conduct to his wife had been such as to constitute just grounds for supposing that this application would be viewed with favor by the court. Regarding these facts in connection with the circumstance that the grantee was his sister, and that the consideration upon which the deed rested, two hundred dollars, was wholly inadequate to the value of the property, which, incumbered with his mother's life estate, was estimated as worth seven or eight hundred dollars; and of the correctness of this estimate the court have no doubt, from the facts of the case, independent of the direct evidence of the witnesses upon the point.

The proof against the defendant, Mary Ann Feigley, stands upon other grounds. There is no direct evidence in the record as to the fraudulent participation of this defendant in this transaction, other than the mere inadequacy of consideration contained in the deed. It is not such a glaring inadequacy as of itself to stamp the transaction with fraud, by shocking the common sense of honesty, and thereby to render the deed void. But at this stage of the case we are met by the doctrine, often announced in this court, that an answer of the defendant responsive to the bill, denying the allegations therein made in regard to his motives and intentions, is conclusive upon that question, unless overcome by the testimony of two witnesses, or of one with corroborating circumstances. In the case now before us, whatever may be our views upon the general merits of the case, we are obliged in the formation of our judicial opinion to

be controlled by the principle announced above. Both of the defendants in this case flatly deny the allegations of the bill in regard to their fraudulent intention, and as that denial has not been contradicted by the testimony of any witness, it must be taken as conclusive upon the question. The defendant, Isaac, being left entirely without property, no decree for alimony can be passed against him, alimony being an allowance out of the husband's estate for the support of the wife. Where there is no estate, there can therefore be no alimony.

The doctrine of *lis pendens* has no application whatever to this case. As well might a pending action at law to recover an ordinary debt be a *lis pendens* as to the property of a debtor as a proceeding like the present, the purpose of each being to subject the property of the debtor to the payment of debts. *Lis pendens* is a proceeding directly relating to the thing or property in question. The decree is affirmed in part and reversed in part.

Decree affirmed in part and reversed in part.

SUPPLEMENTAL BILLS, NATURE OF, AND WHEN ALLOWED: *Dow v. Jewell*, 45 Am. Dec. 371; *Stout v. Shew*, 42 Id. 579; *Allen v. Taylor*, 29 Id. 721; *Candler v. Pettit*, 19 Id. 399.

CONVEYANCES BY HUSBAND IN FRAUD OF HIS WIFE: See *Thayer v. Thayer*, 39 Am. Dec. 211, and note.

CONVEYANCES VOID AS TO CREDITORS: *Hutchinson v. Kelley*, 39 Am. Dec. 250, and cases cited in note.

INADEQUACY OF CONSIDERATION IS BUT EVIDENCE OF FRAUD, and to justify equity in setting aside a conveyance for that reason alone must be extremely so: *Davidson v. Little*, 60 Am. Dec. 81.

ANSWER IN EQUITY IS CONCLUSIVE WHEN RESPONSIVE to the allegations in the bill, unless contradicted by two witnesses, or one witness and circumstances: *Zeigler v. Scott*, 54 Am. Dec. 395, and note; *Price v. McDonald*, 54 Id. 657; *Commonwealth v. Cullen*, 53 Id. 450, and note.

LIS PENDENS, WHEN DOCTRINE OF, DOES NOT APPLY: *Winston v. Westfeldt*, 58 Am. Dec. 278, and note.

THE PRINCIPAL CASE IS CITED in *Schaferman v. O'Brien*, 23 Md. 565-575, to the point that when examining a deed to see if it had its inception in fraud, the court must look for the motives and designs of the parties, to the circumstances surrounding the transactions, and every fact, however trivial, which can throw light upon the subject. In *Elbin v. Wilson*, 33 Id. 135-143, it is cited to the point that in any case involving a fraudulent intent, any fact, however slight, if at all relevant to the issue, is admissible in evidence. It is cited in *Sanborn v. Lang*, 41 Id. 107, to the point that a deed by a husband may be in fraud of his wife, and when so, will be annulled.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

FISHER v. MCGIRR. COMMONWEALTH v. ALBRO.
HERRICK v. SMITH.

[1 GRAY, 1.]

PART OF STATUTE MAY BE DECLARED VOID AND RESIDUE VALID, where such part conflicts with the constitution of the state, while such residue does not so conflict.

LEGISLATURE MAY DECLARE POSSESSION OF CERTAIN PROPERTY TO BE UNLAWFUL, where such property would be dangerous, injurious, or noxious; and may by due process of law, by proceedings *in rem*, provide for the abatement of the nuisance and the punishment of the offender by the seizure and confiscation of the property, by the removal, sale, or destruction of the noxious articles.

FOURTEENTH SECTION OF MASSACHUSETTS STATUTE OF 1852, CONCERNING MANUFACTURE AND SALE OF SPIRITUOUS OR INTOXICATING LIQUORS, is in conflict with the fourteenth article of the declaration of rights contained in the constitution of that state, declaring that every subject has a right "to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions," because the statute, while it authorizes the issuing of a warrant to search dwelling-houses for spirituous or intoxicating liquors, does not require the warrant nor the complaint therefor to state that such liquors are kept by any person named, nor does the statute limit the officer's right of seizure to articles described by quantity, quality, or marks, or restrict his power of seizure to liquors kept for sale. The statute is further objectionable because, on complaint being made that any such liquors are kept in any store, warehouse, or other place, for sale, a warrant must issue for the seizure and removal of all liquors therein, whether kept for sale there or not, or whether imported and remaining in original packages or not. The statute was also held to be repugnant to other provisions of the fundamental law of the state.

SPIRITUOUS LIQUORS ARE PROPERTY, at least until they are judicially and finally confiscated and ordered to be destroyed.

PROCEEDINGS FOR SEIZURE AND CONFISCATION OF SPIRITUOUS LIQUORS, in which proceedings the owner is not required to be named, in which he is not required to be notified unless known to the officer, and in which, if notified, he is required to appear forthwith, can not be authorized under the constitution of this state.

STATUTE AUTHORIZING FORFEITURE OF INTOXICATING LIQUORS seized by an officer, unless the owner can prove that they were lawfully kept, is unconstitutional. It violates article 12 of the Massachusetts declaration of rights, which declares that no "subject shall be arrested or deprived of his property, immunities, or privileges, or of his life, liberty, or estate, but by judgment of his peers or the law of the land," because it throws the burden of proof upon the owner, and authorizes the forfeiture of his property in the absence of any evidence against him or it.

STATUTE AUTHORIZING SEIZURE AND FORFEITURE OF INTOXICATING LIQUORS is not obnoxious to that part of the constitution prohibiting the taking of private property for public use without making compensation therefor. If such liquors can be rightfully taken at all, it would be on the ground that they were illegally kept and constituted a *de facto* nuisance, in which case their owner would not be entitled to any compensation.

STATUTE WHICH AUTHORIZES IMPOSITION OF FINE, WITH ALTERNATIVE OF IMPRISONMENT IN CASE OF NON-PAYMENT, AGAINST OWNER OF INTOXICATING LIQUORS, IS UNCONSTITUTIONAL, if it does not provide for an indictment, information, or complaint in which a specific offense is charged against him, so that it can be put on record and traversed, or an issue joined thereon and tried in due course of law.

OFFICER IS NOT PROTECTED BY PROCESS regular on its face, if the magistrate issuing it had not jurisdiction.

TRESPASS WILL LIE AGAINST OFFICER ACTING UNDER VOID PROCESS.

OFFICER IS NOT JUSTIFIABLE IF ACTING UNDER WARRANT issued under a statute which is unconstitutional and void.

OWNER OF INTOXICATING LIQUORS MAY MAINTAIN ACTION AGAINST OFFICER who has unlawfully seized them, notwithstanding section 19 of the statute provides that "no action of any kind shall be had or maintained in any court in this commonwealth, for the recovery or possession of intoxicating liquors, or the value thereof, except such as are sold or purchased in accordance with the provisions of this act."

PROCEEDINGS UNDER UNCONSTITUTIONAL STATUTE CAN NOT BE SUSTAINED, although they are so conducted as not to bear upon their face the objectionable features of the statute; or in other words, an unconstitutional law can not be made operative by the magistrate adopting expedients and taking precautions not required by the statute.

PRISONER MAY BE RELEASED ON HABEAS CORPUS, where it appears on the face of the proceedings that the magistrate had no jurisdiction, or that the conviction was under an unconstitutional statute.

ACTION OF TORT by Fisher against McGirr and others for forcibly entering and searching a dwelling-house and taking a quantity of spirituous liquors. The defendants admitted the entering.

searching, and taking; but justified under a warrant issued by a magistrate pursuant to section 14, chapter 322, of the Massachusetts statute of the year 1852. The maintenance of the defense was dependent upon the constitutionality of this statute. In the court of common pleas judgment was given for the defendants. Plaintiff thereupon appealed.

G. and N. Marston, for the plaintiff.

T. D. Eliot and B. C. Pitman, for the defendants.

[At the same time of the consideration of the case of *Fisher v. McGirr*, the supreme court had before it the case of *Moses Albro and William A. Anthony*, who had been summoned before the police court of Fall River, on proceedings based on the same statute, and who, being required to plead, were tried, and Albro was convicted while Anthony was discharged. Albro appealed to the common pleas, where he objected to being tried, on the ground that there was no complaint against him, and therefore no issue to be tried. The objection was overruled, and a conviction of Albro resulted. In this case *C. J. Holmes* and *C. B. Goodrich* appeared for the defendant and Attorney General *Rufus Choate* for the state. With these cases was also considered the matter of *Josiah Herrick* on *habeas corpus*. He was imprisoned under a *mittimus* issued as the result of proceedings under the same statute. *W. D. Northend* represented the petitioner and the attorney general the state. The various objections made to the statute in these different proceedings appear from the opinion of the chief justice.]

By Court, *SHAW, C. J.* Many exceptions were taken in these cases to the course of proceedings under the statute of 1852, chapter 322, concerning the manufacture and sale of spirituous or intoxicating liquors; but the one which surpasses all others in importance, and which, if well taken, supersedes all others, is that all that part of that statute directing the seizure and confiscation of liquors kept or deposited for sale is unconstitutional and void. We suppose the principle is now well understood, that where a statute has been passed by the legislature, under all the forms and sanctions requisite to the making of laws, some part of which is not within the competency of legislative power, or is repugnant to any provision of the constitution, such part thereof will be adjudged void and of no avail, whilst all other parts of the act not obnoxious to the same objection will be held valid and have the force of law. There is nothing

inconsistent, therefore, in declaring one part of the same statute valid and another part void.

Many questions have heretofore arisen upon various points on the construction of this statute; but the action brought by Fisher against McGirr and others is the first case wherein any question has come up in this court upon the constitutionality of the fourteenth section of the act, being the one under which these proceedings were had. As it was a question of much general interest and importance, the court reserved the case, especially as they understood that the same question was pending in other counties, and would probably soon be argued. Other cases have since been brought up and argued. Passing over, for the present, all the minor exceptions to the regularity of these proceedings, we are brought to consider what are the true construction and legal effect of this section, and then whether its provisions, correctly construed, are contrary to the declaration of rights and the constitution of this commonwealth, either in their principle, or in the mode in which they are to be carried into execution. The section is long and complicated, and it is not easy, in every instance, to ascertain what was intended.

It is nowhere provided in this section, or in any other part of the statute, in direct terms, that keeping or having liquor deposited for sale shall be in itself unlawful, and render the property liable to confiscation, or subject the owner, agent, or other depositary to a penalty therefor. It rather results by implication from other provisions, and the general tenor of this section. The first part of this section directs that "if any three persons, voters in the town or city where the complaint shall be made, shall, before any justice of the peace or judge of any police court, make complaint, under oath or affirmation, that they have reason to believe and do believe that spirituous or intoxicating liquors are kept or deposited and intended for sale, by any person not authorized," etc., "in any store, shop, warehouse, or in any steamboat or other vessel, or in any vehicle of any kind, or in any building or place, in said city or town, said justice or judge shall issue his warrant of search to any sheriff," etc., "who shall proceed to search the premises described in such warrant." Several suggestions arise upon this passage. The complaint is not required to allege that any person in particular has the articles kept or deposited, nor whose intention to sell them it is, which renders the keeping unlawful, and subjects the property to seizure and confiscation.

We presume, from the context and the purpose of the enactment, that it must be the intention of the owner, or his agent, servant, or some person having it in his power, to make a sale *de facto*, and thereby to make the mischievous use of it, which is intended to be prohibited.

Again: by the collocation of the terms in this sentence, it is a little doubtful whether the words "in said city or town" designate the place within which the liquors are kept, or qualify the intent to sell them within such city or town in order to make the keeping of them unlawful. Perhaps both are intended. The former would seem to be intended to bring them within the jurisdiction of the local magistrates and officers; and unless so kept, with an intent that said liquors should be sold within such city or town, it would make the keeping of liquors unlawful, although intended for sale in another state or foreign country, which we suppose the legislature could not have intended. It is to be regretted that in so important a provision the language should not have been more explicit and free from doubt.

It is obvious, we think, that the complainants are not required, and have no express authority by the act, to state the name of the person by whom the liquors are kept; and as the warrant follows the complaint, the justice is not required by the statute to name such person; and if practically the name is usually mentioned, it is probably done as one mode of identifying or describing the place where the liquors are alleged to be kept, as the house or shop of A. B., in — street, etc. The section goes on: "And if any spirituous or intoxicating liquors are found therein [the premises described], he [the officer] shall seize the same, and convey them to some proper place of security, where he shall keep them until final action shall be had thereon; and such liquors, so seized, together with the implements of the traffic, may be used in evidence against any person charged with the unlawful manufacture or sale of spirituous or intoxicating liquors." From this last clause we might be led to imply that if such liquors were found it was intended that a new and substantive complaint should be filed, upon the trial of which they should be evidence. But by the terms of the statute they are not to be used as evidence of an unlawful keeping with intent to sell, but as evidence upon a charge of actual unlawful manufacture or sale. The statute does not, therefore, by implication direct or provide for a new complaint for an unlawful keeping with intent to sell.

Again: in the same passage, when the complainants have

stated their belief that liquors intended for sale are kept in a place designated, and a warrant is issued to an officer to search such place, the law requires—and we presume the warrant would necessarily follow it—not that he shall seize certain liquors described, or in more general terms, any liquors so kept or deposited for sale, but that “if any spirituous or intoxicating liquors are found therein he shall seize the same.” The intent of the legislature seems to have been that all spirituous liquors found in such place shall be taken into the custody of the law, leaving the question whether any or all of them were kept for sale, or lawfully kept, to be decided afterwards. The section contains a provision for a more special complaint to warrant the search of a dwelling-house; and then goes on to direct the proceedings. “The owner or keeper of said liquors seized as aforesaid, if he shall be known to the officer seizing the same, shall be summoned forthwith before the justice or judge by whose warrant the liquors were seized; and if he fail to appear, or unless he shall prove that said liquors are imported,” etc., “or are kept for sale by authority derived under this act, or are otherwise lawfully kept, they shall be declared forfeited, and shall be destroyed;” “and the owner or keeper of said liquors shall pay a fine of twenty dollars and costs, or stand committed for thirty days in default of payment, if in the opinion of said court said liquors shall have been kept or deposited for sale, contrary to the provisions of this act.”

It may be remarked upon this part of the act, that the first time any mention is made of the owner or keeper is upon the seizure of the liquors; then, upon the contingency that he is known to the officer, he is to be summoned, and if he fail to appear, or unless he can make certain proofs, the liquors are to be destroyed, and he is to be punished. The purpose for which he is summoned seems to be to inform him of the seizure of the goods, and enable him to prove them not liable to forfeiture.

Section 15 provides that “if the owner, keeper, or possessor of liquors seized under the provisions of this act shall be unknown to the officer seizing the same, they shall not be condemned and destroyed, until they shall have been advertised, with the number and description of the packages, as near as may be, for two weeks, by posting up a written description of the same in some public place, that if such liquors are actually the property of any city or town,” etc., “or the property of some person duly authorized to manufacture and sell such liquors under this act, and were lawfully in his possession at the time of such seizure,

or were otherwise lawfully kept, they may not be destroyed." The notice is in effect not to any person in particular, nor to any person in whose possession the liquors were found; but the purpose of the notice, as declared by the act, is that "upon satisfactory proof of such ownership or lawful possession within said two weeks," the justice may make an order to deliver them up. The purpose of the notice seems to be to enable any person to appear and offer such proof, who may have any interest in obtaining a discharge of the property, upon any of the grounds aforesaid.

Section 16 directs what proceedings shall be had in case an owner or keeper of liquors, seized as aforesaid, shall appeal. These are all the provisions of the act on the subject of the seizure of spirituous liquors kept for sale; they together constitute a system of proceedings, and it seemed necessary to consider this system as a whole, in order to a better understanding of its legal and constitutional character.

We think it manifest that the legislature, in this system of measures, proposes to accomplish one and the same object, by two distinct modes of proceeding. The general purpose is to prevent or diminish the evils of intemperance, by the punishment of an indiscriminate sale of spirituous liquors; but the particular purpose in this series of measures is to prevent such liquors from being kept in any place, by any person, for the purpose or with the intent that they shall be sold. Although crimes and offenses punishable by law consist in acts done, and not in mere unexecuted purposes and intentions, yet the more effectually to accomplish the great and salutary purpose of laws necessary to the well-being of society, acts and conduct which would be innocent or indifferent in themselves are often declared unlawful, and made punishable, if done with an intent and purpose which will render them noxious or dangerous, and where, should the law wait till the criminal intent is carried out into action, irremediable mischief will be done. The law is preventive as well as remedial. Thus a person may innocently have in his possession counterfeit coin or bank notes. But if he has them in his possession with intent to pass them as true, knowing them to be counterfeit, the intention qualifies the act, and such act may be justly made punishable. This is the foundation of many criminal enactments. The principle is too familiar to require extended illustration.

Supposing the object to be a legitimate one—to prevent and punish the possession of intoxicating liquors, which leads to

temptation, and facilitates the actual commission of the offense of unlawfully selling, by declaring that possession unlawful, if held with an intent and purpose of selling unlawfully—we have said that this system of measures seems designed to accomplish this one purpose by two distinct modes or courses of proceeding, both well known to the law, but of considerable difference in their modes of operation: the one a proceeding *in rem*, by the sequestration and forfeiture of the property or thing which is noxious in itself, or made the instrument or subject of a noxious and injurious use; the other a proceeding *in personam*, for the punishment of the person of the offender, as an example to deter others from the commission of the like offense. Both are proceedings designed for the enforcement of the criminal law, and must be governed by the rules applicable to its administration.

We have no doubt that it is competent for the legislature to declare the possession of certain articles of property, either absolutely or when held in particular places and under particular circumstances, to be unlawful, because they would be injurious, dangerous, or noxious; and by due process of law, by proceedings *in rem*, to provide both for the abatement of the nuisance and the punishment of the offender, by the seizure and confiscation of the property, by the removal, sale, or destruction of the noxious articles. Putrefying merchandise may be stored in a warehouse, where, if it remain, it would spread contagious disease and death through a community. Gunpowder, an article quite harmless in a magazine, may be kept in a warehouse always exposed to fire, especially in the night; however secreted, a fire in the building would be sure to find it, and the lives and limbs of courageous and public-spirited firemen and citizens engaged in subduing the flames would be endangered by a sudden and terrible explosion. It is of the highest importance that such persons should receive the amplest encouragement to their duty, by giving them the strongest assurance that the law can give them that they shall not be exposed to such danger. This can be done only by a rigorous law against so keeping gunpowder, to be rigorously enforced by seizure, removal, and forfeiture.

The cases of goods smuggled in violation of the revenue laws, and the confiscation of vessels, boats, and other vehicles subservient to such unlawful acts, are instances of the application of law to proceedings *in rem*. The theory of this branch of the law seems to be this: that the property of which injurious or dangerous use is made shall be seized and confiscated, because either it is so unlawfully used by the owner or person having

the power of disposal, or by some person with whom he has placed and intrusted it, or at least that he has so carelessly and negligently used his power and control over it that by default it has fallen into the hands of those who have made and intend to make the injurious or dangerous use of it of which the public have a right to complain, and from which they have a right to be relieved. Therefore, as well to abate the nuisance as to punish the offending or careless owner, the property may be justly declared forfeited, and either sold for the public benefit or destroyed, as the circumstances of the case may require and the wisdom of the legislature direct. Besides, the actual seizure of the property intended to be offensively used may be effected, when it would not be practicable to detect and punish the offender personally.

Supposing, then, that it is competent for the legislature, as one of the means of carrying into effect a law to prohibit the unlawful sale of intoxicating liquors, to declare the keeping of such liquors for the purpose of sale, in any place within any city or town of the commonwealth, unlawful, and to declare the liquors thus kept liable to seizure and forfeiture as *quasi* a nuisance, under a proper and well-guarded system of regulations: the question is, whether the measures directed and authorized by the statute in question are so far inconsistent with the principles of justice and the established maxims of jurisprudence, intended for the security of public and private rights, and so repugnant to the provisions of the declaration of rights and constitution of the commonwealth, that it was not within the power of the legislature to give them the force of law, and that they must therefore be held unconstitutional and void; and the court are all of opinion that they are.

The court are not insensible to the great weight of responsibility devolving on them, when they are called to perform the delicate but important duty of deliberating on the validity and constitutionality of an act of the legislature; and they would approach it with all the solicitude which its importance demands.

I. The measures directed by section 14 of this act are in violation of the fourteenth article of the declaration of rights. That article declares that "every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the foundation of them be not previously supported by oath or affirmation, and if the

order in the warrant to a civil officer to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure." The subject of general warrants, and of illegal searches and seizures under them, had been much discussed in England before the adoption of our constitution, and was probably well understood by its framers: *Entick v. Carrington*, 2 Wils. 275. This case is much more fully reported, and the judgment of Lord Camden given at length, in 19 Howell's State Trials, 1029. The measures authorized and directed by this act are in violation of the principle and spirit of the article respecting general warrants and unreasonable searches.

1. Because the act does not require the three persons who are to make complaint to state that they have reason to believe and do believe that intoxicating liquors are kept or deposited and intended for sale by any person named; nor does it require the magistrate to state, in his warrant to the searching officer the name of any person believed to be the owner or keeper of such liquors, nor the name of any person having the custody or possession thereof, nor the name of any person having the intention to sell the same. On the contrary, the complaint affects the place only, and the belief of the complainants that liquors are kept in such place and are intended for sale. In this respect the warrant is general, not affecting any person, even by way of belief or suspicion, of the unlawful act of keeping such liquors for sale.

2. It does not limit the officer's authority and right of seizure to the articles described, by quantity, quality, or marks; nor does it even restrict the officer's power of seizure to liquors kept and intended to be sold, although it is the avowed purpose of the act to make the keeping of such liquors unlawful, and subject them to forfeiture. But even were it to provide that the search and seizure should be confined to liquors intended for sale it would be open to another objection perhaps quite as formidable, which is, that it would leave it to the mere discretion of an executive officer to judge and decide what were so intended for sale and what were not, leaving it to him to decide what to take and what to leave, and making his decision conclusive. We say conclusive, for if the seizing officer does not take them the magistrate acquires no jurisdiction over them, and no other tribunal or magistrate can entertain the question whether they were intended for sale, and so liable to forfeiture or not. No

liquors, therefore, could be adjudged forfeited under this section, unless the searching officer should take and return them as in his belief intended for sale.

3. Again; if the three persons state their belief that any spirituous liquors are kept or deposited and intended for sale, in any store, shop, or warehouse, or in any steamboat or other vessel, or in any vehicle, or in any building or place, then the warrant shall issue, and the sheriff or constable shall proceed to search the premises—that is, the store, vessel, or place described—and if any spirituous liquors are found therein, he shall seize the same. Under this express power and direction, if a few kegs, demijohns, or bottles of liquor are placed in a warehouse, or on board a ship or steamer, by some person intending to sell them, or under such circumstances that three respectable persons can safely testify that they believe that they are so intended for sale, then the officer shall seize and remove the whole stock of the warehouse, or the whole cargo of the ship or steamboat, so far as it may consist of wine, spirits, or intoxicating liquors. This makes it the imperative and indispensable duty of the officer to seize all the liquors found, however clearly it may appear to him that the larger quantity is about to be sent to other states, or to a foreign country, and not intended for sale in the city or town where the liquors are found, or even in the commonwealth. This would be equally the officer's duty, whether the liquors should be found in kegs or in larger packages, as pipes or hogsheads. Thus the authority to seize is carried greatly beyond the articles the possession of which is made unlawful, and the keeping of which is intended to be treated by the act as a nuisance; to wit, spirits kept and intended for sale. It appears to us, therefore, that this act in terms warrants and requires unreasonable searches and seizures, and is therefore contrary to the constitution.

If it be said that the act provides for as much certainty in the description of the articles to be searched for and seized, and in the definition and limitation of the officer's power, as the nature of the case will admit of; that the complainants can not know with certainty, before search is made, that spirits are deposited in the place described, or are intended for sale, and can only state their belief; and that neither the complainants nor the magistrate can know, before search, who is the owner, or has the custody, or intends to sell, and therefore can not name him; and that it is impossible for the complainants or for the searching officer to distinguish what part of the liquors found is intended for sale,

and that that must be a subject of inquiry before the magistrate afterwards—the answer seems to us to be obvious that if these modes of accomplishing a laudable purpose, and of carrying into effect a good and wholesome law, can not be pursued without a violation of the constitution, they can not be pursued at all, and other means must be devised, not open to such objection.

4. Another ground is, that if, upon a complaint that some liquors are kept in a warehouse, or on board a vessel, believed to be intended for sale, a warrant shall go, and the officer is obliged to seize all the liquors found in the same store or vessel—and such is the plain direction of the statute—then the officer must seize such liquors, though imported and remaining in the original packages (a cargo of wine and brandy, for instance), and bring them before the magistrate. This would be an interference with the regulation of foreign commerce placed under the exclusive jurisdiction of the constitution and laws of the United States. And though there is a provision in this act that the owner of such imported liquors may go before the magistrate and obtain their release by proof of the facts, yet such seizure and detention, perhaps for a long period, would be in danger of bringing this power into conflict with the laws of the United States, which, within their proper sphere, are the supreme law of the land.

II. Another ground upon which we are of opinion that this section of the act is unconstitutional is, that in the commencement and course of proceedings required and directed by the series of measures provided for in the act, many of the precautions and safeguards for the security of persons and property, and the most valuable rights of the subject, so sedulously required and insisted on in the laws of all well-ordered governments, and specially prescribed as the governing rule of the legislature in our declaration of rights, are overlooked and disregarded.

The declaration of rights declares, article 1: "All men have certain natural, essential, and unalienable rights," among others, "that of acquiring, possessing, and protecting property." Article 10: "Each individual has a right to be protected in the enjoyment of his property, according to standing laws." Article 11: "Every subject ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and

without delay; conformably to the laws." Article 12: "No subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself; and every subject shall have a right to produce all proofs that may be favorable to him, to meet the witnesses against him face to face, and to be fully heard in his defense by himself or his counsel, at his election; and no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land." These are homely and familiar maxims, scarcely requiring citation, and yet the declaration of rights itself (article 18) admonishes us that a frequent recurrence to them is absolutely necessary to preserve the advantages of liberty and maintain a free government; and that the people have a right to require of their lawgivers and magistrates an exact and constant observance of them. In comparing the section in question with these injunctions of the declaration of rights, the first thing to be remarked is, that it vests extraordinary and unusual powers in justices of the peace, not merely as to the taking of preliminary measures, such as receiving and verifying complaints, issuing warrants of search and arrest, and the like, but also invests them with jurisdiction to adjudicate upon an unlimited amount of property. There can be no doubt that spirituous liquors, at least before they are judicially and finally confiscated and ordered to be destroyed, are property; this act so recognizes them.

1. Then recurring to the course of proceeding under this statute, the first step required is the complaint of three persons, *ex parte*; and no provision is made that in any stage of the proceeding these complainants are to be again examined, nor that the party whose property is taken shall have opportunity to meet them face to face; yet, as we shall see, their oath to their belief of a certain fact is the only evidence upon which the property may be adjudged forfeited.

There is no provision or direction that the name of any person may be inserted in the complaint or in the warrant; and if the complainants or the magistrate do name a person in the warrant as an owner, or one having possession, it is no direction or authority to the officer to summon such person, either to defend the property or answer to any complaint. The direction in the statute is that the sheriff or constable shall search the premises

described in the warrant, and if any spirituous liquors are found therein, he shall seize the same, "and the owner or keeper of said liquors seized as aforesaid, if he shall be known to the officer seizing the same, shall be summoned forthwith before the justice or judge by whose warrant the liquors were seized;" and if he fail to appear, or unless he can prove that they are lawfully kept, they shall be declared forfeited, and shall be destroyed. It depends on the contingency of the owner or keeper being known to the officer, be he named in the warrant as such or not, whether anybody is summoned or has notice. If the officer returns the name of some person as owner or keeper, and such person does not forthwith appear, then the liquor may be adjudged forfeited, without further notice or proof. The officer, who of course must act upon hearsay and the best information he can obtain, however honestly he may endeavor to ascertain the truth, may be mistaken in his return of the name of a person as owner or keeper; then the property may be confiscated and destroyed without any opportunity given the true owner to appear and defend.

2. But suppose the officer happens to be right, and the owner has notice, the notice is to appear forthwith. No day in court is given, no allowance made for the contingency of the owner's absence, or sickness, or engagements. No provision is made that personal notice shall be given, or that proceedings shall be postponed until personal notice be given. A summons at the owner's last usual place of abode would be good service where not otherwise specially directed. Upon such constructive notice, which may not reach the owner personally, and which from its shortness is very likely not to reach him until after the confiscation and destruction of the property, if he fail to appear forthwith, the property may be declared forfeited, and the party whose name is thus returned as owner or keeper may have judgment against him personally for a penalty and costs. These measures seem wholly inconsistent with the right of defending one's property, and of finding a safe remedy in the laws.

3. But if the owner or keeper shall be unknown to the officer seizing the liquors, they shall not be condemned and destroyed until they shall have been advertised, with the number, etc., for two weeks, by posting up a written description in some public place, that if such liquors are actually the property of any city or town, purchased for sale by the agent for medicinal, mechanical, or chemical purposes only, or of some person duly authorized, or are otherwise lawfully kept, they may not be destroyed;

but upon satisfactory proof of such ownership, within said two weeks, before the justice or judge, he shall deliver to the agent, etc., an order to the officer to deliver them up. Whether such a written advertisement posted in one place is adequate public notice it is for the legislature to decide. The manifest objection to this notice is, that it fixes no time or place at which a claimant may appear with his evidence and have a trial, and meet the witnesses face to face. It presupposes that he is to appear and offer his proofs at any time when the magistrate may be found, and is ready and willing to hear him and receive and consider his proofs. It looks to no trial, but assumes that the liquors are to be condemned, unless a claimant can make such proof.

The theory upon which a judgment *in rem* is regarded as a judgment binding upon all the world is, that all the world have constructive notice of the seizure, with the cause and purpose of the taking, and the time and place at which any person may appear before a competent tribunal and have a trial, before the condemnation of his property.

Supposing the process *in rem*, when rightly conducted, to be a suitable and proper mode of enforcing obedience to a useful and salutary law, it does it by punishing the offender, who must be the owner, or some person intrusted with the possession by him, or some person for whose unlawful possession of it the owner is responsible; it does this by depriving such owner of his property, at the same time preventing the further noxious and unlawful use of it. Such being the character of the prosecution, in a high degree penal in its operation and consequences, it should be surrounded with all the safeguards necessary to the security of the innocent, having the full benefit of the maxim, that every person shall be presumed innocent until his guilt be established by proof. He should have notice of the charge of guilty purpose, upon which his property is declared to be unlawfully held and in danger of being forfeited, a time and opportunity to prepare his defense, an opportunity to meet the witnesses against him face to face, and the benefit of the legal presumption of innocence.

4. But there is another objection to the constitutionality of this law, of a more formidable character, and as it appears to us, quite decisive of the case. Supposing the owner of the liquor to have full notice, to have appeared before the magistrate, and to have had full opportunity to procure evidence and prepare for trial: no provision is made by the statute for a trial, for

a determination by judicial proofs of the facts, upon the truth of which alone the property can be justly confiscated and destroyed. On the contrary, the statute especially directs that if the owner fail to appear, or (that is, if he does appear) unless he shall prove that the liquors were lawfully kept, they shall be declared forfeited, and the owner shall be adjudged to pay a fine and costs. There is no room for implication; the judgment shall pass for the forfeiture and fine, unless the owner can prove that they were lawfully kept. This is the most favorable provision made for him. The judgment, then, passes without trial and without proof, unless that which preceded the seizure, and the seizure itself, are to be considered as legal proof.

To see whether any trial is provided for, we must first ask what is to be tried. The case supposes that the keeping of spirituous liquors, intended for sale, is made unlawful by the statute itself; that the illegality consists in the intent of selling; that the intent qualifies the act of keeping, and impresses on the property illegally kept the character of a nuisance, which makes it lawful to seize the property thus made the instrument of an illegal purpose, and confiscate and destroy it. This is done, as well to remove and abate the nuisance, and prevent the illegal use of it, as to punish the owner, upon whom ultimately the loss must fall, by a deprivation of property, in the nature of a penalty. What, then, is the fact upon which any adjudication must proceed? Clearly, keeping with an intent to sell. As keeping without such intent would not be illegal, the whole criminality of the act, as well that which affects the owner or keeper personally as that which stamps the character of illegality upon the property, is the intent to sell it. This intent must be that of the owner, or of his agent, servant, or bailee, having acquired through him the possession and the actual power to sell it. The intent of a mere stranger, having no possession or control over it, could not bring it within the act and render the possession unlawful. The fact, then, to be proved, the main, the indispensable fact, in order to render the keeping illegal, and without which there is no legal ground for a penal judgment, is the intent of the owner, or other person in possession of the property, to sell it in violation of the law. Now, we can perceive no provision for the trial and proof of this offense of keeping liquors with illegal intent, in any sense in which a judicial trial is understood, in which a party charged with an offense, for which his property may be taken from him and confiscated, may stand on his defense, and have the pre-

presumption of innocence, until proofs are adduced against him to establish the crime or misdemeanor with which he is charged. Such a trial alone can satisfy the express provision in the declaration of rights, article 12, which declares that no subject shall be arrested, or deprived of his property, immunities, or privileges, or of his life, liberty, or estate, but by the judgment of his peers or the law of the land. These expressions have been understood, from Magna Charta to the present time, to mean a trial by jury, in a regular course of legal and judicial proceedings.

In order to ascertain whether provision is made for such a trial, we must look to the statute and see upon what grounds a judgment of forfeiture shall be had. The warrant is issued; the goods, including all liquors found at the place designated, are seized and detained by the officer, subject to the order of the justice; and the owner or keeper is summoned. What is then to be done? The statute answers: If he fail to appear, or unless he can prove that the said liquors are of foreign production, imported, etc., contained in the original packages, and in quantities not less than the laws of the United States prescribe, or are kept for sale by authority derived under this act (that is, by an agent of the city or town), or otherwise lawfully kept, they shall be declared forfeited. The most favorable privilege offered to the owner is that he may prove, if he can, that the liquors were lawfully kept. If he offers no proof, or fails to satisfy the magistrate, then they are to be declared forfeited. But upon what proof? The act seems to presuppose that a *prima facie* case of unlawful keeping has been established, upon which, unless rebutted, a judgment may pass; but again we ask, Upon what preceding evidence has any *prima facie* case been proved? The oath of the original complainants could be no proof, for many reasons: it was *ex parte*, and made for another purpose, to wit, to obtain a warrant; it states their belief that some liquors were kept in the store, vessel, or place described, and upon this all the liquors there found, as well those to which the oath may have been intended to apply as all others, were seized, brought under the control of the magistrate, and now stand before him for their deliverance, which must depend upon his adjudication. But such a complaint, if it could be held to apply to all the goods seized, could on no principle be regarded as evidence on a trial. If the complainants, respectable as they are required to be, were to be regarded as witnesses, their preliminary examination is *ex parte*; they are not required to appear

before the magistrate afterwards, and after some person has been summoned; and the accused has no opportunity to meet them face to face. An indictment is far more precise and explicit, charging all the particulars of an offense with technical accuracy, and is found on the oath of at least twelve men, upon evidence given on oath. As well, therefore, might a statute provide that, upon an indictment being read, the party charged should be convicted unless he could prove that he was not guilty. Yet up to the time of the appearance of the respondent before the magistrate, such preliminary complaint is the only semblance of evidence of any criminal intent to render the owner or keeper liable, either to the forfeiture of the property or to a judgment for a penalty. The fact that the liquor was found in the custody of the respondent when seized is no evidence of unlawful intent to sell. The place, time, and circumstances, and the mode in which it is kept, if proved by witnesses, might be evidence of such intent. But no such testimony is required; and what we mean to say is, that the finding of the liquor, the fact of seizure, and the custody by the officer afford no evidence of that intent which makes the property liable to forfeiture and subjects the keeper to a penalty.

These considerations apply to the property of those intended by the complainants to be charged as the guilty owners or keepers, but who before judgment of forfeiture are entitled to a fair trial. But they apply with greatly increased force to those not even believed by the complainants to be guilty owners or keepers, but whose liquors in the same warehouse or vessel are swept by the statute, and the proceedings under it, into the same net, and are in danger of the same condemnation by a judgment, without the trial assured by the declaration of rights. We have only to look at the plain directions of the act to perceive that it provides for no trial, in any proper or judicial sense; that it permits and requires a judgment of forfeiture, if no proof, or if proof not satisfactory to the magistrate, is offered by the respondent. In this respect, this enactment is in violation of the plain dictates of justice, and contrary to the letter and spirit of the declaration of rights. This statute declares that a subject may be deprived of his property under the forms of law, without meeting the witnesses face to face, without being fully heard in his defense, in an unusual mode, not by the judgment of his peers or the law of the land.

Probably it was not the intention of the legislature to direct a proceeding subversive of the rights of the subject; and it

is quite probable that magistrates and courts, acting in conformity with the more familiar and established maxims governing the administration of justice, have required proofs on the part of the prosecutor, and given to respondents some of the privileges of a defendant, before proceeding to a judgment. But in order to judge of the conformity of the enactment with the requisites of the constitution, we must be governed by the terms and provisions of the act itself, and can not construe it according to any presumed intention of the legislature not expressed; especially against an expressed direction. In a law directing a series of measures which in their operation are in danger of encroaching upon private rights, vesting in subordinate officers large powers, which when most carefully guarded are liable to be mistaken or abused, and which are to direct, limit, and regulate the judicial conduct of a large class of magistrates, it is highly important that the powers conferred and the practical directions given be so clear and well-defined that they may serve as a safe guide to all such officers and magistrates, in their respective duties; and in these respects the statute itself must, on its face, be conformable to the constitution.

We have already alluded to section 16 as one of this series of measures, which provides that "if any owner or keeper of liquors, seized as aforesaid, shall appeal," etc.—upon which it is proper to make one or two remarks. It is obvious that this section does not give an appeal in terms, but only hypothetically; nor does it state from what judgment; but we presume it to be from the entire judgment for forfeiture and fine. It is further to be noticed, that the appellate court is not authorized in terms to render a judgment against the appellant for a fine. But it is important to cite all that part of the section which directs what final judgment the appellate court is to give. It is as follows: "If the final decision shall be against the appellant, that such liquors were intended by him for sale, contrary to the provisions of this act, then such liquors shall be destroyed, as provided in section 14." If this clause had stood alone, it might have been plausibly, perhaps strongly, argued that by such "final decision," that such liquors were intended by the appellant for sale, must be understood a judicial decision, to be arrived at in a regular course of trial, upon allegations and proof; thus by implication intending a trial according to the maxims and forms of law. It is hardly to be presumed that the legislature intended to direct a different mode

of trial and form of judgment in the appellate court, contrary to the common theory of appeal, which is, to enable a higher court, in a case depending upon the same state of facts and the same rule of law, to re-examine the judgment of a lower court, and affirm or reverse the judgment; though perhaps it would be in the power of the legislature to do so, by words sufficiently express to manifest such intention. But if such were the intention, it would leave the objections already made in full force.

If it should be urged that, upon the maxim of construction that every part of a statute may be resorted to for expounding every other part, this clause manifests the intention of the legislature that a regular trial shall be had in the proceedings before the magistrate, the answer is, that the directions in regard to the proceedings there, and to those preliminary thereto, as well when there is no appearance and no power of appeal as when there is, are too plain, explicit, and mandatory to admit of any such construction. Besides, the rights of parties ought not to be made to depend on a doubtful interpretation of various, and in some respects incompatible and conflicting, provisions.

It may be proper slightly to notice an objection to the constitutionality of this law, in so far as it directs the taking of private property for public use without making any compensation therefor, contrary to article 12 of the declaration of rights. We are of opinion that that clause has no bearing on and no connection with this subject. It is a most wise and salutary principle, but relates to another class of subjects and of rights. If spirituous liquor is rightfully taken at all, it is on the ground that it is illegally kept; that being so kept, it is noxious to the public, and *de facto* a nuisance; and when it is adjudged forfeited, it is because it is so noxious, and declared to be such by law, the owner's right of property is divested by the judgment, and he can have no claim to compensation.

III. Thus far we have considered this section as it directs proceedings *in rem* to effect the forfeiture and destruction of liquors. But it also authorizes a judgment for a fine and costs, with an alternative sentence to imprisonment thirty days in case of non-payment; and it is contended that, as a proceeding *in personam*, it is equally repugnant to the constitution.

If this branch of the act treats the case as a proceeding in the administration of criminal justice, to recover a penalty for a violation of the statute law of the commonwealth, it is to be commenced, prosecuted, and conducted in the manner required by the constitution.

Article 12 of the declaration of rights directs (in addition to the other provisions common to both modes of prosecution) that no subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally, described to him. Article 14: "All warrants, therefore, are contrary to this right [to be secure from searches and seizures], if the cause as foundation of them be not previously supported by oath or affirmation."

The offense intended to be declared and punished by this section is keeping or depositing spirituous liquors in any shop or vessel, etc., intended for sale. The statute, after the provisions for a seizure, forfeiture, and destruction of the liquor, proceeds to add, that "the owner or keeper of said liquors shall pay a fine of twenty dollars and costs, or stand committed for thirty days in default of payment, if in the opinion of said court said liquors shall have been kept or deposited for sale, contrary to the provisions of this act."

1. The statute does not, distinctly and in terms, make the keeping of liquors intended for sale a distinct, substantive offense, punishable by fine; but only circuitously and by implication, through the medium of a search, seizure, and forfeiture. The statute does not require the complainants to state, either as fact or belief, that the defendant, or any person designated, has kept or is keeping liquor for sale contrary to law. On the contrary, it seems studiously to avoid naming anybody, by requiring the complainants to state their belief that liquors are kept and intended for sale in the place designated: seeming to look to the result of the search to be made on the warrant which is to issue on the complaint, to ascertain whether liquors are so kept, and by whom. When they are seized by the officer, the owner or keeper is to be summoned by him, not in pursuance of any direction in the warrant, but upon his own knowledge. Summoned for what? Not apparently to answer to any complaint against him personally; but to enable him to look after his property thus seized, and defend it if he can. The only cognizance which the magistrate can take, the only jurisdiction he has, over the person of any one as owner or keeper is that derived from the return of the officer on his search-warrant he certifies that he has seized certain liquors described, and summoned a person named, as one whom he knows to be the owner or keeper of the liquors seized. The jurisdiction of the person, such as it is, is incidental to the jurisdiction over the property, obtained by the seizure.

2. But could we regard this as a statute making the keeping

of liquor intended for sale a distinct, substantive offense, punishable by fine, and giving jurisdiction of it to a justice of the peace, as an ordinary case *in personam*, still we think it fails to conform to the constitution in the articles above cited. There is no complaint setting forth the offense, either fully, substantially, or formally. The complaint required to be made by three voters has accomplished its office when it has laid the foundation for the search-warrant. The complaint, if it follows the statute, names no one as a party chargeable with the offense of unlawfully keeping; there is no warrant or process to arrest or summon such person; on the contrary, the officer is directed to summon the owner or keeper, if known to him. Suppose the complainant, though not required by the statute, should name some person as owner or keeper, and the officer, upon search, should summon another person, as one known to him to be the owner or keeper, which is the person charged? Which is amenable to the law, and liable to judgment of fine and imprisonment? And against which of them can the magistrate render a judgment *in personam*? The specific ground on which this part of the statute, directing proceedings *in personam*, is repugnant to the provisions of the constitution is, that, considered as a charge of a crime or offense, there is no provision for an indictment, information, or complaint, on oath or otherwise, in which the specific offense of keeping or depositing spirituous liquors intended for sale is in any way described, so that it can be put on record and traversed, or an issue thereon be joined and tried in due course of law.

The return of the officer, which alone can bring before the magistrate the name of an owner or keeper, can not satisfy the requisites of the constitution; it is not a direct charge against him of keeping liquor intended for sale; he is not summoned to answer such a charge, but to inform him of the seizure; and the charge is not on oath. The judgment to be rendered for fine and costs is not a distinct, independent judgment, on a charge of a personal offense, but is only incidental to a judgment of forfeiture and confiscation of property. The provision in regard to the judgment *in personam* is, after directing that the liquors shall be declared forfeited and destroyed, that the owner or keeper of said liquor shall pay a fine of twenty dollars, etc., "if in the opinion of said court said liquors shall have been kept or deposited for sale, contrary to the provisions of this act." Now, supposing this should be construed to mean a judicial opinion, formed upon examination and proof,

it would be obnoxious to the objections of being repugnant to the constitution: 1. Because it would be a conviction for a penalty, without any substantial and formal charge described and set forth, with opportunity to defend, contrary to the declaration of rights; and 2. Because the matter of fact of which an opinion is to be formed, in order to convict, is not that the respondent, whose name has been returned as owner or keeper, has kept the liquor with intent to sell, but only that the liquors were kept for sale, which might be true if kept by any other person. A party, therefore, may be convicted and sentenced to fine and costs and imprisonment for an offense neither legally charged nor legally proved to have been committed by him.

In the case of *Fisher v. McGirr*, several particular exceptions were taken to the regularity of the proceedings, which would require more particular consideration, had we not already come to the conclusion that the section under which the seizure was made, and is now sought to be justified, was unconstitutional and void. Still there is one question to which it is proper to advert. This is in the nature of an action of trespass *vi et armis*, and the question is, whether it will lie against an officer who merely acts under the direction of a warrant from a magistrate, and does not go beyond the line of his duty as marked out by his warrant. This is certainly an important consideration; inasmuch as it is for the interest of the community that subordinate and executive officers should, as far as possible, be protected in the full and fearless discharge of their duties, leaving all responsibility for errors in judgment and irregularities of process to rest upon others. But this principle must have some limit; it would be dangerous and injurious to the common rights of citizens, if one man, under the mere color or semblance of legal process, could justify the arrest and imprisonment of the person, or the seizure and removal of the property of another, without any responsibility. And we take the well-settled line of distinction to be this: if the magistrate or tribunal from which the process issues has jurisdiction, and the process is apparently regular, the officer may safely follow and obey it, and justify himself under it. But if the magistrate has no jurisdiction, the process is not merely voidable, but wholly void; the officer taking property under it has no authority, and is therefore liable to an action of trespass.

The case already cited of *Entick v. Carrington*, 2 Wils. 275,

S. C., 19 Howell's State Trials, 1029, was an action of trespass against messengers, under a warrant from a secretary of state; it being held that the warrant was void because not within the jurisdiction of the magistrate, the action was sustained and considerable damages recovered. Where one is committed under process wholly void, trespass will lie: *Groome v. Forrester*, 5 Mau. & Sel. 314; so for goods levied upon by order of a magistrate who had no jurisdiction: *Branwell v. Penneck*, 7 Barn. & Cress. 536. So, in the supreme court of the United States, Marshall, C. J., said: "It is a principle that a decision of such a tribunal [a court-martial], in a case clearly without its jurisdiction, can not protect the officer who executes it:" *Wise v. Withers*, 3 Cranch, 337. So in New York, when it appears on the face of the process that the court or magistrate had no jurisdiction, it is void, and affords no protection to the officer who has acted under it: *Savacool v. Boughton*, 5 Wend. 172 [21 Am. Dec. 181]; but if the court had jurisdiction, and the process is right on its face, though wrongly issued, the officer is justified: *Lewis v. Palmer*, 6 Id. 369. The principle is recognized in many cases in this commonwealth, and is stated by Metcalf, J., by way of illustration, in a very recent case. In case of imprisonment, a jailor is not answerable, "unless he acts under the mandate of an inferior court which has not jurisdiction of the cause, or by virtue of a warrant which, on its face, shows the magistrate's want of jurisdiction:" *Folger v. Hinckley*, 5 Cush. 266. The law relied on for a justification being void, gave the magistrate no jurisdiction and no authority to issue the search-warrant; the officer can not justify the seizure under it, and therefore an action lies against him for the taking.

One other point was taken in argument in this case which it is proper to consider. It is founded on the latter part of section 19 of the statute of 1852, chapter 322, which is in these words: "No action of any kind shall be had or maintained, in any court in this commonwealth, for the recovery or possession of intoxicating liquors, or the value thereof, except such as are sold or purchased in accordance with the provisions of this act." On the strength of this provision, it is contended in behalf of the defendant that no action will lie in the present case. The first and obvious answer, and a conclusive one, so far as the maintenance of the action is concerned, is, that in this action of trespass the right of possession of the liquors taken, or the recovery of their value, is not the gist of the action; but the breach of the plaintiff's close is the gist of the action, and the

taking away of the liquors is one of the aggravating incidents and consequences of the trespass. But as the objection admits of a less technical answer, founded upon broader and more general considerations, and as the same question may arise in this case in the assessment of damages, it seems proper to give a construction to this provision of the act.

Every clause and provision of an act of legislation must be construed according to the manifest intent and purpose of the legislature, which is to be ascertained by a reference to its general scope, and to all its other provisions. The statute in question contains many provisions, in great detail, but the manifest purpose is to repress intemperance, by prohibiting the purchase and sale of intoxicating liquors in any other mode than that prescribed and regulated by its terms. But the statute does not declare nor imply that there can be no property in intoxicating liquors; on the contrary, it fully recognizes them as property, and of course entitled to the same security and protection by the law to which other lawful property and possessions are entitled. A manufacturer, under license given pursuant to this act, may have a large amount of distilled spirits designed for exportation; or a person may have wine or spirits, imported according to law, before or since the passage of this act. Suppose he has occasion to deposit this property with a warehouse keeper, and the latter refuses to deliver it on request; or it is obtained from him by force or fraud, and he seeks to regain it: to hold that by law he has no remedy would be to deprive him of a right guaranteed by the constitution. It is plain, therefore, that to give the clause in question a literal construction and a general application to all rights and causes of action, respecting this right of property, would be plainly absurd, and could not have been intended by the legislature. The clause therefore requires some construction; and a reference to all parts of the act, and its general scope, will enable us, we think, to perceive what such construction must be. The object of the statute is to regulate the purchase and sale of intoxicating liquors; and this prohibition of any action is declared as one of its penal consequences. It prohibits all actions for such liquors, or their value, except such as are sold and purchased in accordance with the act. The exception shows what was in the minds of the legislature, namely, liquors sold or purchased, and the prohibition of all actions is therefore limited to actions for liquors bought or sold not in accordance with the provisions of the act. And such is the construction put upon a similar

clause in the statute of Maine, and for similar reasons: *Preston v. Drew*, 33 Me. 562, 563 [54 Am. Dec. 639].

At all events, it would be doing great injustice to the legislature to suppose that by this provision it was intended to extend protection to a mere wrong-doer, and shield him from all legal liability for injuries done to the property of another. If it were possible that such could have been the intention of any legislators, it would be a palpable violation of the eleventh article of the declaration of rights, that "every subject ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character." The court are therefore of opinion that the plaintiff is not barred of his present action by the clause of the statute relied on, nor can it afford any ground to prevent him from recovering the value of the liquor taken in the assessment of damages.

Damages to be assessed, and judgment to be entered for the plaintiff.

In the case of *Commonwealth v. Albro*, having come to the decision that the statute which was the sole foundation and authority for these proceedings in that part of it which provides for a search, seizure, and forfeiture of spirituous liquors is unconstitutional and void, it follows that the exceptions must be sustained, and further proceedings in the case stayed. It may be proper to remark upon these proceedings that the complaint and warrant were so framed, and the proceedings so conducted, as if practicable to avoid many of the objections to the constitutionality of the statute. The complaint sets forth that the complainants believe that liquors are "kept and deposited in a warehouse [described] occupied by Moses Albro and William A. Anthony, and intended for sale by them, the said Albro and Anthony, in said Fall River, not being authorized," etc. Here is a direct charge that they kept with intent to sell, without authority, which is the offense supposed to be created by the statute. So the warrant, after reciting the complaint and the prayer for process, commands the officer not only to search, and if found to seize and keep the liquors, but also to summon said Albro and Anthony to appear before the police court and there show cause, if any they have, why said liquors should not be declared forfeited, to be destroyed, and they be adjudged and held to pay a fine of twenty dollars and costs. It does not distinctly appear how and upon what evidence the conviction was in fact

had, either before the police court or the court of common pleas; but as it appears upon the bill of exceptions that the government offered no other evidence to prove that Albro was not licensed, the implication is that upon other points of the case they did offer evidence, and very probably offered evidence to prove that the defendants, or one of them, did own and keep the liquors, and did intend to sell them in Fall River. But these considerations do not remove the objections to the constitutionality of the statute. The defect of the statute is, that it does prescribe these measures without the precautions required by the constitution for the safe execution of the law.

Therefore if particular magistrates and courts, perhaps feeling the force of these objections, and adopting expedients to avoid them or diminish their force, take precautions for that purpose not required, perhaps not permitted, by the actual terms of the statute, this can not justify a judgment under so defective a law. The statute is to be carried into operation by hundreds of magistrates and officers, and if it fail in those qualities and characteristics required by the constitution to give it the force of law, and afford the full protection of the law to all those who act under and obey it, it is so far void, and can not be made good in any particular case by attempts to supply its defects.

Exceptions sustained.

In Herrick's case, a question was made by the attorney general whether the prisoner could be relieved on *habeas corpus*, even if the conviction is wrong, and whether his remedy is not by writ of error or *certiorari*, on the authority of *Riley's Case*, 2 Pick. 172. We take the distinction to be this: when the proceedings are irregular or erroneous, if the court or magistrate has jurisdiction, the judgment is voidable only, and not void; and of course must stand good until reversed or annulled in a proper course of proceeding, by a court having authority to revise and annul it. But where it appears on the face of the proceedings that the magistrate had no jurisdiction, the proceedings are wholly void, the commitment is without authority, and the party committed is entitled to be discharged from his imprisonment without reversal of the judgment. The case being rightly before us, the court are all of opinion that, for the reasons already given, that section of the law under which the conviction was had is unconstitutional, and therefore the judgment is void, and the prisoner is entitled to be discharged from custody.

From the *mittimus* alone, it might appear doubtful whether

the prisoner was personally present or not when the conviction for the penalty was had; but on recurring to the justice's minutes of the proceedings, it appears that he was not. No complaint was read to him, and no plea entered for him. Whether in any case a person charged with a criminal offense can be convicted and sentenced in his absence to the payment of a fine and costs, and process issue in the nature of an execution to collect it, we give no opinion. Commonly, on a criminal charge, the party is brought before the magistrate by warrant and arrest, and then he is in a condition to be bailed or committed, and to know and take notice of all orders and proceedings in the case. But if it is competent for the legislature to provide by law that on a charge of a crime or misdemeanor the process may be by summons instead of arrest, it is necessary that the summons contain a full and direct statement of the offense charged, and specify a time when, a place where, and the tribunal before which he is to appear and answer.

Again: the *multimus* appears to us to be erroneous, and founded on a misconception of the law, in this: after reciting the conviction, it directs the jailer to arrest and keep the prisoner thirty days, or until he shall comply with the sentence—that is, as we understand, unless he shall sooner pay the fine and costs. This appears to us to be irregular. The alternative judgment to pay or stand committed is passed in the first instance, and the person convicted has his election; but if he does not pay, which the justice is to know and determine, then the alternative part of the judgment to stand committed thirty days becomes absolute. The imprisonment is to be the punishment, and is not used as a means to enforce payment of a fine and costs; and the *multimus* issues accordingly. No alternative remains; the officer or jailer has no authority to receive the money and discharge the prisoner within thirty days.

One other remark occurs to us on these proceedings, showing that the law is practically construed as we construe it; which is, that the proceeding for the fine and that for the forfeiture are connected together and dependent on each other. The costs with which the defendant is charged are not merely the costs of a proceeding in *personam*, as on a separate and independent process, but include all the expenses of the seizure, keeping, and destruction of the liquors, under the other branch of the judgment.

These considerations are not necessary to the decision of this case, which rests on the grounds taken in the principal opinion;

but they seem naturally to arise from the view there taken, and tend to explain it.

Ordered that Josiah Herrick be discharged from his imprisonment.

NOXIOUS TRADE OR BUSINESS TO BE NUISANCE NEED NOT ENDANGER HEALTH OF NEIGHBORHOOD: *Catlin v. Valentine*, 38 Am. Dec. 567, and note.

STATE HAS UNCONTROLLED JURISDICTION OVER ALL PROPERTY, REAL OR PERSONAL, WITHIN ITS JURISDICTION: *Smith v. Eaton*, 58 Am. Dec. 746; and may through its legislature determine that articles injurious to public health or morals shall not constitute property within its jurisdiction, where the enactment is to operate prospectively: *Preston v. Drew*, 54 Id. 639.

COURT MAY DECLARE ACT OF LEGISLATURE UNCONSTITUTIONAL; but its unconstitutionality must be palpable and certain to justify judicial interference: *Lycoming v. Union*, 53 Am. Dec. 575; *Winter v. Jones*, 54 Id. 379; *Sharpless v. Mayor etc. of Philadelphia*, 59 Id. 759.

POWER OF STATE TO PROVIDE FOR REGULATION AND SALE OF SPIRITUOUS LIQUORS: *Commonwealth v. Kimball*, 35 Am. Dec. 326, and lengthened discussion of same in note 331.

WHEN PROCESS IS JUSTIFICATION FOR ACTS DONE UNDER IT: *Humphreys v. Case*, 20 Am. Dec. 95; *Putnam v. Man*, Id. 686; note to *Savacool v. Boughton*, 21 Id. 196; *Watson v. Watson*, 23 Id. 324; *Commonwealth v. O'Call*, Id. 393; *Miller v. Brown*, Id. 693; note to *Chapman v. Dyett*, 25 Id. 600; *Hall v. Howard*, 27 Id. 696; *Parker v. Walrod*, 30 Id. 124; *Yeager v. Carpenter*, 31 Id. 665; *Day v. Sharp*, 34 Id. 509; *Beach v. Botsford*, 40 Id. 45; *State v. Page*, Id. 608; *Stevenson v. McLean*, 42 Id. 434; *Dunlap v. Hunting*, 43 Id. 763; *Cody v. Quinn*, 44 Id. 71; note to *State v. Weed*, 53 Id. 202; *Rollins v. State*, Id. 151; *Paul v. Slason*, 54 Id. 75; note to *Mitchell v. State*, Id. 286; *State v. McNally*, 56 Id. 650; *Twitchell v. Shaw*, 57 Id. 80; *Coleman v. McAnulty*, Id. 229; note to *Wallace v. Holly*, 58 Id. 523; *Gurney v. Tufts*, Id. 777.

SEARCH-WARRANTS, GROUNDS FOR ISSUANCE AND CONSTRUCTION OF: *Gru-mon v. Raymond*, 6 Am. Dec. 200; *Bell v. Clapp*, Id. 339; extended note to *Chipman v. Bates*, 40 Id. 686; *Larimer v. Forgay*, 46 Id. 554.

STATUTORY CONSTRUCTIONS.—Unnatural, unjust, or impracticable legislative enactment is absolutely void: *Campbell's Case*, 20 Am. Dec. 360. Statute can be declared void only so far as it exceeds the legislative power, and only as to those whose rights are injuriously affected thereby, where it is assailed on those grounds: *Wellington, Petitioner*, 26 Id. 631. An act susceptible of two interpretations will be given that which will render it constitutional and valid: *Boisdere v. O'Brien's Bank*, 29 Id. 453. Part of statute may be unconstitutional and part valid: *Regents v. Williams*, 31 Id. 72; *Davis v. State*, ante, p. 331, and note discussing the subject.

HABEAS CORPUS.—Prisoner may be released where committing magistrate had no jurisdiction: See extensive note to *Commonwealth v. Lecky*, 26 Am. Dec. 40; *Ex parte Adams*, 59 Id. 234; or where conviction has been had under unconstitutional law: See case and note first cited; also, Church on Habeas Corpus, secs. 221-225, 370, citing the principal case with approval.

THE PRINCIPAL CASE HAS BEEN NUMEROUSLY CITED in the subsequent Massachusetts decisions. In *Orcutt v. Nelson*, 1 Gray, 541, where the court say that in the principal case it was strongly intimated, if not decided, that the statute under discussion does not prohibit an action of replevin or trover

to recover liquors wrongly taken or detained, or their value in damages. In *Booream v. Crane*, 103 Mass. 523, and in *Breck v. Adams*, 3 Gray, 569, it was decided that the purchaser of intoxicating liquors sold contrary to the statute of 1852, chapter 322, may maintain an action for a wrongful taking of them from his possession, notwithstanding section 19 of that statute. This upon the sole authority of the principal case. It is again cited in *Ewings v. Walker*, 9 Gray, 95; *Cobb v. Farr*, 16 Id. 597, and *Commonwealth v. Intoxicating Liquors*, 107 Mass. 400, where the above statute is further construed.

"ALL RIGHTS OF PROPERTY ARE HELD SUBJECT TO SUCH REASONABLE CONTROL and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the constitution of the commonwealth, may think necessary for the prevention of injuries to the rights of others and the security of the public health and welfare." The court then proceed to show how this power may be exercised: *Blair v. Forehand*, 100 Mass. 139, citing the principal case. It is also cited by the court while discussing the power of the legislature to pass laws which belong to the class of police regulations, in *Solmer v. Trinity Church*, 109 Id. 22, and *Watertown v. Mayo*, Id. 318.

JUSTIFICATION UNDER WARRANT.—A warrant regular upon its face, and being issued by a magistrate having jurisdiction over the subject-matter, affords a full justification for all acts done by any one in its lawful execution: *Clarke v. May*, 2 Gray, 413; S. C., *post*, p. 470; *Ela v. Smith*, 5 Id. 137. But a person whose premises an officer is proceeding to search, under a warrant defective and void, is justified in using all reasonable and necessary force to prevent such search: *Commonwealth v. Certain Intoxicating Liquors*, 105 Mass. 178; and a complainant who obtains a warrant from a magistrate who has no jurisdiction of the cause, and instigates and induces an officer to arrest the defendant thereon, is liable in damages to the party arrested, even if the warrant is valid on its face: *Emery v. Haggood*, 7 Gray, 55. So a justice of the peace who issues a warrant under an unconstitutional statute is liable in damages to the person arrested thereon: *Kelly v. Bemis*, 4 Id. 83; all citing the principal case.

PART OF STATUTE MAY BE CONSTITUTIONAL AND PART NOT: *Jones v. Robbins*, 8 Gray, 338; *Commonwealth v. Hitchings*, 6 Id. 485; *Commonwealth v. Rock*, 10 Id. 4, citing the principal case.

THE PRINCIPAL CASE IS CITED *arguendo* in *Randall, Petitioner for Mandamus*, 11 Allen, 479; *Tyler v. Pomeroy*, 8 Id. 485.

COMMONWEALTH v. MCKIE.

[1 GRAY, 61.]

BURDEN OF PROVING THAT OFFENSE HAS BEEN COMMITTED rests upon the government; and if the evidence fails to establish any essential element of the crime charged, the defendant must be acquitted.

UNDER PLEA OF NOT GUILTY, all matters of justification or excuse may be given in evidence.

ASSAULT AND BATTERY CONSISTS IN UNLAWFUL AND UNJUSTIFIABLE use of force and violence upon the person of another, however slight.

IF IN PROSECUTION FOR ASSAULT AND BATTERY IT DOES NOT APPEAR THAT ACT WAS UNJUSTIFIABLE, from the evidence of the prosecution, the

accused should be acquitted. The prosecution must show, not only the commission of the act, but also, beyond a reasonable doubt, that it was not justifiable; for if justifiable, it is not criminal.

PROSECUTION for assault and battery, resulting in a conviction. The prosecuting witness, as it appeared from the evidence, had spit in the face of the accused, who thereupon struck him with a dangerous weapon. The defendant asked the court to instruct the jury that if they were left in reasonable doubt whether the beating was justifiable or not, they should acquit. But the court told them that if the prosecution had shown the beating, then the burden was on the defendant to show that it was justifiable.

B. H. Dana, jun., for the defendant.

Rufus Choate, attorney general, for the state.

By Court, BICKLOW, J. Upon the facts stated in the bill of exceptions, it is difficult to understand how the question of justification of the assault alleged could have arisen at the trial of this cause. The use of a weapon, dangerous to life and limb, to repel such an assault as was shown to have been committed on the defendant by the prosecutor, was unreasonable and wholly disproportionate to the exigency, and could furnish no legal excuse to the defendant. Under the circumstances as reported, the jury should have been instructed that the defendant had not encountered the case proved against him by the government, and was liable to be convicted of the offense charged in the indictment. We feel bound to say thus much, lest by silence we might seem to give sanction to a defense which appears to have been placed on untenable grounds.

The general rule as to the burden of proof in criminal cases is sufficiently familiar. It requires the government to prove beyond a reasonable doubt the offense charged in the indictment, and if the proof fails to establish any of the essential elements necessary to constitute a crime, the defendant is entitled to an acquittal. This results not only from the well-established principle that the presumption of innocence is to stand until it is overcome by proof, but also from the form of the issue in all criminal cases tried on the merits, which, being always a general denial of the crime charged, necessarily imposes on the government the burden of showing affirmatively the existence of every material fact or ingredient which the law requires in order to constitute an offense. If the act charged is justifiable

or excusable, no criminal act has been committed, and the allegations in the indictment are not proved. And this makes a broad distinction in the application of the rule of the burden of proof to civil and criminal cases. In the former, matters of justification or excuse must be specially pleaded in order to be shown in evidence, and the defendant is therefore, by the form of his plea, obliged to aver an affirmative, and thereby to assume the burden of establishing it by proof; while in the latter, all such matters are open under the general issue, and the affirmative, namely, proof of the crime charged, remains in all stages of the case upon the government.

In the application of these familiar principles to particular cases, many nice distinctions have arisen, which it is unnecessary now to consider; because we are all of opinion that the case at bar falls clearly within the general rule. However the rule may be in cases where the defendant sets up, in answer to a criminal charge, some separate, distinct, and independent fact or series of facts, not immediately connected with and growing out of the transaction on which the criminal charge is founded, there can be no doubt that, in a case like the present, the burden of proof remains on the government throughout to satisfy the jury of the guilt of the defendant. It appears by the evidence, as stated in the bill of exceptions, that the justification upon which the defendant relied was disclosed partly by the testimony introduced by the government and in part by evidence offered by the defendant; and that it related to and grew out of the transaction or *res gestæ*, which constituted the alleged criminal act. The defendant did not set up any distinct, independent fact in defense of the charge; he neither alleged nor assumed to prove anything aside or out of the case on the part of the government; but he contended, taking the facts and circumstances as proved by the evidence on both sides, constituting the transaction itself on which the case for the prosecution rested, that he was not shown to be guilty, because they did not prove beyond a reasonable doubt that he had committed the offense laid to his charge. An assault and battery consists in the unlawful and unjustifiable use of force and violence upon the person of another, however slight. If justifiable, it is not an assault and battery; 1 Hawk. P. C., c. 62, sec. 2; 1 Russ. on Crimes, 7th Am. ed., 750; 3 Bla. Com. 121; Bac. Abr., tit. Assault and Battery, B; 5 Dane Abr. 584; *Commonwealth v. Clark*, 2 Met. 24. Whether the act in any particular case is an assault and battery, or a gentle imposition of hands, or a proper appli-

cation of force, depends upon the question whether there was justifiable cause: *Commonwealth v. Clark, supra*.

If, therefore, the evidence fails to show the act to have been unjustifiable, or leaves that question in doubt, the criminal act is not proved, and the party charged is entitled to an acquittal. To illustrate this: it is clearly settled that when an injury to the person is accidental, and the party defendant is without fault, it will not amount to an assault and battery: *Rosc. Crim. Ev.* 289.

Now, in a case of this sort, if the evidence offered by the government leaves it doubtful whether the injury was the result of accident or design, there can be no question of the right of the defendant to an acquittal, because it is left doubtful whether any criminal act was committed. But can the government, in such a case, on proving simply the injury to the person, rest their case and call on the defendant to assume the burden of proof and satisfy the jury that it was accidental, or else submit to a conviction? If so, then a criminal charge can always be shown by proving part of a transaction, and the burden of proof can be shifted upon the defendant, by a careful management of the case on the part of the government, so as to withhold that part of the proof which may bear in his favor. But further: the rule of the burden of proof can not be made to depend upon the order of proof, or upon the particular mode in which the evidence in the case is introduced. It can make no difference, in this respect, whether the evidence comes from one party or the other. In the case supposed, if it is left in doubt, on the whole evidence, whether the act was the result of accident or design, then the criminal charge is left in doubt. Suppose a case where all the testimony comes from the side of the prosecution: the defendant has a right to say that upon the proof so introduced no case is made against him, because there is left in doubt one of the essential elements of the offense charged, namely, the wrongful, unjustifiable, unlawful intent. The same rule must apply where the evidence comes from both sides, but relates solely to the original transaction constituting the alleged criminal act, and forming part of the *res gestæ*.

Even in the case of homicide, where a stricter rule has been held as to the burden of proof than in other criminal cases, upon peculiar reasons applicable to that offense alone, it is conceded that the burden is not shifted by proof of a voluntary killing, where there is excuse or justification apparent on the

proof offered in support of the prosecution, or arising out of the circumstances attending the homicide: *Commonwealth v. York*, 9 Met. 116 [43 Am. Dec. 873]; *Commonwealth v. Webster*, 5 Cush. 305 [52 Am. Dec. 711].

There may be cases where a defendant relies on some distinct, substantive ground of defense to a criminal charge, not necessarily connected with the transaction on which the indictment is founded (such as insanity, for instance), in which the burden of proof is shifted upon the defendant. But in cases like the present (and we do not intend to express an opinion beyond the precise case before us), where the defendant sets up no separate, independent fact in answer to a criminal charge, but confines his defense to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains upon the government to satisfy the jury that the act was unjustifiable and unlawful.

Exceptions sustained.

WHAT CONSTITUTES ASSAULT: *State v. Davis*, 35 Am. Dec. 735; *State v. Morgan*, 38 Id. 714.

WHAT MAY BE GIVEN IN EVIDENCE, UNDER PLEA OF NOT GUILTY, TO MITIGATE DAMAGES IN ACTION FOR ASSAULT AND BATTERY: *Lee v. Woolsey*, 10 Am. Dec. 230; *Bobb v. Bosworth*, 12 Id. 273; *Rawlings v. Commonwealth*, 19 Id. 757; *Fullerton v. Warrick*, 25 Id. 99; *Jacaway v. Dula*, 27 Id. 492.

WHAT WILL SUSTAIN PLEA OF JUSTIFICATION IN ACTION FOR ASSAULT AND BATTERY: *Shain v. Markham*, 20 Am. Dec. 232; note to *State v. Morgan*, 38 Id. 720; *Gray v. Ayres*, 32 Id. 107.

THE PRINCIPAL CASE IS CITED *arguendo* in *Smith v. Porter*, 10 Gray, 68, where the court say: "Whatever opinion may have prevailed heretofore, the law is now well settled that the burden of proof, when it once devolves upon a party, never afterwards, in relation to the same question, shifts in the progress of the trial over upon his adversary." It is cited in the same manner in *Commonwealth v. Williams*, 6 Id. 4.

MULHALL v. QUINN.

[1 GRAY, 105.]

ASSIGNMENT "OF ALL SUMS DUE OR TO BECOME DUE to me for services in laying common sewers" of the city of B. will not defeat a trustee process against said city to reach earnings arising out of engagements subsequently entered into between the assignor and the city.

MERE POSSIBILITY OF BEING AGAIN EMPLOYED, and of earning wages at a future time under such employment, is not assignable.

IRREVOCABLE POWER OF ATTORNEY DOES NOT AMOUNT TO ASSIGNMENT, when no assignable interest exists.

FUTURE EARNINGS MAY BE ASSIGNED when the assignor is under an engagement for a term of time, and has entered on the duties of his office, although he is liable to removal at any time.

TRUSTEE process against the city of Boston. The facts are stated in the opinion.

J. H. Bradley, for the claimant.

R. F. Fuller, for the plaintiff.

By Court, **SHAW, C. J.** The city of Boston are summoned as the trustees of Nicholas Quinn; they admit that at the time of the service, August 27, 1851, they were indebted to Nicholas, but they deny that they are liable to be charged as his trustees, because they say that before the summons the debt was assigned to James Quinn, of which they had notice. On this disclosure, James Quinn was summoned, came in, and asserted his claim under an assignment made to him by the defendant on the first of July, 1851, purporting to transfer to him "all claims and demands which I (Nicholas Quinn) now have or which I may have against the city of Boston on the first day of January next, for all sums of money due and to become due to me, for services in laying common sewers of the said city;" with power of attorney irrevocable to receive the same.

The facts appearing from the trustees' answers, after long and repeated examinations, are few and simple. It is conceded that all the sums due to Nicholas Quinn at the time of the assignment had been paid to James Quinn as assignee, and that he receipted for them as the attorney of Nicholas. The question therefore is, on the moneys which became due for services between the first of July and the twenty-seventh of August. It appears that at the time of the assignment there was no subsisting engagement between Nicholas Quinn and the city, the one to perform work, or the other to employ and pay him. All that appears is, that at an anterior period the agent of the city in that department had engaged the defendant for a particular job, and paid him for his own services, and the services of the men employed by him, at a fixed rate; that since the assignment, when engaged by the agent on other jobs without any other agreement as to price, he had charged and the city had paid the prices formerly paid. But each piece of work on which the defendant was engaged was done in pursuance of directions from the agent; the city were at liberty to employ him or not, and he to work or not; and it would have been open to either to propose and insist on other prices. Notice of the assignment was given

to the city, but they did not accept or undertake to pay the assignee. They took notice of the assignment, as they afterwards did of the service of the trustee process, for their own information and government. They paid to James Quinn, taking his receipt "for Nicholas Quinn," as they well might until service of trustee process, whether James Quinn held a valid assignment or only a naked power. A power he certainly had.

Under these circumstances, the court are of opinion that, beyond the earnings due at the time of the assignment, there was no valid assignment which can be set up to defeat this trustee attachment, and that the earnings of Nicholas Quinn, between the assignment and the attachment, did not vest in the assignee. The future earnings constituted a mere possibility coupled with no interest. There was no subsisting engagement under which wages were to be earned, and it depended altogether upon a future engagement whether anything would ever become due. Such was the decision of the judge who tried the cause; and we are satisfied that it was correct.

None of the cases go so far as to hold that the mere possibility of being again employed by the city, and of earning wages under that employment at a future time, is capable of being assigned. The debt may be conditional, uncertain as to amount, or contingent, but to be the subject of an assignment there must be an actual or possible debt due or to become due. The assignment of an unliquidated balance is good: *Crocker v. Whitney*, 10 Mass. 316. A power of attorney, although irrevocable in terms, does not amount to an assignment, when no assignable interest exists at the time: *Hall v. Jackson*, 20 Pick. 194.

The case of *Carrique v. Sidebottom*, 3 Met. 297, went on the ground, not only that there was no assignable interest, but apparently no interest to assign, and only a power of attorney to receive. In *Gardner v. Hoeg*, 18 Pick. 168, though it was an assignment of wages not earned, yet it was for a voyage on which the assignor had shipped for a certain lay or rate of wages to be earned. In the case of *Weed v. Jewett*, 2 Met. 608 [37 Am. Dec. 115], in which the assignment was held good, the assignor was in the actual employment of the company summoned as trustees, and it does not appear whether for a certain time or indefinitely. So in *Emery v. Lawrence*, 8 Cush. 151, the assignor was in the actual employment of the trustees. The true principle is stated and the proper distinction taken in *Brackett v. Blake*, 7 Met. 335 [41 Am. Dec. 442]. If a party is

under an engagement for a term of time, to which a salary is affixed payable quarterly, especially if he has entered upon the duties of his office, although at any time liable to be removed, he has an interest which may be assigned.

In the present case we think that this assignment was not available beyond the sums then due, and that the trustees must be charged on their answers.

Trustees charged.

FUTURE EARNINGS MAY BE ASSIGNED: *Weed v. Jewett*, 37 Am. Dec. 115. The validity of an assignment of a debt to become due is quite fully discussed in the notes to *Brackett v. Blake*, 41 Id. 442; *Field v. Mayor etc. of New York*, 57 Id. 440. Future wages to be earned under an existing engagement are capable of being assigned, although the workman works by the piece, and his wages per month vary: *Hartley v. Tapley*, 2 Gray, 565; *Twiss v. Cheever*, 2 Allen, 41. And a written order to pay certain sums out of wages to be earned under a subsisting engagement, and accepted by the assignor's employer, applies to wages earned under a new engagement, entered into by the workman immediately after the expiration of the first, with the same employer, for lower wages: *Wallace v. Walter Heywood Chair Co.*, 16 Gray, 208. The principal case is cited in each of the above cases. It is also cited by the court while discussing the question of the assignability of a claim for injuries to the person, in *Rice v. Stone*, 1 Allen, 566.

THE PRINCIPAL CASE IS CITED AND DISTINGUISHED in *Law v. Pew*, 106 Mass. 350, where it was held that the sale of fish hereafter to be caught in the sea did not pass title to the fish when caught; in *Boylan v. Leonard*, 2 Allen, 407, where it was decided that an assignment of future wages, without limitation of time, would include wages earned by a laborer for nine months thereafter, under a contract then existing, by which he was to labor for his employer for an indefinite time, although the rate of wages was increased after the assignment; and in *Taylor v. Lynch*, 5 Gray, 49, where the court sustained an assignment by a laborer, of his future wages, as against an attachment thereof by trustee process.

BLANCHARD v. ELLIS.

[1 GRAY, 196.]

IF GRANTOR IN DEED OF WARRANTY SUBSEQUENTLY ACQUIRES TITLE, he and his successors in interest are, at the election of the grantee, estopped to set up the subsequently acquired title as against him; but there is no force in the original deed to convey the title not then existing in the grantor.

WHERE GRANTEE UNDER WARRANTY DEED HAS BEEN EVICTED BY TITLE PARAMOUNT, the grantor can not, by purchasing such title, compel the grantee to accept the same, either in satisfaction of the covenant against incumbrances, or in mitigation of damages for breach of it.

ACTION ON A COVENANT OF WARRANTY. The defendants, in 1838, made a conveyance to the plaintiff, with the usual covenants of

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warranty, purporting to convey the undivided one fourth of certain lands. At the time of the conveyance the land was subject to an attachment for fifty-two thousand seven hundred and fifty-five dollars and thirty-nine cents. The attachment suit resulted in a judgment and execution, under which seisin and possession was delivered to the judgment creditor, Wiggins Hill, and title vested absolutely in him in 1839. He remained in possession until December, 1848, when he conveyed to defendants. They claimed that the operation of this conveyance was to vest title in plaintiff, and to deprive him of any claim for damages.

W. H. L. Smith, for the plaintiff.

C. M. Ellis, for the defendants.

By Court, THOMAS, J. It is not doubted that the facts of this case establish a breach of the defendants' covenant; but the question at issue between the parties is as to the measure of damages. The defendants say that a deed of the premises having been made to them by Hill, on the fourth of December, 1848, the title so conveyed to them inured, by way of estoppel, to the plaintiff, and is now in him, and that the only damages he can recover are nominal, or his quarter of the stumpage of the entire tract; such stumpage constituting the only rents and profits of the estate during the eviction of the plaintiff, or the difference, if any, between the value of the land at the time of the conveyance by the defendants to the plaintiff and its value at the time of the conveyance by Hill to the defendants.

The general doctrine on which the defendants rely is quite familiar; that if A., having no title, make a deed of land to B., with full covenants of warranty, and A. subsequently acquire a title by descent or purchase, he is estopped by his covenants, as against his grantee, to deny that he had a good title at the time of his grant, and such new title is said to inure to his grantee. Strictly speaking, there would seem to be no transmutation of estate when the new title comes to the grantor. Nor is there any force in the original deed to convey a title not then existing in the grantor. For nothing can pass but his then existing title. But the grantor and those claiming under him are estopped to deny the validity of the title which he has solemnly asserted, and to set up a title against it. The law presumes that he has spoken and acted according to the truth of the case, and will not permit him or those claiming under him to deny it. "The reasons," says Mr. Butler, "why estoppels are allowed, seem to be these: no man ought allege anything but the truth

for his defense, and what he has alleged once is to be presumed true, and therefore he ought not to contradict it; for, as it is said in the 4 Inst. 272, *allegans contraria non est audiendus*:" Co. Lit. 352 a, note. It might be curious to trace the progress of this doctrine of estoppel, as applicable to the covenant of warranty, from the simple rebutter of Lord Coke, Co. Lit. 265 a, which should bar a future right, to avoid a circuitry of action, to its present condition, in which there is claimed for it the full force of a feoffment, or fine or common recovery at the common law; that is, having the function of actually divesting the feoffor or conusor of any estate which he might thereafter acquire. But waiving, because not necessary to our purpose, the discussion of the origin and extent of the doctrine of estoppel, it will be sufficient to say that we do not feel called upon to extend its application; especially when such extension would tend to defeat the principle on which the doctrine of estoppel rests, which is the prevention of wrong and injustice.

Supposing it to be well settled that if a new title come to the grantor before the eviction of his grantee it would inure to the grantee, and not deciding, because the case does not require it, whether the grantee, even after eviction, might elect to take such new title, and the grantor be estopped to deny it, we place the decision of this case on this precise ground, that where a deed of land has been made with covenants of warranty, and the grantee has been wholly evicted from the premises by a title paramount, the grantor can not, after such entire eviction of the grantee, purchase the title paramount, and compel the grantee to take the same against his will, either in satisfaction of the covenant against incumbrances, or in mitigation of damages for the breach of it.

We do not seek a better illustration of the soundness of this principle than is furnished by the facts of this case. The land, for which the consideration stated in the deed was five thousand five hundred and twenty dollars, was under attachment in a suit in which judgment had been recovered for more than fifty thousand dollars; the entire tract, of which one quarter had been conveyed to the plaintiff, was afterwards levied upon, seisin given to the creditor, and the plaintiff wholly evicted. He had no estate or interest left. The covenant against incumbrances being personal, and not running with the land, he had nothing which could pass by deed. He could not redeem his undivided quarter without a redemption of the entire estate. He could not, for a period of ten years, enter upon the land without com-

mitting a trespass. The defendants admit the existence of the title paramount, and the eviction of the plaintiff; but contend, after the eviction has continued ten years, that they, as grantors, may avail themselves of the rule of estoppel to force the grantee to take the estate, however changed the situation of his own affairs or the condition of the land. So that the equitable rule of estoppel, which forbids the grantor to deny that he had the estate which he had assumed to grant, and the truth of his own covenant—a rule established for the protection of the grantee, and to be applied only to effect justice and prevent wrong—is converted into a right of election in the grantor, upon a breach of his covenant to pay back the consideration money, or by indirection to reconvey the estate. We say an election by the grantor; for it is clear that the grantee can not compel the grantor to buy in the paramount title, but must rely solely upon his covenants. It is equally clear that if the estate, during the eviction, should greatly increase in value, the grantor would not be likely to purchase such paramount title, but would submit to an action on his covenants. So that, under any rule of damages suggested, the plaintiff would lose many of the advantages resulting from the ownership of land, including the increase of value by the application of his own labor or capital, or its rise in the market. There is neither mutuality nor equity in such a rule.

And we are satisfied, upon examination of the authorities, that no case will be found which carries the doctrine of estoppel to the length claimed by the defendants, which in fact estops the grantee, and leaves a right of election in the grantor. The case of *Baxter v. Bradbury*, 20 Me. 260 [37 Am. Dec. 49], has been strongly pressed upon us as a decision of the very question at issue. If this were so, the question having reference to the title to land in that state, the decision, on that ground, as well as from our respect for that court, would be entitled to the highest consideration, if indeed it were not conclusive. But though there are *dicta* in that case which state the doctrine very broadly, the case itself differs materially from the one at bar. That was an action for a breach of the covenant of seisin, in a deed of warranty, with a mortgage back of the premises, of the same date, to the grantor. The ground taken by the counsel of the defendant, and upon which the court seem to have proceeded in their judgment, was that there never had been any interruption of the possession of the plaintiff. In seeking to deduce from that case a rule for our guidance, this circumstance must be deemed

most material; as for a breach of this covenant against incumbrances, nominal damages only could be recovered, unless the plaintiff had been evicted by title paramount, or had actually discharged the incumbrance.

The court in the case of *Baxter v. Bradbury*, *supra*, refer to a statement of the result of the authorities by the late Chief Justice Parker, in the case of *Somes v. Skinner*, 3 Pick. 52. An examination of the whole opinion in that case would lead us to infer that this statement was not made without some misgiving and distrust. The precise question now under consideration was not before the court, and what in that part of the case was decided was, that where a title has inured by estoppel, it will avail the grantee, not only against the grantor and his heirs, but strangers who usurp possession without right; and under the facts of the case, and in the view in which it was applied, there is no occasion to reconsider the rule there stated.

The case of *Cornell v. Jackson*, 3 Cush. 506, S. C., 9 Met. 150, was an action upon the covenant of seisin. An action had before been brought upon the covenant of warranty, in which there was a judgment for the defendant. The defendant had conveyed land to the plaintiff, bounded on land of Tuckerman; a conventional line had been fixed by parol agreement between the defendant and Tuckerman; and they had occupied according to that conventional line; but the court, in the action on the covenant of warranty, held that the true line, and not the conventional line, was the boundary referred to in the defendant's deed. An action was then brought on the covenant of seisin; and the possession of land by Tuckerman, between the true line and the conventional line, being under a claim of title, was held to be a breach of the covenant of seisin. In the assessment of damages, it appeared that a portion of the land had been recovered by the defendant of the heirs of Tuckerman; and the report of the assessor submitted the question whether the value of the land so recovered should be included in his assessment. The court said: "If by any means the party is restored to his land before the assessment of damages, though it can not purge the breach of covenant, it will reduce the damages *pro tanto*." In that case the title was in the grantor at the time of the deed, and he might have made a valid conveyance but for the disseisin; and what the court decided was, that if he subsequently regained the seisin, and the land was restored to the grantee, it would proportionally reduce his damages.

Upon examination of the authorities, we think no decision

will be found to be in conflict with the point now decided, or which leads to the result claimed by the defense. There are *dicta* which, taken out from their connection with the facts in relation to which they are made, and by which their soundness must always be tested, might tend to a different conclusion; but no precedent has so extended the doctrine of estoppel, and we do not feel willing to make one. The question of course arises, How will the defendants, the grantors, be protected? Will they not be still estopped to deny the title of the plaintiff if he should bring his writ of entry for the land? The answer is, that the judgment in this suit will be a perfect bar to the plaintiff and those claiming under him: *Porter v. Hill*, 9 Mass. 34 [6 Am. Dec. 22].

With regard to the rule of damages, there can be no serious controversy if the plaintiff has gained no title by estoppel; the plaintiff will be entitled to the consideration money and interest. The consideration expressed in the deed is *prima facie* the true one, but liable to be controverted by evidence.

The case must be sent to a jury to ascertain the damages under this rule.

ESTOPPEL OF GRANTOR TO DENY GRANTEE'S TITLE, ARISING FROM HIS DEED, extends to all persons who claim from or under the grantor by title acquired subsequent to the grant, whether by deed or otherwise: *McWilliams v. Nisly*, 7 Am. Dec. 654; *Brown v. McCormick*, 31 Id. 450; *Gilliam v. Bird*, 49 Id. 379, and note 386, discussing the subject.

EFFECT OF WARRANTY DEEDS IN PASSING SUBSEQUENTLY ACQUIRED TITLES BY WAY OF ESTOPPEL: *Bank of Utica v. Mercereau*, 49 Am. Dec. 189, and note 231, containing collected cases in this series and other references: *Brown v. Manter*, 53 Id. 223; *Frink v. Darst*, 58 Id. 575, and note thereto 587; see also *Squire v. Harder*, 19 Id. 446.

GRANTOR IS NOT ESTOPPED FROM SHOWING THAT HIS DEED WAS GIVEN SUBJECT TO INCUMBRANCES: *Bolles v. Beach*, 53 Am. Dec. 263.

GRANTEE MAY FORTIFY HIS TITLE BY SUBSEQUENT DEED FROM HIS GRANTOR: *Thompson v. Thompson*, 36 Am. Dec. 751.

THE PRINCIPAL CASE IS CITED in *Russ v. Alpaugh*, 118 Mass. 376, where the court say: "By our law it is well settled that a deed with full covenants of warranty estops the grantor to set up any title subsequently acquired by him against the grantee, and that the subsequently acquired title inures by virtue of the estoppel to the grantee, at least at the election of the latter."

NORWAY PLAINS COMPANY v. BOSTON AND MAINE RAILROAD.

[1 GRAY, 263.]

RAILROAD CORPORATIONS ARE LIABLE AS COMMON CARRIERS for losses occurring from any accident during the transit of the goods, except those arising from the act of God or the public enemy. They can not escape this liability by showing that the loss occurred from some cause for which neither they nor their agents are chargeable.

COMMON CARRIER BY MEANS OF SHIPS MAY DELIVER the goods at the usual wharf, and be thereby discharged from his liability as a carrier.

COMMON CARRIER BY RAILROAD MAY DELIVER the goods on his platform at their place of destination; or may store them there if no one is present to receive them. Until the goods are so delivered or stored they are liable as common carriers; but after such storage they are responsible only as warehousemen.

IF GOODS CARRIED BY RAILROAD CORPORATION ARE DESTROYED BY FIRE after they have reached their place of destination and been stored in the railroad warehouse, the transit being at an end, the corporation is not answerable as a common carrier, but only as a warehouseman.

ACTION against a railroad corporation to recover for goods of the plaintiffs, which were destroyed by fire while in the depot of the defendants. The facts, so far as material, are stated in the opinion.

C. G. Loring, for the plaintiffs.

Rufus Choate and G. Minot, for the defendants.

By Court, **SHAW, C. J.** The liability of carriers of goods by railroads, the grounds and precise extent and limits of their responsibility, are coming to be subjects of great interest and importance to the community. It is a new mode of transportation, in some respects like the transportation by ships, lighters, and canal-boats on water, and in others like that by wagons on land; but in some respects it differs from both. Though the practice is new, the law by which the rights and obligations of owners, consignees, and of the carriers themselves are to be governed is old and well established. It is one of the great merits and advantages of the common law, that instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail when the practice and course of business to which they apply should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public

policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited, and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases under like circumstances. The effect of this expansive and comprehensive character of the common law is, that whilst it has its foundations in the principles of equity, natural justice, and that general convenience which is public policy—although these general considerations would be too vague and uncertain for practical purposes in the various and complicated cases of daily occurrence, in the business of an active community—yet the rules of the common law, so far as cases have arisen and practices actually grown up, are rendered, in a good degree, precise and certain, for practical purposes, by usage and judicial precedent. Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances. The consequence of this state of the law is, that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice, and policy, which underlie the particular rules of the common law, will still apply, modified and adapted by the same considerations to the new circumstances. If these are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. Therefore, although steamboats and railroads are but of yesterday, yet the principles which govern the rights and duties of carriers of passengers, and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common law, subject only to such modifications

as new circumstances may render necessary and mutually beneficial.

The present is an action brought to recover the value of two parcels of merchandise, forwarded by the plaintiffs to Boston in the cars of the defendants. These goods were described in two receipts of the defendants, dated at Rochester, New Hampshire, the one October 31, 1850, and the other November 2, 1850.

By the facts agreed, it appears that the goods specified in the first receipt were delivered at Rochester, and received into the cars, and arrived in Boston seasonably on Saturday, the second of November, and were then taken from the cars and placed in the depot or warehouse of the defendants; that no special notice of their arrival was given to the plaintiffs or their agent; but that the fact was known to Ames, a truckman, who was their authorized agent, employed to receive and remove the goods, that they were ready for delivery at least as early as Monday morning, the fourth of November, and that he might then have received them.

The goods specified in the other receipt were forwarded to Boston on Monday, the fourth of November; the cars arrived late; Ames, the truckman, knew from inspection of the way-bill that the goods were on the train, and waited for them some time, but could not conveniently receive them that afternoon in season to deliver them at the places to which they were directed, and for that reason did not take them; in the course of the afternoon they were taken from the cars and placed on the platform within the depot; at the usual time at that season of the year the doors were closed. In the course of the night the depot accidentally took fire and was burned down, and the goods were destroyed. The fire was not caused by lightning; nor was it attributable to any default, negligence, or want of due care on the part of the railroad corporation, or their agents or servants.

We understand the merchandise depot to be a warehouse, suitably inclosed and secured against the weather, thieves, and other like ordinary dangers, with suitable persons to attend it, with doors to be closed and locked during the night, like other warehouses used for the storage of merchandise; that it is furnished with tracks on which the loaded cars run directly into the depot to be unloaded; that there are platforms on the sides of the track on which the goods are first placed; that if not immediately called for and taken by the consignees, they are separated according to their marks and directions, and placed

by themselves in suitable situations within the depot, there to remain a reasonable and convenient time, without additional charge, until called for by parties entitled to receive them.

The question is, whether under these circumstances the defendants are liable. That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules of the common law, and make them eminently common carriers. Their iron roads, though built, in the first instance, by individual capital, are yet regarded as public roads, required by common convenience and necessity, and their allowance by public authority can be only justified on that ground. The general principle has been uniformly so decided in England and in this country; and the point is to ascertain the precise limits of their liability. This was done to a certain extent in this court in a recent case, with which, as far as it goes, we are entirely satisfied: *Thomas v. Boston & Providence R. R.*, 10 Met. 472.

Being liable as common carriers, the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods during the transit, except those arising from the act of God or a public enemy. It is not necessary now to inquire into the weight of those considerations of reason and policy on which the rule is founded; nor to consider what casualty may be held to result from an act of God or a public enemy; because the present case does not turn on any such distinction. It is sufficient, therefore, to state and affirm the general rule. In the present case, the loss resulted from a fire, of which there is no ground to suggest that it was an act of God; and it is equally clear that it did not result from any default or negligence on the part of the company, though the goods remained in their custody. If at the time of the loss they were liable as common carriers, they must abide by the loss; because, as common carriers, they were bound as insurers to take the risk of fire not caused by the act of God, and in such case no question of default or negligence can arise. Proof that it was from a cause for which they, neither by themselves nor their servants, were in any degree chargeable could amount to no defense, and would therefore be inadmissible in evidence. If, on the contrary, the transit was at an end, if the defendants had ceased to have possession of the goods as common carriers, and held them in another capacity as warehousemen, then they were responsible only for the care and diligence which

the law attaches to that relation; and this does not extend to a loss by an accidental fire, not caused by the default or negligence of themselves, or of servants, agents, or others, for whom they are responsible.

The question then is, when and by what act the transit of the goods terminated. It was contended in the present case that, in the absence of express proof of contract or usage to the contrary, the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery. This rule applies, and may very properly apply, to the case of goods transported by wagons and other vehicles traversing the common highways and streets, and which therefore can deliver the goods at the houses of the respective consignees. But it can not apply to railroads, whose line of movement and point of termination are locally fixed. The nature of the transportation, though on land, is much more like that by sea, in this respect, that from the very nature of the case the merchandise can only be transported along one line and delivered at its termination, or at some fixed place by its side, at some intermediate point. The rule in regard to ships is very exactly stated in the opinion of Buller, J., in *Hyde v. Trent & Mersey Navigation*, 5 T. R. 397: "A ship trading from one port to another has not the means of carrying the goods on land; and according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier."

Another peculiarity of transportation by railroad is, that the car can not leave the track or line of rails on which it moves; a freight train moves with rapidity, and makes very frequent journeys, and a loaded car, whilst it stands on the track, necessarily prevents other trains from passing or coming to the same place; of course it is essential to the accommodation and convenience of all persons interested that a loaded car, on its arrival at its destination, should be unloaded, and that all the goods carried on it, to whomsoever they may belong or whatever may be their destination, should be discharged as soon and as rapidly as it can be done with safety. The car may then pass on to give place to others, to be discharged in like manner. From this necessary condition of the business, and from the practice of these transportation companies to have platforms on which to place goods from the cars, in the first instance, and warehouse accommodation by which they may be securely stored, the goods of each consignment by themselves, in accessible places, ready to be

delivered, the court are of the opinion that the duty assumed by the railroad corporation is—and this, being known to owners of goods forwarded, must, in the absence of proof to the contrary, be presumed to be assented to by them so as to constitute the implied contract between them—that they will carry the goods safely to the place of destination, and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith; or if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. This, it appears to us, is the spirit and legal effect of the public duty of the carriers, and of the contract between the parties when not altered or modified by special agreement, the effect and operation of which need not here be considered.

This we consider to be one entire contract for hire; and although there is no separate charge for storage, yet the freight to be paid, fixed by the company as a compensation for the whole service, is paid as well for the temporary storage as for the carriage. This renders both the services, as well the absolute undertaking for the carriage as the contingent undertaking for the storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of the carriers by railroad, we think there result two distinct liabilities: first, that of common carriers, and afterwards that of keepers for hire, or warehouse keepers; the obligations of each of which are regulated by law.

We may then say, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers, to deliver the goods to the consignee, which is more strictly conformable to the truth of the fact; or, in analogy to the old rule, that delivery is necessary, it may be said that delivery by themselves as common carriers, to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses occasioned by their fault or negligence. Indeed, the same doctrine is distinctly laid down in *Thomas v. Boston & Providence R. R.*, 10 Met. 472, with the same limitation. The point that the same company, under one and the same contract, may be subject to distinct duties, for a failure in which they may be liable to different de-

gress of responsibility, will result from a comparison of the two cases of *Garside v. Trent & Mersey Navigation*, 4 T. R. 581; and *Hyde v. Trent & Mersey Navigation*, 5 Id. 389. See also *Van Santvoord v. St. John*, 6 Hill, 157; *McHenry v. Philadelphia, Wilmington & Baltimore R. R.*, 4 Harr. (Del.) 448.

The company, having received an adequate compensation for the entire service, if they store the goods, are paid for that service; they are depositaries for hire, and of course responsible for the security and fitness of the place and all precautions necessary to the safety of the goods, and for ordinary care and attention of their servants and agents, in keeping and delivering them when called for. This enforces the liability of common carriers, to the extent to which it has been uniformly carried by the common law, so far as the reason and principle of the rule render it fit and applicable, that is, during the transit; and affords a reasonable security to the owner of goods for their safety, until actually taken into his own custody.

The principle thus adopted is not new; many cases might be cited: one or two will be sufficient. Where a consignee of goods, sent by a common carrier to London, had no warehouse of his own, but was accustomed to leave the goods in the wagon-office or warehouse of the common carrier, it was held that the transit was at an end when the goods were received and placed in the warehouse: *Rowe v. Pickford*, 8 Taunt. 83. Though this was a case of stoppage *in transitu*, it decides the principle. But another case in the same volume is more in point: *In re Webb*, Id. 443. Common carriers agreed to carry wool from London to Frome under a stipulation that when the consignees had not room in their own store to receive it, the carriers, without additional charge, would retain it in their own warehouse until the consignor was ready to receive it. Wool thus carried, and placed in the carriers' warehouse, was destroyed by an accidental fire; it was held that the carriers were not liable. The court say that this was a loss which would fall on them as carriers, if they were acting in that character, but would not fall on them as warehousemen.

This view of the law, applicable to railroad companies, as common carriers of merchandise, affords a plain, precise, and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform; that if, on account of their arrival in the night, or at any other time when, by the

usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause, they can not then be delivered; or if, for any reason, the consignee is not there ready to receive them—it is the duty of the company to store them and preserve them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them; and for the performance of these duties after the goods are delivered from the cars the company are liable as warehousemen, or keepers of goods for hire.

It was argued in the present case that the railroad company are responsible as common carriers of goods until they have given notice to consignees of the arrival of goods. The court are strongly inclined to the opinion that in regard to the transportation of goods by railroad, as the business is generally conducted in this country, this rule does not apply. The immediate and safe storage of the goods on arrival, in warehouses provided by the railroad company, and without additional expense, seems to be a substitute better adapted to the convenience of both parties. The arrivals of goods at the larger places to which goods are thus sent are so numerous, frequent, and various in kind that it would be nearly impossible to send special notice to each consignee of each parcel of goods or single article forwarded by the trains. We doubt whether this is conformable to usage; but perhaps we have not facts enough disclosed in this case to warrant an opinion on that question. As far as the facts on this point do appear, it would seem probable that persons frequently forwarding goods have a general agent, who is permitted to inspect the way-bills, ascertain what goods are received for his employers, and take them as soon as convenient after their arrival. It also seems to be the practice for persons forwarding goods to give notice by letter, and inclose the railroad receipt, in the nature of a bill of lading, to a consignee or agent, to warn him to be ready to receive them. From the two specimens of the form of receipt given by these companies produced in the present case, we should doubt whether the name of any consignee or agent is usually specified in the receipt and on the way-bill. The course seems to be to specify the marks and numbers, so that the goods may be identified by inspection and comparison with the way-bill. If it is not usual to specify the name of a consignee in the way-bill as well as on the receipt, it would be impossible for the corporation to give notice of the arrival of each article and parcel

of goods. In the two receipts produced in this case, which are printed forms, a blank is left for the name of a consignee, but it is not filled, and no consignee in either case is named. The legal effect of such a receipt and promise to deliver no doubt is to deliver to the consignor or his order. If this is the usual or frequent course, it is manifest that it would be impossible to give notice to any consignee; the consignor is *prima facie* the party to receive, and he has all the notice he can have. But we have thought it unnecessary to give a more decisive opinion on this point, for the reason, already apparent, that in these receipts no consignee was named; and for another, equally conclusive, that Ames, the plaintiffs' authorized agent, had actual notice of the arrival of both parcels of goods.

In applying these rules to the present case, it is manifest that the defendants are not liable for the loss of the goods. Those which were forwarded on Saturday arrived in the course of that day, lay there on Sunday and Monday, and were destroyed in the night between Monday and Tuesday. But the length of time makes no difference. The goods forwarded on Monday were unladen from the cars and placed in the depot before the fire. Several circumstances are stated in the case, as to the agent's calling for them, waiting, and at last leaving the depot before they were ready. But we consider them all immaterial. The argument strongly urged was, that the responsibility of common carriers remained until the agent of the consignee had an opportunity to take them and remove them. But we think the rule is otherwise. It is stated, as a circumstance, that the train arrived that day at a later hour than usual. This we think immaterial; the corporation do not stipulate that the goods shall arrive at any particular time. Further, from the very necessity of the case and the exigencies of the railroad, the corporation must often avail themselves of the night, when the road is less occupied for passenger cars; so that goods may arrive and be unladen at an unsuitable hour in the night to have the depot open for the delivery of the goods. We think, therefore, that it would be alike contrary to the contract of the parties and the nature of the carriers' duty to hold that they shall be responsible as common carriers, until the owner has practically an opportunity to come with his wagon and take the goods; and it would greatly mar the simplicity and efficacy of the rule that delivery from the cars into the depot terminates the transit. If, therefore, for any cause the consignee is not at the place to receive his goods from the car as unladen, and in consequence

of this they are placed in the depot, the transit ceases. In point of fact, the agent might have received the second parcel of goods in the course of the afternoon on Monday, but not early enough to be carried to the warehouses at which he was to deliver them; that is, not early enough to suit his convenience. But for the reasons stated, we have thought this circumstance immaterial, and do not place our decision for the defendants, in regard to this second parcel, on that ground.

Judgment for the defendants.

COMMON CARRIERS ARE INSURERS OF GOODS AGAINST ALL BUT ACTS OF GOD AND PUBLIC ENEMY, IN ABSENCE OF ANY QUALIFICATION OF THEIR LIABILITY: *Colt v. McMechen*, 5 Am. Dec. 200; *Williams v. Grant*, 7 Id. 235; *Smyrl v. Nolon*, 23 Id. 146; *Jones v. Pitcher*, 24 Id. 716; *Daggett v. Shaw*, 25 Id. 439; *Robertson v. Kennedy*, 26 Id. 466; *Turney v. Wilson*, 27 Id. 515; *Parsons v. Hardy*, 28 Id. 521; *Beckman v. Shouse*, Id. 653; *Parker v. Flagg*, 45 Id. 101; *Friend v. Woods*, 52 Id. 119; *Leonard v. Hendrickson*, 55 Id. 687; *Morrison v. Davis*, 57 Id. 695, and note 701.

HOW COMMON CARRIER'S LIABILITY AS INSURER MAY BE MODIFIED: Note to *Farmers' & Mechanics' Bank v. Champlain T. Co.*, 42 Am. Dec. 498; *Swindler v. Hilliard*, 45 Id. 732; *Fisk v. Chapman*, 46 Id. 393; note to *Governor v. Withers*, 50 Id. 99; *Camden etc. R. Co. v. Baldauf*, 55 Id. 481, and notes to same; *Farmers' & Mechanics' Bank v. Champlain T. Co.*, 56 Id. 68, and notes thereto.

WHAT CONSTITUTES GOOD DELIVERY BY COMMON CARRIER: *Ostrander v. Brown*, 8 Am. Dec. 211, and comprehensive note to same 214; *Packard v. Getman*, 16 Id. 475; *Kohn v. Packard*, 23 Id. 453; *Gibson v. Culver*, 31 Id. 297; *Hill v. Humphreys*, 39 Id. 117; *Fisk v. Newton*, 43 Id. 649, and note to same, showing what is sufficient to discharge him from further liability, 650; *Farmers' & Mechanics' Bank v. Champlain T. Co.*, 42 Id. 491, and extensive note on the liability of common carriers, and limitation and termination thereof, 496; *Adams v. Blankenstein*, 56 Id. 350.

WHO IS COMMON CARRIER: Note to *Beckman v. Shouse*, 28 Am. Dec. 657; exhaustive note to *Chevallier v. Straham*, 47 Id. 648, showing who is liable as such; note to *Governor v. Withers*, 50 Id. 99.

LIABILITY OF CARRIER FOR LOSS BY FIRE: *Hunt v. Morris*, 12 Am. Dec. 689.

CARRIER'S RESPONSIBILITY CEASES WHEN TRANSIT OF GOODS IS ENDED, AND DELIVERY IS COMPLETED OR WAIVED BY OWNER: *Stone v. Waitt*, 52 Am. Dec. 621.

WAREHOUSEMEN, AND LIABILITY THEREOF: See comprehensive note to *Schmidt v. Blood*, 24 Am. Dec. 145; *Cox v. O'Riley*, 58 Id. 633, and note; *Chace v. Washburn*, 59 Id. 623, and note. The cases show that they are held only to ordinary care and diligence.

FOR CASES ENUMERATED WHERE PERSON MAY BECOME LIABLE AS DEPOSITARY, see *Smith v. Nashua & Lowell Railroad*, 59 Am. Dec. 364.

RAILROAD CORPORATION CEASES TO BE COMMON CARRIER, and becomes a warehouseman as matter of law, when it has completed the duty of transportation and assumed the position of warehouseman as matter of fact, and

according to the usages and necessities of the business in which it is engaged: *Rice v. Hart*, 118 Mass. 201. The same principle will be found fully established by the following cases. They also afford some excellent illustrations of what acts amount to such a delivery as will exonerate the carrier for his liability as such: *Rice v. Hart*, *supra*; *Denny v. New York Central R. R. Co.*, 13 Gray, 481; *Sessions v. Western R. R. Co.*, 16 Id. 132; *Fitchburg R. R. Co. v. Gage*, 12 Id. 393; *Mansur v. New England Mutual Marine Ins. Co.*, Id. 520; *Fitchburg & Western R. R. Co. v. Hanna*, 6 Id. 539; *Stevens v. Boston & Maine R. R.*, 1 Id. 277; *Judson v. Western R. R. Corporation*, 4 Allen, 523; *Hall v. Boston & Worcester R. R. Corporation*, 14 Id. 439; *Barron v. Eldredge*, 100 Mass. 455; *Jenkins v. Bacon*, 111 Id. 373; *Müller v. Mansfield*, 112 Id. 260; *Stowe v. N. Y. Boston & Providence R. R. Co.*, 113 Id. 521. The principal case is cited in each of the above cases.

BULLARD v. RANDALL.

[1 GRAY, 605.]

DRAFT ON BANK, FOR FIXED SUM payable out of the drawer's general deposit, being a large sum standing to his credit, is not operative as an assignment of the sum named in the draft, until it is presented at the bank and payment demanded, although verbally accepted by the cashier when absent from the bank.

CHECK IN ORDER TO PAY HOLDER SUM OF MONEY at the bank on presentment of the check and demand of the money.

MERE NOTICE TO BANK THAT CHECK HAS BEEN DRAWN, and that a party holds it, does not bind the bank, nor give the holder precedence over an attachment subsequently levied before presentment of the check for payment.

CHECKS ARE NOT PAYABLE IN ORDER OF PRIORITY in which they are given, but in the order of their presentation for payment.

TRUSTEE process. The facts are stated in the opinion—

G. F. Hoar, for the plaintiff.

E. B. Stoddard, for the trustees.

By Court, SHAW, C. J. The question before us arises on the answer of the Millbury Bank, summoned as trustees of Randall. They admit that at the time of the service of this process upon them a balance of money deposited was credited to Randall upon their books. But they contend that by force of the transaction set forth in their answer, three hundred dollars, part of said balance, had been legally or equitably transferred to Jonathan Day, and that they were responsible to him for it. From the facts stated in their answer, it appears that Day had, previously to the thirtieth of September, 1852, commenced a suit against Randall, and summoned the bank as trustees. The banking house of said bank is held and kept at Millbury, and

their general business is done there. On the said thirtieth of September, Day, Randall, and Farnum, cashier of the bank, met at Worcester. Randall there delivered to Day a check on the bank for three hundred dollars. Day handed the check to Farnum, with an order that, when the check should be paid from Randall's funds, and carried to Day's credit on the books of the bank, his trustee process should be discharged. On the cashier's arrival at the bank, with this check and order, after bank hours, he was informed by the president, Farnsworth, that this trustee process had been served on him, as an officer of the bank, during the cashier's absence, with some others, but none earlier than the present plaintiff's. It further appears that on the next morning, October 1st, as soon as the bank opened, the cashier charged the check to the deposit account of Randall, and carried the same amount to the credit of Day.

The only question presented to us upon the answer is whether Day's check or Bullard's attachment had the prior legal claim to this fund, to the extent of said three hundred dollars. The court of common pleas decided in favor of Day, and from this decision the plaintiff appealed. There is no doubt that the summons left with the president was a good service on the bank, and bound them from that time. It is also to be remembered that the facts do not make it certain whether the attachment at Millbury or the delivery of Randall's check in favor of Day to the cashier at Worcester was first in the order of time. But in the view we take of the case, this question is immaterial.

In the first place, the court are of opinion that the transaction at Worcester was not an assignment, as of a chose in action, by Randall to Day, of a part of the debt due to him from the bank, creating an equitable transfer. It was a draft on a bank at sight, for a fixed sum, payable out of a general deposit of the drawer, being a larger sum standing to his credit. Such an order is held not to be an assignment: *Gibson v. Cooke*, 20 Pick. 15 [32 Am. Dec. 194].

As a check on a bank, it was not available to Day until it reached the bank, which was after the service of the plaintiff's process. A check is an order to pay the holder a sum of money at the bank, on presentment of the check and demand of the money: no previous notice is necessary; no acceptance is required or expected; it has no days of grace. It is payable on presentment, and not before. Mere notice to the bank that a party holds a check, without presentment and demand, will not bind the bank; and if there be funds when notice is thus given,

without presentment for payment by the holder, and in the mean time other checks of the same drawer are presented and the fund paid out upon them, the bank is not liable. The cashier has no authority from the bank to pay the money elsewhere. In the present case he was merely the agent of Day to take the check to the bank, and receive the money for him, and so the parties considered it. When it reached the bank it was to be charged to Randall's account, and credited to Day, and then, and not before, it was to be deemed paid. Checks are not payable in the order of priority in which they are given, but in that in which they are presented. Had other checks been presented at the bank at Millbury, after Day's was given to the cashier at Worcester, before the close of the bank hours on that day, they would have had precedence of Day's, though in the cashier's pocket. Nor would the cashier's assent inure, by way of acceptance or otherwise, to give it effect, so as to give it a preference over other checks presented before it was carried to the bank and entered; and we see no reason why a trustee process, operating by law to bind the fund in another form, should not have the same effect. Were it the practice of banks to accept checks, and thereby bind the bank to their payment, it would be necessary to keep a separate account with the depositor, in which all such acceptances should be charged; such acceptance being as effectual a reduction of the deposit as actual payment, making the bank, from the time of such acceptance, a debtor to the holder, and discharging them as debtor to the drawer; otherwise a bank would never know on the presentation of a check whether the drawer had funds to pay it or not. But if it must be presented, accepted, and charged before it can avail the holder, this must necessarily be done at the bank, and the verbal assent of the cashier elsewhere could not avail the holder.

The court are therefore of opinion that the sum of three hundred dollars credited to Day ought not to have been so credited and deducted from the sum for which the trustees were chargeable; and to this extent the appeal of the plaintiff is sustained.

THOMAS, J., did not sit in this case.

CHECK CONSIDERED BILL OF EXCHANGE: *Cruiger v. Armstrong*, 2 Am. Dec. 128; *Smith v. Jones*, 32 Id. 527; *Taylor v. Wilson*, 45 Id. 180, and note; note to *Chapman v. White*, 57 Id. 464.

TIME WITHIN WHICH CHECK SHOULD BE PRESENTED FOR PAYMENT: *Mohawk Bank v. Broderick*, 27 Am. Dec. 192; *Smith v. Jones*, 32 Id. 527; *Salter v. Burt*, Id. 530; *Taylor v. Wilson*, 45 Id. 180, and note; note to *Barbour v. Bayon*, 52 Id. 593; *Lancaster Bank v. Woodward*, 57 Id. 618.

PRESENTMENT, TO WHOM AND HOW SHOULD BE MADE: Note to *Wesson v. Garrison*, 58 Am. Dec. 675.

EFFECT OF UNACCEPTED CHECK OR DRAFT AS ASSIGNMENT: *Harris v. Clark*, 51 Am. Dec. 352, and note thereto 363; *Chapman v. White*, 57 Id. 464, and note 466. But parol acceptance of bill is good: Note to *Wells v. Brigham*, 52 Id. 760.

FOR LAW OF DEPOSITS IN BANK, see exhaustive note to *In the Matter of the Franklin Bank*, 19 Am. Dec. 418; note to *Chapman v. White*, 57 Id. 466.

HOLDER OF UNACCEPTED CHECK OR DRAFT CAN NOT SUE DRAWER THEREOF: Note to *Chapman v. White*, 57 Am. Dec. 466.

THE PRINCIPAL CASE IS CITED *arguendo* in *Dana v. Third National Bank*, 13 Allen, 445, where the court decide that a check drawn upon a bank for more than the amount of the drawer's funds on deposit creates no lien upon and gives the payee no right to the actual balance, until the bank has agreed to pay it *pro tanto*; and in *Carr v. National Security Bank*, 107 Mass. 45, where it was held that the promise of a bank to one of its depositors to pay all checks which he may draw, does not make it liable to an action of contract by the holder of a check afterwards drawn by him for part of the amount deposited.

ANGIER v. TAUNTON PAPER MANUFACTURING CO.

[1 GRAY, 621.]

MEASURE OF DAMAGES IN SUIT BY OWNER OF CHATTEL which he has conditionally sold, and for which he has been partly paid, is the full value of such chattel.

TORT for the conversion of a paper-machine which plaintiff had sold to one Shepard for one thousand dollars, payable in monthly installments of one hundred dollars each, the machine to become Shepard's property when fully paid for. He paid five hundred dollars, and mortgaged the machine to defendants, who converted it. They claimed that they ought to be allowed in mitigation of damages the five hundred dollars paid by Shepard under his purchase. The trial court ruled otherwise.

D. Foster, for the defendants.

G. F. Hoar, for the plaintiff.

By Court, THOMAS, J. The plaintiff was the legal owner of the paper-machine. The facts show, not a sale, but an agreement for a sale, upon certain conditions precedent, to be performed by Shepard. Those conditions had not been performed at the time of the conversion by the defendants. The property therefore remained in the plaintiff, and the measure of damages is indemnity to the plaintiff as the owner of the chattel, that is, the value of the property taken and interest from the time of

the conversion. The ruling of the court of common pleas was clearly right.

Exceptions overruled.

MEASURE OF DAMAGES IN TROVER.—For a lengthy discussion of this subject, see notes to *Baker v. Wheeler*, 24 Am. Dec. 70; *Harker v. Dement*, 52 Id. 678; see also *Pridgin v. Strickland*, 58 Id. 124, and references in note thereto.

COMMONWEALTH v. HAYNES.

[2 GRAY, 72.]

CRIMINAL INTENT IS SUFFICIENTLY CHARGED IN INDICTMENT FOR INDECENT EXPOSURE where the words in the introductory part are "devising and intending the morals of the people to debauch and corrupt," followed by the allegation that the defendant did the act "unlawfully, scandalously, and wantonly," when taken in connection with the particular acts charged.

INDICTMENT FOR INDECENT EXPOSURE NEED NOT CONCLUDE, "to the common nuisance of all the citizens," etc.

INDICTMENT for indecent exposure, alleging that the defendant, "devising and intending the morals of the people of this commonwealth to debauch and corrupt," at a certain time and place, "in a public building there situate, in presence of divers citizens of said commonwealth then and there being, and within sight and view of the said citizens in and about said public building then and there passing and repassing, unlawfully, scandalously, and wantonly did expose to the view of said persons present and so passing and repassing as aforesaid the body and person of him, the said Horace Haynes, naked and uncovered, for the space of one hour, to the manifest corruption of public morals and manners, and against the peace of said commonwealth, and the form of the statute in such case made and provided." The defendant pleaded guilty, and moved in arrest of judgment: 1. Because it did not appear with what intent the acts set forth in the indictment were committed; 2. Because it was not alleged that the acts were committed to the great damage and common nuisance of all the citizens of this commonwealth, etc. The motion was overruled, and the defendant alleged exceptions.

J. H. Clifford, attorney general, for the commonwealth.

F. F. Heard, for the defendant.

By Court, *DEWEY, J.* This indictment sufficiently charges a criminal intent. The words in the introductory part of it,

"devising and intending the morals of the people to debauch and corrupt," followed by the allegation that the defendant did the act "unlawfully, scandalously, and wantonly," taken in connection with the particular acts charged, sufficiently show a charge of criminal intent and purpose in the indecent exposure of himself in view of the people passing and repassing.

The indictment would have been more full, and more in conformity with the precedents, if it had contained a second allegation of the intent, succeeding the narration of the acts done by the defendant; but this would have been but a repetition of what was already alleged. That the material criminal intent may be, in a case like the present, thus found in the prefatory part of the indictment, seems to be assumed by *Ellenborough*, C. J., in his opinion in the case of *Rex v. Philipps*, 6 East, 473. The case of *Miller v. People*, 5 Barb. 203, is to the same effect.

The further ground taken for arresting the judgment is that the indictment does not conclude, "to the common nuisance of all the citizens," etc. The form of the present indictment in this respect is supported by the authority of 2 Ch. Crim. L. 41, and Archb. Crim. Pl., 5th Am. ed., 655.

Although this form of conclusion has been questioned in the English cases cited by the counsel for the defendant, we are of opinion that it has been too long sanctioned by authority and practice to require us to arrest the judgment for that cause.

Exceptions overruled

THE PRINCIPAL CASE IS CITED in *Commonwealth v. Reynolds*, 14 Gray, 91, to the point that it is not necessary, in an indictment alleging matters that constitute a common nuisance, to conclude *ad commune nocumentum*, although it is usual to do so; and in *People v. Jackson*, 7 Mich. 446, it is referred to on the proposition that where public and private rights so nearly approach each other, individual cases only can serve to illustrate the distinction, and each case must be decided upon its own peculiarities.

PIPER v. PEARSON.

[3 GRAY, 120.]

MAGISTRATE OF INTERIOR COURT ACTING WITHOUT OR IN EXCESS OF JURISDICTION IS LIABLE IN DAMAGES to a party injured thereby, and can show no legal justification under any judicial record.

COMMITMENT OF WITNESS FOR CONTEMPT BY JUSTICE IN CAUSE OF WHICH HE HAS NO JURISDICTION is unauthorized and void, and renders him liable in damages.

RECORD PRIMA FACIE SHOWS WANT OF JURISDICTION IN JUSTICE for the county of Middlesex, where it sets out on its face an offense committed

in the city of Lowell, a district in which the police court has exclusive jurisdiction.

RECORD OF INFERIOR COURT MUST SHOW THAT MAGISTRATE ACTED WITHIN LIMITS OF JURISDICTION, in order to avail him as a defense to an alleged trespass.

TORT against a justice of the peace, for assault, battery, and false imprisonment. The defendant answered that the plaintiff was imprisoned in due process of law for a contempt of court. Certified copies of a complaint charging one Russ with an unlawful sale of intoxicating liquors in the city of Lowell, a warrant issued thereon for the arrest of Russ, a *mittimus* issued by the defendant for the commitment of the plaintiff to jail for refusing to testify at the trial, and a subsequent judgment of acquittal of Russ by the defendant, were offered in evidence by the plaintiff at the trial. The record of the judgment was relied upon by the defendant for his justification; but it was ruled that the record and *mittimus* constituted no defense. The defendant, being found guilty, alleged exceptions.

H. G. Blaisdell, for the plaintiff.

B. F. Butler, for the defendant.

By Court, BIGELOW, J. The decision of this case depends on the familiar and well-settled rule concerning the liability of courts and magistrates exercising an inferior and limited jurisdiction for acts done by them, or by their authority, under color of legal proceedings. One of the leading purposes of every wise system of law is to secure a fearless and impartial administration of justice, and at the same time to guard individuals against a wanton and oppressive abuse of legal authority. To attain this end, the common law affords to all inferior tribunals and magistrates complete protection in the discharge of their official functions, so long as they act within the scope of their jurisdiction, however false and erroneous may be the conclusions and judgments at which they arrive. But on the other hand, if they act without any jurisdiction over the subject-matter, or if, having cognizance of a cause, they are guilty of an excess of jurisdiction, they are liable in damages to the party injured by such unauthorized acts. In all cases, therefore, where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done *colore officii*, the single inquiry is whether he has acted without any jurisdiction over the subject-matter, or has been guilty of an excess of jurisdiction. By this simple test his legal liability will at once be

determined: 1 Ch. Pl., 6th Am. ed., 90, 209-213; *Beaurain v. Scott*, 3 Camp. 388; *Ackerley v. Parkinson*, 3 Mau. & Sel. 425, 428; *Borden v. Fitch*, 15 Johns. 121 [8 Am. Dec. 225]; *Bigelow v. Stearns*, 19 Id. 39 [10 Am. Dec. 189]; *Allen v. Gray*, 11 Conn. 95. If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; and if he attempts to enforce any process founded on any judgment, sentence, or conviction in such case, he thereby becomes a trespasser: 1 Ch. Pl. 210; *Bigelow v. Stearns*, *supra*; see *Clarke v. May*, 2 Gray, 410 [*post*, p. 470].

These well-settled principles leave no room for question as to the liability of the defendant in this action. As a justice of the peace for the county of Middlesex he had no jurisdiction whatever to try the complaint against Russ. It was for an offense committed "within the district of Lowell," of which the police court of the city of Lowell had exclusive jurisdiction by statute of 1848, chapter 331, section 4, and which the justice of said court was legally competent to try and determine: *Commonwealth v. Emery*, 11 Cush. 406. The defendant therefore acted wholly without legal authority, and can show no legal justification under any judicial record.

It was urged on the part of the defendant that he had authority to punish the plaintiff for contempt, although he had no jurisdiction to try the principal case before him. But the answer to this suggestion is obvious. The power to punish for contempt is only incidental to the more general and comprehensive authority conferred on a magistrate, by which he is empowered to exercise important judicial functions. It is to enable him to try and determine causes without molestation, and protect himself from indignity and insult, that the law gives him authority to punish such disorderly conduct as may interrupt judicial proceedings before him or be a contempt of his authority or person: R. S., c. 85, sec. 33. But it is only when he is in the proper exercise of his judicial functions that this power can be exercised. If he has no jurisdiction of a cause, he can not sit as a magistrate to try it, and is entitled to no protection while acting beyond the sphere of his judicial power. His action is then extrajudicial and void. His power and authority are commensurate only with his jurisdiction. If he can not try the case, he can not exercise a power which is only auxiliary and incidental. There can be no contempt, technically speaking, where there is no authority. In the case at bar, the defendant had no more power to entertain jurisdiction

of the complaint against Russ than any other individual in the community. Although he acted through mistake, it was nevertheless a usurpation. The plaintiff, therefore, could not have been guilty of contempt toward the defendant in his capacity as a magistrate while trying a cause of which he had no jurisdiction; and the commitment therefor was unauthorized and void.

It was suggested by the counsel for the defendant that there was nothing in the case from which it could be properly inferred that the offense with which Russ was charged was actually committed in the city of Lowell; and that as the defendant, by virtue of his authority as a justice of the peace, had cognizance of offenses committed elsewhere in the county of Middlesex which he might well hear and determine in the city of Lowell, the presumption was that he was acting rightfully, till the contrary was shown. But there are two decisive answers to this argument. In the first place, the record on its face sets out an offense committed in the city of Lowell. That being a district set apart by statute in which the police court has exclusive jurisdiction of criminal offenses usually cognizable by magistrates, and the offense being charged as having been committed in Lowell, the record legally imports that it was committed there: 1 Stark. Crim. Pl., 2d ed., 62; Bac. Abr., tit. Indictment, G, 4.

But in the next place, it was for the defendant to show a complete justification for the alleged trespass; if the record left it doubtful whether he had jurisdiction of the offense, it would not avail as a defense to the action. There is a marked distinction in this respect between courts of general jurisdiction and inferior tribunals having only a special or limited jurisdiction. In the former case, the presumption of law is that they had jurisdiction, until the contrary is shown; but with regard to inferior courts and magistrates, it is for them, when claiming any right or exemption under their proceedings, to show affirmatively that they acted within the limits of their jurisdiction: *Peacock v. Bell*, 1 Saund. 74, and notes; *Mills v. Martin*, 19 Johns. 33, 34. The record in the present case *prima facie* shows a want of jurisdiction in the defendant.

Exceptions overruled.

LIABILITY OF JUDICIAL OFFICERS: See *Barkeloo v. Randall*, 32 Am. Dec. 46; *Stone v. Graves*, 40 Id. 131, and prior cases in notes to these decisions; *Pratt v. Gardner*, 48 Id. 652; *Borden v. State*, 54 Id. 217; *Bailey v. Wiggins*, 60 Id. 650; *Clarke v. May*, *post*, p. 470. Magistrates and officers, even when exercising a special and limited jurisdiction, are exempted from liability for their judgments, or acts done in pursuance of them, if they do not exceed their authority, although the conclusions to which they

arrive are false and erroneous: *Ela v. Smith*, 5 Gray, 136. But if a magistrate of inferior jurisdiction acts beyond the limits of his authority, the proceedings are *coram non judio* and void: *Learned v. Bailey*, 111 Mass. 162; so if he acts without jurisdiction by issuing a warrant under an unconstitutional statute, he is liable in damages to the person injured thereby: *Kelly v. Bemis*, 4 Gray, 84; and nothing can be presumed in favor of his jurisdiction, but the burden is upon him who claims any right under the proceedings to show affirmatively that the court or magistrate acted within the limits of his authority: *Rossiter v. Peck*, 3 Id. 539. In *Hendrick v. Whittemore*, 105 Mass. 28, the following observation is made: "In *Piper v. Pearson*, the justice assumed to exercise a judicial power, when in fact he was clothed with no judicial authority in the premises. The whole proceeding was *coram non judio*, and he was a mere trespasser. There is a broad distinction between that case and one where the magistrate possesses the requisite judicial authority, but in the exercise of that authority fails to secure by proper proceedings jurisdiction of the person of the defendant." In all the preceding Massachusetts cases the principal case was cited. In *McClure v. Hill*, 36 Ark. 272, the principal case is referred to, among others, on the point that courts of general jurisdiction are protected against civil suits for acts done in their jurisdictional capacities, while with inferior magistrates the protection extends only to acts within their jurisdiction; and in *Cooley on Torts*, 416, the following is laid down, to which also the principal case is cited: "Every judicial officer, whether the grade be high or low, must take care before acting to inform himself whether the circumstances justify his exercise of the judicial function. A judge is not such at all times and for all purposes; when he acts, he must be clothed with jurisdiction; and acting without this, he is but the individual falsely assuming an authority he does not possess." See this language quoted and the principal case cited in *Vanderpool v. State*, 34 Ark. 176, 177; and see also the principal case cited in *Clarke v. May*, *post*, p. 470, as fully stating the rule of law, and the authorities in its support, by which magistrates who exceed their jurisdiction are held responsible.

POWER OF COURTS TO PUNISH FOR CONTEMPT: See *State v. Woodfin*, 42 Am. Dec. 161; *Neel v. State*, 50 Id. 209; *Ex parte Adams*, 59 Id. 234, and notes to these cases. If a court has no jurisdiction over the subject-matter, its subsequent action in punishing for contempt is extrajudicial and void: *Walton v. Develing*, 61 Ill. 206, citing the principal case. The principal case is also cited in *Whitcomb's Case*, 120 Mass. 121, to the point that the authority of justices of the peace to punish for contempts, at least so far as is indispensable to the orderly conducting of their business, and especially in the case of the refusal of witnesses, after due summons and payment of their fees, to appear and testify before them, has been generally admitted and regulated by statute in Massachusetts from the earliest time; and in *Emery v. Hapgood*, 7 Gray, 57, as fully settling the want of jurisdiction of a justice of the peace of the county of Middlesex to try and determine a complaint for an alleged violation, in Lowell, of the law respecting the sale of intoxicating liquors, and the invalidity of the commitment of a defendant for contempt committed after his conviction, and when the justice was about proceeding to try the party on another complaint for a like offense.

NOTHING IS PRESUMED IN FAVOR OF JURISDICTION OF INFERIOR COURTS. The jurisdiction must be affirmatively shown: *Case v. Woolley*, 32 Am. Dec. 54; *Bloom v. Burdick*, 37 Id. 299; *Lowry v. Erwin*, 39 Id. 556; *Levy v. Shurman*, 42 Id. 690; *Gay v. Lloyd*, 46 Id. 499; *Palmer v. Oakley*, 47 Id. 41; *Spear v. Carter*, 48 Id. 688; *Kenney v. Greer*, 54 Id. 439; *Reynolds v.*

Stansbury, 55 Id. 459; *Tucker v. Harris*, 58 Id. 488; note to *Stiles v. Stewart*, 27 Id. 144. It is otherwise with courts of general jurisdiction: *Lowry v. Erwin*, 39 Id. 556; *Adams' Lessee v. Jeffries*, 40 Id. 477; *Palmer v. Oakley*, 47 Id. 41; *Kenney v. Greer*, 54 Id. 439; *Reynolds v. Stansbury*, 55 Id. 459.

MISCELLANEOUS CITATIONS OF THE PRINCIPAL CASE.—The principal case is referred to in *Hush v. Sherman*, 2 Allen, 598, on the proposition that it can not be held that a justice had no interest in a case which he tried, in which a person was charged with keeping an unregistered dog in the town in which the justice lived, merely because it might happen that the forfeiture provided in such cases would be appropriated towards the payment of the losses of individuals for which the town as a town might be liable; it might happen otherwise. The principal case and *Clarke v. May*, *post*, p. 470, are cited in *Dynes v. Hoover*, 20 How. 81, to the point that where a court has no jurisdiction over the subject-matter, or having such jurisdiction is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered *coram non iudice*, an officer executing the process is liable; and in *Chase v. Ingalls*, 97 Mass. 529, it is held that an officer can not be affected by the existence of any fact which deprives the court or magistrate of jurisdiction in that particular case, provided the defect be not disclosed by the precept itself, nor known to the officer; distinguishing the principal case in that in it the officer was held liable because his warrant did not show affirmatively an apparent jurisdiction, there being none in fact, and the burden being upon him to establish his justification; but *quære* whether it was not *Clarke v. May*, *post*, p. 470, instead of the principal case that the court here had in mind.

BIXBY v. BRUNDIGE.

[2 GRAY, 129.]

RECORD OF PROSECUTION AND ACQUITTAL AFFORDS NO SUFFICIENT BASIS TO SUSTAIN ACTION FOR MALICIOUS PROSECUTION, where the proceedings were before a magistrate who had no jurisdiction of the offense

TORT for malicious prosecution. The plaintiff, at the trial, to prove the prosecution and acquittal, offered in evidence certified copies of a complaint, warrant, and judgment of acquittal, in a prosecution against him before a justice of the peace, who was admitted to have no jurisdiction of the offense. The defendant objected to the evidence, and it was ruled that the plaintiff could not maintain the action upon the state of facts presented. A verdict was returned for the defendant, and the plaintiff alleged exceptions to the ruling.

No counsel appeared for the plaintiff.

B. F. Butler, for the defendant.

By Court, *MERRICK, J.* The ruling excepted to was unobjectionable. As the magistrate had no jurisdiction of the of-

sense of which the plaintiff was accused in the complaint, the proceedings before him were of no legal force or validity; and they therefore afford no sufficient basis to sustain an action for malicious prosecution.

Exceptions overruled.

ACTION, WHETHER LIES FOR MALICIOUS PROSECUTION BEFORE COURT HAVING NO JURISDICTION.—Actions on the case for malicious prosecutions in courts without jurisdiction were held sustainable in *Stone v. Stevens*, 30 Am. Dec. 611; *Morris v. Scott*, 34 Id. 236; but the principal case has been cited to the point that such an action can not be maintained where the proceedings complained of were had in a court having no jurisdiction of the subject-matter of the suit: *Painter v. Ives*, 4 Neb. 127; therefore a declaration is not good when it avers the institution of a suit in a court without jurisdiction: *Whiting v. Johnson*, 6 Gray, 247; but while there may be good ground for holding that when a justice has no jurisdiction of the subject-matter, or a total want of jurisdiction otherwise appears upon the face of the warrant, the proceedings can not properly be called a prosecution, as was held in the principal case, still when the want of jurisdiction does not appear upon the face of the warrant, and is only to be shown by evidence *alimunde*, an action for malicious prosecution may be maintained when it is shown to have been malicious, and the prosecution does not show in defense that there was probable cause and good faith: *Sweet v. Negus*, 30 Mich. 409; and if a magistrate has jurisdiction of the subject-matter, there is a sufficient prosecution and acquittal to furnish a foundation for the action, notwithstanding any insufficiency of the complaint or defect of process by which the plaintiff was brought before the court, or want of jurisdiction arising from such defect, where the plaintiff was required to plead to the complaint, to answer further thereto at a subsequent day, to give surety for her appearance, and in default of bail she was committed, and upon the day fixed for trial she was discharged, the magistrate finding and adjudging her to be "not guilty of said charge:" *Gibbs v. Ames*, 119 Mass. 66, distinguishing the principal case and *Whiting v. Johnson*, *supra*, in that in them the magistrates had no jurisdiction of the subject-matter of the complaint. The principal case was also cited in *Denehey v. Woodrum*, 100 Id. 198, to the point that where a count in a declaration for malicious prosecution alleged that the complaint therein was upon appeal to the superior court "dismissed without trial, and the plaintiff discharged," this decision did not show want of probable cause, and upon that statement the action could not be maintained.

BLOOD v. NASHUA & LOWELL R. R. CORPORATION.

[3 GRAY, 137.]

MILL-OWNER MAY RECOVER DAMAGES FOR OBSTRUCTION OF STREAM through the erection below of a bridge by a railroad corporation, whereby the water is prevented from passing off from his mill as freely as before.

MILL-OWNER CAN NOT RECOVER FOR INJURIES SUSTAINED BY BEING IMPEDED and put to increased expense in getting logs to his mill, through the erection below of a bridge by a railroad corporation, whether the stream be or be not navigable for rafts and boats.

TORT brought by the owners of a saw-mill, situated on a stream called Stony brook, about five hundred feet from its outlet into the Merrimack river, to recover damages caused by the erection by the defendants of a stone bridge across the stream below the plaintiffs' mill. The case was referred to referees to report the facts to the court, and to ascertain and report the damages, if any, to be awarded the plaintiffs, if the court should be of the opinion that they were entitled to recover. The parties agreed at the hearing before the referees that the report should include all damages for the erection, maintenance, and repair of the bridge as it existed, provided no further obstruction was made than that then caused, and the judgment upon the award should be final as to the right to maintain the bridge in its present state. The report of the referees showed that for more than forty years the owners of the mill had taken logs for sawing from the Merrimack river into Stony brook, and that the building of the stone bridge had impeded and increased the expense of so conducting the logs, and diminished the width of the channel, preventing the water at certain stages from passing off from the mill as freely as it had under a pile bridge previously existing. The award of the referees was that the plaintiffs recover: 1. Fifty dollars for damage caused by leaving piles of the old bridge remain in the stream after the removal of that bridge, thereby obstructing the passage of logs; 2. Two hundred dollars for damage caused by obstructing the stream, whereby the water was prevented from passing off from the plaintiffs' mill as freely as before, when the pile bridge existed; 3. Six hundred and fifty dollars for the damage caused by the stone bridge rendering it more expensive to get logs to the plaintiffs' mill from the Merrimack river up Stony brook than under the pile bridge.

J. G. Abbott, for the plaintiffs.

B. F. Buller, for the defendants.

By Court, SHAW, C. J. The question is, whether the awards of damages are founded on correct legal principles, and whether the report can be accepted. In considering it, we must take notice that there are two classes of rights which may be had in rivers, streams, and watercourses in this commonwealth. Every person owning land through or along which a watercourse passes has a right, as inseparably incident to his estate, to the beneficial use of the stream in its passage in its natural channel, for all purposes for which it can be usefully applied, to

supply his cattle, to irrigate his land, and the like; and if the fall be sufficient, he may use it as a mill-power. It follows, of course, that no riparian proprietor higher up has a right to divert or corrupt it or render it unfit for use; and no riparian proprietor below has a right to obstruct its free passage off, or to set it back upon the mill or land of such owner.

But there is another right in rivers and watercourses, for navigation, boating, and rafting. The rule of the common law is, that waters are not navigable unless within reach of the ebb and flow of the tide. But it has often been held here that the public have a right to the use of the large rivers, and indeed of all rivers and watercourses suitable for boats and rafts, and in that sense they are deemed navigable, though above the ebb and flow of the tide. In these there is a right of way for boats and rafts: *Commonwealth v. Charlestown*, 1 Pick. 180 [11 Am. Dec. 161]; *Commonwealth v. Chapin*, 5 Id. 199 [16 Am. Dec. 386].

The referees have compared the present condition of the stream with that in which it was when the pile bridge first erected by the defendants was standing; but we think the rule should be to compare it with the natural flow of the stream. But as it is impossible to suppose that the flow was more free through the pile bridge than in its natural course, and as there is no intimation that the pile bridge was practically an obstruction, we are to assume that it had no effect in this respect, and that the passage of water was equally free with as without it. The comparison, therefore, taken between the present bridge and the pile bridge is the same as that between the present bridge and the natural course of the stream. Then, applying the principles above stated, the court are of opinion that the plaintiffs have a right to recover the second item of damage found by the referees. The defendants, by their charter, had a right to make a bridge across this stream, but they were bound to do it in such a manner as not to obstruct the stream. But it appears that by their stone bridge they have diminished the width of the natural channel, penned up the water, and set it back on the plaintiffs' mills, and this causes damage to them in their estate; for this they may recover.

But we are of opinion that they have not a right to recover the damages awarded in the first and third items, both which are founded in the fact that the plaintiffs have been impeded and will be put to increased expense in getting logs to their mills from the Merrimack river. Perhaps the case does not dis-

close facts enough to enable us to judge whether that section of Stony brook lying between the plaintiffs' mills and Merrimack river is or is not navigable for rafts and boats. But we have not thought that question material; for if it is not navigable in this sense, then the plaintiffs had no right to use it for boats and rafts, the loss they sustain in getting logs through it is *damnum absque injuria*. But supposing it to be navigable for boats and rafts (the supposition most favorable to the plaintiffs), they can not maintain this action, because such obstruction would be a public, not a private, nuisance; it would be a violation of the public right, not of the plaintiffs' private right. The obstruction of a public right of way is a public, not a private, wrong; it may affect those near the obstruction much more than the rest of the public; but the damage sustained by those near it differs in degree only, not in kind. It is a wrong, therefore, if it be one, to be redressed by a public prosecution, not by recovering damages in a private action.

A question was made whether, as the estate of the plaintiffs is under mortgage, this action can be maintained without the concurrence or consent of the mortgagees, and whether the mortgagees, should they foreclose, would not have a claim against the defendants for the same damages. But being informed that the plaintiffs would procure and file a release, we have not considered that question, it being understood that such a release will be filed before judgment is entered.

We would also suggest whether, as the effect of the agreement of parties before the referees, and the assessment of damages to the plaintiffs for a perpetual right, as against the plaintiffs and their successors, the future owners of the mill estate, to maintain the bridge in its present state is to create an easement or subject their estate to a servitude, which is an interest in real estate, there ought not to be a deed of grant or release executed by the plaintiffs to the defendants. The case of a perpetual right to flow, when gross damages are assessed, is no authority; because there the perpetual right passes, and is secured by force of the statute.

Judgment for the plaintiffs for two hundred dollars.

RIPARIAN PROPRIETOR'S RIGHT TO NATURAL AND UNINTERRUPTED FLOW OF STREAM: See *Newhall v. Iveson*, 54 Am. Dec. 790, and note collecting the prior cases in this series; *Elliot v. Fitchburg R. R.*, 57 Id. 85; *Olney v. Fenner*, Id. 711; *Stein v. Burden*, 60 Id. 453.

NAVIGATION OF STREAM ABOVE TIDE-WATER, WHETHER MAY BE OBSTRUCTED: See *Wadsworth v. Smith*, 28 Am. Dec. 525, and note.

PUBLIC WRONG TO BE REDRESSED BY PUBLIC, where no special or peculiar damage is sustained by individuals, different in kind, and not in degree only from that sustained by others: *Brightman v. Inhabitants of Fairhaven*, 7 Gray, 272; *President etc. of Harvard College v. Stearns*, 15 Id. 7; *Fall River Iron Works Co. v. Old Colony R. R.*, 5 Allen, 224; *Wesson v. Washburn Iron Co.*, 13 Id. 101; *Blackwell v. Old Colony R. R.*, 122 Mass. 3; and cases in which this doctrine is held with reference to the obstruction of highways can not be distinguished from a case where a city bound to keep a highway in repair obstructs it, whereby the place of business of an individual becomes more difficult to reach, his business injured, his rents diminished in value, etc., the elements of damage not being special and peculiar to him: *Willard v. City of Cambridge*, 3 Allen, 574. The principal case was cited to the foregoing points; and in *Brayton v. City of Fall River*, 113 Mass. 228, it was cited as tending to restrict the right to bring a private suit for a public nuisance within narrower limits than seems to have been adopted in some of the English cases. See further, on the proposition that public nuisances are to be redressed by the public, *Stetson v. Faxon*, 31 Am. Dec. 123; *Rung v. Shoneberger*, 26 Id. 96, and note. But if an individual suffers special injury, an action for damages will lie: *Stetson v. Faxon*, 31 Id. 123, and note considering the question; *Thayer v. Boston*, Id. 157; *Low v. Knowlton*, 45 Id. 100; *Cole v. Sprout*, 56 Id. 696; and see the principal case cited to this point in *Enos v. Hamilton*, 27 Wis. 259; or a bill in equity for an injunction may be maintained: *Rosser v. Randolph*, 31 Am. Dec. 712; *Bigelow v. Hartford Bridge Co.*, 36 Id. 502; *Walker v. Shepardon*, 60 Id. 423, and notes to these cases; *People v. City of St. Louis*, 48 Id. 339; *Frisk v. Lawrence*, 50 Id. 274.

THE PRINCIPAL CASE WAS FURTHER CITED in *Warner v. Bacon*, 8 Gray, 404, to the point that where the plaintiff and defendant agreed to exchange land, in an action for breach of the contract, damages for the expenses incurred by the plaintiff in preparing to build a barn on his other land, by reason of his not obtaining a legal right to place thereon a barn that was on the land which the defendant agreed to convey to him, can not be recovered, the ground of damage being too remote, and not a proximate consequence of the defendant's breach of agreement.

LOWELL v. DANIELS.

[2 GRAY, 161.]

MARRIED WOMAN AND HER HEIRS ARE NOT ESTOPPED TO DENY VALIDITY OF HER DEED, executed during coverture, but dated previously to her marriage, and signed with the name she bore at that time, with a fraudulent purpose of deceiving and imposing upon some person to be affected by it, and without disclosing the fact of her marriage.

WRIT of entry. The demandant relied upon two mortgage deeds of the premises, with covenants of warranty, made to him by John B. Hooton, who claimed under a warranty deed executed to him in the name of Mrs. Rachel Smith, as grantor, bearing date August 1, 1834, at which time Mrs. Smith was sole. The tenant showed title in Mrs. Smith prior to 1834: that in

1835 she intermarried with Heffrein; that her deed to Hooton was executed after her marriage with Heffrein, but antedated and signed by her with the name she bore before marriage; and that in 1839 she died intestate, leaving the tenant's wife, her daughter by her former marriage, her heir at law. The demandant claimed that the tenant was estopped to deny the validity of Mrs. Heffrein's deed. Further facts relating to the evidence and its order of introduction appear in the opinion. The tenant asked that the jury be instructed that the deed of Mrs. Heffrein, being that of a married woman, was void, and that the demandant could not recover; but the judge declined to give the instruction, and charged the jury that if Mrs. Heffrein executed the deed after marriage, and it was antedated and signed by her in the name she bore before marriage, with a fraudulent purpose of giving the deed an effect which it would not have had in her true name and under the true date, knowing that it would deceive and impose upon some person to be affected by it, she and her heirs would be estopped to deny the date, and this would be so whether the fraudulent purpose was to deprive her husband of an interest in the estate or any other; but mere passive conduct on her part in suffering the demandant, without notice, to take a defective conveyance, or signing the deed with a wrong name and date, without a fraudulent purpose, would not estop her heirs to deny its validity. A verdict was returned for the demandant, and the tenant alleged exceptions.

A. H. Nelson and J. P. Converse, for the demandant.

J. Parker and H. M. Parker, for the tenant.

By Court, THOMAS, J. The decision of one of the questions raised by the bill of exceptions seems to be conclusive of the rights of the parties, and to this we have confined our attention. That question is whether the tenant, whose wife is heir at law of Mrs. Heffrein, is estopped to deny the validity of the deed under which, through the deeds of Hooton, the demandant claims. The deed of Mrs. Heffrein to Hooton, *proprio vigore*, conveyed no estate. The separate deed of a married woman, without the assent of the husband, it was absolutely void: *Fowler v. Shearer*, 7 Mass. 21; *Concord Bank v. Bellis*, 10 Cush. 276. It has no force, because the grantor had no capacity to make it. The instrument has the form and semblance of a deed, and nothing more. Indeed, the demandant does not contend that this deed has of itself any validity; but that under the facts of the case, the tenant is estopped to deny its validity; or in other

words, the title of the demandant is the result of estoppel, and not of grant; or to speak perhaps more precisely, of an estoppel that works a grant.

The demandant, to show title in himself, offers the two deeds of mortgage from John B. Hooton. Deeds of warranty, they make *prima facie* evidence of the seisin of the premises in the demandant. The tenant then shows that the premises belonged to Mrs. Smith; that she died intestate; that his wife was her daughter and heir in law. The tenant thus makes an elder title. The demandant must now show that the estate that was in Mrs. Smith passed out of her and into his grantor. He undertakes to show it passed by deed. To do this, he must prove not merely the execution of the instrument, but its execution by one having the requisite legal capacity to make a deed. He offers for this purpose a copy from the registry of a deed, purporting to be from Mrs. Smith to his grantor, bearing date August 1, 1834. Assume that this is sufficient *prima facie* evidence of the execution and delivery of the deed at the time of its date; it is only *prima facie*, and when the evidence is closed, the burden is still on the demandant to show its execution and delivery by one competent in law for that purpose. When the evidence is in, it appears that this deed was made, delivered, acknowledged, and recorded when the grantor was a married woman, and incapable of making it; that is, that it was absolutely void. By force of the deed, then, the demandant wholly fails to show that the land had passed from the tenant's wife's mother to his grantor.

Then the demandant says that the deed, upon its face, bears date of the first of August, 1834, when the grantor was sole and capable of making a deed; that it was signed with the name she bore before her marriage with Heffrein; and was so signed and dated with a fraudulent purpose, on her part, of giving the deed an effect which it would not have had in her true name and under the true date; knowing it would deceive and impose upon some person to be affected by it; and when the agent of the demandant called upon Mrs. Heffrein, stating to her that he wished to examine Hooton's title, and informing her that the application was made with a view to a mortgage, she produced the deeds of the land to herself, but did not communicate to the agent any defect in Hooton's title; and that therefore, whether the fraudulent purpose was to deprive her husband of his interest in the estate, or any other, the grantor and her heirs are estopped to deny that the date of the deed, which she executed and caused to be recorded, was the

true date; and as against her and her heirs, the deed will be taken to be of the same effect as if it had been executed and delivered at the time of its date, when she was unmarried and had capacity to execute it; or in other words the tenant is, upon these facts, estopped from setting up any title in Mrs. Heffrein at the time Hooton conveyed to the demandant. This we understand to be the view of the case taken by the learned judge, though perhaps in a critical examination of the language used by him, the silence of the grantor as to the defect of Hooton's title will not be found to be included as an element in the instruction given to the jury.

This raises the material question at issue between the parties, whether a married woman and her heirs may be barred of her estate by an estoppel *in pais*

She can make no valid contract in relation to her estate. Her separate deed of it is absolutely void; any covenants in such separate deed would be likewise void. If she were to covenant that she was sole, was seised in her own right, and had full power to convey, such covenants would avail the grantee nothing. She could neither be sued upon them nor estopped by them. The law has rendered her incapable of such contract, and she finds in her incapacity her protection; her safety in her weakness. Her most solemn acts, done in good faith and for full consideration, can not affect her interest in the estate, or that of the husband and children. The strongest possible example of this was presented in the case of *Concord Bank v. Bellis, supra*, in which it was held that where an estate was conveyed to a married woman, and she at the same time gave back a deed of mortgage to secure a part of the purchase money, such deed of mortgage was wholly void. And we think a married woman can not do indirectly what she can not do directly; can not do by acts *in pais* what she can not do by deed; can not do wrongfully what she can not do rightfully. She can not by her own act enlarge her legal capacity to convey an estate.

This doctrine of estoppel *in pais* would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment, or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates.

But if Mrs. Heffrein were personally estopped to say this deed

was executed by her while under coverture, we are not prepared to say that the daughter would be so estopped. The condition of the estate was this: The fee was in Mrs. Heffrein with limited power of alienation; with no power indeed to convey, except by the joint deed of herself and husband: R. S., c. 59, sec. 2; and with no power to devise it. The law had given her no power by any act of hers to change the destination of the estate or impair the title which at her decease would vest in her child. Upon her decease the daughter enters into possession of the estate. She is rightfully there; the estate is in her, unless there has been an alienation of the estate, in the mode prescribed by law, in the life-time of the mother. If it be said that the mother was guilty of misrepresentation and concealment, for which coverture affords no protection, the answer might well be, That whatever might be the effect upon her personally, even if it estopped her to claim any interest in the estate, it could not do what the statute has not done—give her a power so to alienate the estate as to prevent the entry of her heirs at law upon her decease.

Such seems to us the result of the application of well-settled principles of law to the case at bar. And upon a somewhat diligent examination of the authorities, we have found none to lead us to a different conclusion. The diligence of the counsel for the demandant has cited but two cases having much tendency even to sustain the position that the estate of a married woman, incapable of making a deed, may pass by estoppel *in pais*; these are *Hunsden v. Cheyney*, 2 Vern. 150, and *Savage v. Foster*, 9 Mod. 35.

In both these cases the husband and wife, who jointly were capable of levying a fine, were parties to the original frauds. They were both suits in equity against the parties to the fraud. They both rely, as matter of authority, upon the case of the estoppels of infants, who are not incapable of conveying, but whose deeds are voidable only, and not void; and neither of the cases is, we think, entitled to the highest consideration. If they established the point for which they are cited, that the estate of a married woman may pass by her acts *in pais*, not only without the concurrence of the husband, but in fraud of his rights, we should question their application under our system, where the statute of frauds is equally binding in courts of equity as of law, where the powers of married women in the conveyance or devise of lands are defined and limited by express statute, and where the titles to real estates are matters of public record.

No case at law has been cited, nor have we found one, in which it has been held that the estate of a party has been barred by estoppel *in pais*, who was incapable of conveying by deed. And though courts of law have liberally applied the doctrine of estoppel *in pais* to cases of personal property, in the transfer of which no technical formalities intervene to prevent its application, we know of no case in which it has been applied to a party incapable in law of making a contract.

The result of the views we have felt compelled to take of the case is, that the deed of Mrs. Heffrein to the demandant's grantor was absolutely void, and that this tenant is not estopped to deny its validity.

New trial in this court.

MARRIED WOMAN, WHEN ESTOPPED: See *Bradley v. Snyder*, 58 Am. Dec. 564, and cases in this series collected in the note thereto. The principal case has been frequently cited to the point that a married woman can not be barred of her real estate by an estoppel *in pais*: *McGregor v. Wait*, 10 Gray, 75; *Bemis v. Call*, 10 Allen, 517; *Wales v. Coffin*, 13 Id. 216; *Pierce v. Chace*, 108 Mass. 269; and see *Pells v. Webquish*, 129 Id. 472; and quoted from at length with approval on this point in *Behler v. Weyburn*, 59 Ind. 145. In *Knight v. Thayer*, 125 Mass. 26, it is cited to the point that by the common law of Massachusetts the warranty deed of a married woman, though executed in such form as to convey her title, did not operate against her by way of covenant or of estoppel; but this is changed by chapter 108, section 3, of the general statutes. So in *Plumer v. Lord*, 9 Allen, 457, it is referred to on the proposition that a married woman can not, by any act or declaration *in pais*, estop herself from setting up her legal incapacity to make a contract, and thus indirectly bind herself to fulfill obligations which she could not assume directly, even by an instrument executed in the most solemn and formal manner; and in *Merriam v. Boston etc. R. R.*, 117 Mass. 244, it is cited to the point that the doctrine of estoppel is not applied to the case of a party incapable in law of making a contract, and a married woman is therefore not estopped to deny the validity of her conveyance of certificates of shares of stock. Professor Pomroy, in discussing how far the doctrine of equitable estoppel applies to married women, says, citing the principal case with others: "There are, however, decisions which hold, in effect, that since a married woman can not be directly bound by her contracts or conveyances, even when accompanied with fraud, so she can not be indirectly bound through means of an estoppel; and the operation of the estoppel against her must be confined to cases where she is attempting affirmatively to enforce a right inconsistent with her previous conduct upon which the other party relied. These decisions seem to be opposed to the general current of authority:" 2 Pom. Eq. Jur., sec. 814; and in the note he says: "In *Lowell v. Daniels* this view was maintained with great force and ability."

THE PRINCIPAL CASE IS FURTHER CITED in *Leggate v. Clark*, 111 Mass. 308; *Weed Sewing Machine Co. v. Emerson*, 115 Id. 557, to the point that a married woman's deed or mortgage, in which her husband does not join, is inoperative and void; and in *In re Comstock*, 11 Nat. Bank. Reg. 181, it is quoted with approval on the point that the doctrine of estoppel *in pais* has

never been carried so far as to prevent a party from showing that a corporation, even if it be one *de jure*, had no power to do a particular thing, or that it was done in violation of a statute.

GREENE v. GREENE.

[2 GRAY, 361.]

DECREE OF DIVORCE A VINCULO CAN NOT BE SET ASIDE on the ground that it was obtained by false testimony and fraud, upon an original libel filed at a subsequent term of the court.

LIBEL for a divorce. The opinion states the case.

E. L. Barney, for the libellant.

T. D. Robinson, for the respondent.

By Court, SHAW, C. J. It will be perceived that this is an original libel by wife against husband, alleging five years' desertion, and seeking on that ground a decree of divorce from the bond of matrimony. In this libel, and as subsidiary to it, probably for the purpose of anticipating and obviating a probable defense, and showing that the bond of matrimony still legally subsists, she sets forth a decree of divorce *a vinculo* for adultery, obtained by her husband at a former term against her; she then avers that the decree was obtained by fraud and false testimony, prays the court to hear evidence of the fraud and collusion by which the decree was obtained against her, and that the same may be reversed, annulled, and set aside, and that such proceedings may be had as justice may require. We can perceive no difference between the case where a libellant inserts such an allegation and prayer in an original libel by which she seeks a divorce *a vinculo* on another ground and a case where such allegation and prayer are made the only subject of an original libel to set aside a former decree. The object in both cases is to reverse and annul a subsisting decree.

In using the term "collusion" in the present case, we presume the libellant does not mean to use it in its ordinary sense, as collusion between the parties to the former proceeding, and so a fraud upon the law, because that would include herself as party to the fraud. As said by Willes, C. J., in *Prudam v. Phillips*, Hargrave's Law Tracts, 456, note, "if both parties colluded in the cheat upon the court, it was never known that either of them could vacate the judgment." We therefore understand this allegation as stating that the husband colluded or

combined with other persons to obtain false testimony, or otherwise to aid him in fraudulently obtaining a decree. We are then to understand this libel as alleging that the former decree was obtained by the husband by false testimony and fraud practiced by him, and on that ground praying a reversal of a decree of divorce from the bond of matrimony, rendered by the same court, between the same parties, at a former term.

Such a libel, we think, can not be maintained. When the court has jurisdiction of the subject-matter and of the parties, when both parties are domiciled in Massachusetts, and the respondent actually appears and defends, or when it appears to the court that the adverse party has been so legally summoned as to be held legally in default if he does not appear, and a decree is passed dissolving the bond of matrimony, and no appeal, exception, or other step is taken to avoid the final judgment, we think it must in its nature be conclusive upon the parties. Whether such final decree is, by our law, open to any revisal by review, writ of error, *certiorari*, or any other proceeding in the nature of an appeal, we give no opinion; no such question, we believe, has been judicially decided or raised. Nor does this opinion apply to any case where the fact of the existence of the matrimonial relation between such parties, at any particular time, is drawn in question between other parties.

We do not take into view a consideration sometimes adverted to in English cases, which is, that the fact and legality of marriage and divorce are in England exclusively cognizable in the ecclesiastical courts; we place our opinion upon the more general doctrine of *res judicata*, as settled in this commonwealth, and as applied to the case of divorce. We must inquire, then, what would be the consequences of any other decision? A binding decree of divorce *a vinculo* determines the *status* of the parties. If valid and effectual, the innocent party has a right to marry again. If the husband be the innocent party, his after marriage would be lawful, his wife would be entitled to dower and other rights of property, the children would be legitimate and entitled to inherit, and various other persons acquire or lose civil rights. If the decree is reversed, it must be for a cause that shows it ought not to have been rendered; the reversal relates back and declares the decree void *ab initio*, and that the parties have never ceased to be husband and wife. The husband is then exposed to a prosecution for polygamy—we use this term rather than bigamy, because it is so used in the statute: R. S., c. 130, sec. 2—which is a state-prison

offense; the wife has no right of property in the real or personal estate of the husband; the offspring are illegitimate; and creditors and others may lose rights of action. On such new hearing, the wife may bring new evidence to show that the evidence on which the former decree was rendered was false; or she may hope to persuade another tribunal, court, or jury, as the case may be, that the evidence formerly adduced was not entitled to be believed, and so effect a reversal of the decree. And as there is no limitation of time within which such new and original libel must be filed, it may be after a lapse of months or years.

But if a new and original libel may be brought, upon the ground that a former decree was obtained by false evidence, we see nothing to prevent the husband from bringing a third suit to reverse the decree of reversal, on a suggestion and offer of proof that the decree of reversal was obtained by perjury, subornation of perjury, and other fraud, and thus reverse the second decree, and reinstate the original decree of divorce *a vinculo*. Consequences are not always conclusive against a rule of positive law; but where it is a question of construction, either of a statute provision or a rule of the common law, the consequences to which any particular construction or application would lead have a strong bearing upon the question what the legislature intended, or what is the just extent and qualification of the rule. To maintain an original libel, in a case like this, would seem to be contrary to the fundamental principles of judicial action.

But we think the point here is settled by authority, not specifically in regard to divorce, but generally as to the conclusive effect of a judgment in a case arising afterwards on the same matter between the same parties. We take the rule to be, that a judgment of a court of competent jurisdiction, having jurisdiction of the subject and of the parties, by legal process duly served, where no appeal, writ of error, *certiorari*, review, or other legal process lies, for revising, affirming, or reversing such judgment, or where no such process is commenced by the party who would avoid the judgment in the mode and within the time prescribed by law, is conclusive upon the same parties in any other proceeding in law, in equity, or before any other judicial tribunal.

Instead of numerous citations of authorities, we refer to *Homer v. Fish*, 1 Pick. 435, and the cases there cited. Some of the cases are certainly calculated to put the rule to a severe test; as

that of *Peck v. Woodbridge*, 3 Day, 30, where false testimony and forgery were alleged, to impeach the former judgment; but the rule was enforced on the ground of its being necessary to the administration of justice that when cases are once finally decided that must be held to be the end of litigation between the same parties. The same rule is as steadily adhered to in chancery. In *Gelston v. Codwise*, 1 Johns. Ch. 195, it was said by Chancellor Kent: "If a decree could be altered or varied by an original bill, a cause, as it has been frequently observed, would never be at rest, and there would be confusion and inconsistency in the decrees of the court." It is no good exception to show that the matter now offered did not in fact come in question; such an exception, as said by Parker, C. J., in *Homer v. Fish*, *supra*, would render the rule nugatory. It is sufficient that the action was of a nature to admit of such a defense, and that the plaintiff in the new suit might have availed himself of it.

Most of the cases supposed to have a contrary bearing are those where the fact or the legality of a particular marriage has been drawn in question in a suit between third parties. The *Duchess of Kingston's Case*, most fully reported in 20 Howell's State Trials, 355, was an indictment for bigamy. The defense relied upon was that before her second marriage with the Duke of Kingston her former supposed marriage was adjudged void in a jactitation case in the ecclesiastical court; and her counsel insisted that that decree was conclusive. The opinion of the judges was taken by the house of lords, which was that such decree in a court of competent jurisdiction was conclusive between the parties, but not so in a suit between other parties; and that on an indictment it was competent for the crown to avoid the effect of the decree in question, by proving that it was obtained by the collusion of both parties and a fraud upon the court; and such evidence was therefore received, and the duchess was convicted.

The article cited as one of Mr. Hargrave's Law Tracts, 451, was an argument prepared with a view to the trial of that case. The opinion of the judges affirmed one of the opinions maintained by Mr. Hargrave in his treatise and disaffirmed the other. In the case already cited, *Prudam v. Phillips*, *supra*, Lord Chief Justice Willes said that "whatever objections would avoid a judgment in a court of common law would be sufficient to overturn a sentence in the spiritual court, but none others; that fraud was a matter of fact, and if used in obtaining judgment, was a deceit on the court, and hurtful to strangers, who, as they could not come in to reverse or set aside the judgment, must of

necessity be admitted to aver it was fraudulent. But who ever knew a defendant plead that a judgment obtained against him was fraudulent?" The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been either actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and can not be controverted. But a stranger may impeach a judgment which stands in his way, by plea and proof of fraud in obtaining it, because it is his only means of availing himself of the fraud.

There are several cases which have been supposed to have a bearing on this question, to which we will briefly refer. We have already noticed *Prudam v. Phillips* and *Duchess of Kingston's Case*, *supra*. The case of *Allen v. Maclellan*, 12 Pa. St. 328 [51 Am. Dec. 608], was an action of *assumpsit* by an indorsee, on a note made payable to a woman, and indorsed by one professing to be her husband; it was contended by the promisor that he was not the true husband, and certain decrees in matter of divorce were relied on. It was not, therefore, a case between the parties to either decree.

Colvin v. Colvin, 2 Paige, 385 [22 Am. Dec. 644], was a petition, by both parties, after a decree for a divorce had been enrolled, but for aught that appears, at the same term, or at all events soon after, to open the enrollment and set aside the decree, the party originally charging adultery and claiming a divorce, stating his belief and conviction, from facts since come to his knowledge, that the adultery charged had not been committed. The petition was granted, on the ground that the party, though he had a right to a divorce, might waive that right, and that a condonation would take away that right, and restore the parties to marital relations. *Dunn v. Dunn*, 4 Id. 425, was a petition to set aside a decree of divorce entered on a bill taken *pro confesso*, on the ground that by service of an original subpoena out of the jurisdiction of the court, in another state, the court did not acquire jurisdiction of the person of the respondent, and the decree, on the face of the proceedings, was erroneous. It proceeded on the ground that for want of legal service, and without an actual appearance, the court had no jurisdiction. And the chancellor says: "If the court of chancery has once acquired jurisdiction over the party, by the service of original process within the jurisdiction of the court, or by

his voluntary appearance, the decree, or any order in the cause, may be served on the defendant out of the jurisdiction." And in another passage he says: "The vice-chancellor was right in deciding that the service of a subpoena at Newark, New Jersey, was not sufficient to warrant the entry of an order to take the bill as confessed for the want of appearance." The court, therefore, though they had jurisdiction of the subject, had not, by legal process, acquired jurisdiction of the person of the respondent.

We have seen no reliable authority opposed to the position above taken, that a decree of divorce *a vinculo*, where no appeal, review, or writ of error is allowed by law, or when the time for bringing such review or writ of error has expired, is final and conclusive upon the parties, and that an original proceeding to set it aside, on the ground that it was fraudulently obtained upon false evidence, can not be maintained.

Libel dismissed.

PROCEEDINGS TO VACATE AND ANNUL DIVORCES, AND EFFECT ON PARTIES AND ON MARRIAGES WHICH THEY HAVE CONTRACTED.—It is not our purpose to inquire into the validity of foreign divorces. That subject has already been considered in this series in the note to *Tolen v. Tolen*, 21 Am. Dec. 747; and besides, foreign divorces are seldom attacked in direct proceedings to vacate and annul, which, only, it is now our object to consider.

VACATING AND ANNULING DIVORCES AT ECCLESIASTICAL LAW.—It appears to have been the generally accepted doctrine of the ecclesiastical law that a sentence against the validity of a marriage was never final, but always open to revision and reversal: Poynter on Mar. & Div. 157; Shelford on Mar. & Div. 474; 2 Bishop on Mar. & Div., sec. 748; *Bowzer v. Ricketts*, 1 Hag. Con. 213, 214. As was said by Dr. Calvert, in argument in *Duchess of Kingston's Case*, 20 Howell's State Trials, 355, 420: "There can be no determination against a marriage but what is open to future litigation. We all know that in a question of marriage any person that has an interest may intervene before sentence given; and any persons having an interest, though they have neglected to intervene in that cause, might appeal within the proper time; nay, I will go so far as to say that if any person having an interest should have so far neglected it as to omit availing himself of an intervention or appeal, yet he might still come before the court, show his interest, and be heard. A marriage cause goes further still; for I believe in most other cases a determination would be forever binding, at least to the parties; but in these questions I conceive it is not; for if there was to be a question between a husband and wife in a cause of joctitation, and, as in this cause, it was determined that there was no marriage; yet the party against whom that sentence was obtained, I apprehend, might appear afterwards, he might produce any new proof that he did not know of at that time; or even if he had not produced what proof he had, he might be heard upon it. The reason of that indulgence I take to be this: by the canon law a marriage was held to be indissoluble, and for that reason a sentence against it never could be final; *sententia contra matrimonium nunquam transibit in rem judicatam*. The canon law, it is well known, has been received in this country with

respect to marriage, particularly as to that position of its being indissoluble. In most other questions, as of property, a person might be bound by time bound by not making so good a case as he should have done; but as a person can not release himself from the obligations of marriage by any lapse of time, or any neglect in stating his case, the question is ever open;" and see *Id.* 406, 442, 443, 450, 451, 506, 507. But there have been, notwithstanding, some expressions of dissent by ecclesiastical judges from this doctrine of the canon law. Thus in *Norton v. Seton*, 3 Phillim. 162, Sir John Nicholl says: "By the canon law the marriage is not absolutely dissolved; the parties are separated; and if the church is deceived, the former marriage is to be renewed; and if a second marriage is contracted, it becomes null and void. What a state to place the parties in! This is something in the text law which I can not readily assent to belong to the law of this country." And in *Meadowcroft v. Huguenin*, 3 Curt. 403, 404, Sir Herbert Jenner Fust observes to counsel: "According to your argument, every child and every child's child may bring a suit to have the sentence reversed; they will equally be strangers; I do not see where it is to stop." So in *Prudam v. Phillips*, *Hargrave's Law Tracts*, 456, note; S. C., 2 Amb. 763; 20 *Howell's State Trials*, 479, note, it is intimated that if a sentence of divorce is obtained by fraud there may be an application for its vacation to the court which pronounced it.

POSSIBILITY OF AND GROUNDS FOR VACATING AND ANNULING DIVORCES AT AMERICAN LAW.—In America, the law in regard to vacating and annulling divorces is by no means uniform. Governed probably by the reason that judgments of divorce ought to be more stable than others, it has been frequently held that statutes providing for the opening, within a certain time, of judgments or decrees rendered without any other notice than publication, do not apply to actions for divorce: *McJunkin v. McJunkin*, 3 Ind. 30; *Lewis v. Lewis*, 15 Kan. 181, citing the principal case 190, in a review of the cases on this subject; *O'Connell v. O'Connell*, 10 Neb. 390; S. C., 6 N. W. Rep. 29; *Gilruth v. Gilruth*, 20 Iowa, 225; *Whitcomb v. Whitcomb*, 46 Id. 437; *Owens v. Sims*, 3 Coldw. 544. The contrary conclusion was, however, reached in *Smith v. Smith*, 20 Mo. 166, Scott, J., dissenting; and in *Lawrence v. Lawrence*, 73 Ill. 577, Walker, C. J., and Breese and Scott, JJ., dissenting, the argument of the majority in the latter case being that a decree of divorce against one notified by publication only, and who did not appear, was not absolute until after the expiration of the time allowed by the statute for opening the decree; and persons acting in view of the decree, and seeking to acquire rights under it, would do so knowing its provisional, conditional character. It is further held that the sections of the Indiana code which provide for relieving a party from a judgment taken against him through his mistake, inadvertence, surprise, or inexcusable neglect, and for granting a new trial within a certain time, on cause shown, do not apply to decrees of divorce: *Ewing v. Ewing*, 24 Ind. 468, citing the principal case 476; but on the other hand, *Rush v. Rush*, 10 Iowa, 648; S. C., 26 Am. Rep. 179, holds that a decree of divorce fraudulently obtained may be set aside, notwithstanding the rights of innocent third parties may have intervened, under section 3154 of the Iowa code of 1873, providing for the vacating of a judgment or order after the term at which it was made. And the principal case; *Folsom v. Folsom*, 55 N. H. 78; *Colvin v. Colvin*, 2 Paige, 385; S. C., 22 Am. Dec. 644; and *Gilruth v. Gilruth*, *supra*, did not justify the conclusion that a decree of divorce should be excepted from the provisions of the section. The statutes of certain states are more explicit in their terms. Thus section 2185, Missouri revised statutes of 1879, provides that where an appeal is not taken or writ of error sued out in time,

"no petition for review of any judgment for divorce rendered in any case arising under this chapter shall be allowed, any law or statute to the contrary notwithstanding;" and under this a decree of divorce can not be set aside for fraud, on petition after the lapse of the term at which the decree was rendered, although prior to this act this was possible: *Mansfield v. Mansfield*, 26 Mo. 163. Section 135 of the New York code, fixing a time wherein a defendant, "except in an action for divorce," may be allowed to come in and defend, where service of summons was by publication, is held not to deprive the court of power to open a default where summons was so served: *Brown v. Brown*, 53 N. Y. 609; and see *Denton v. Denton*, 41 How. Pr. 221.

Independent of any statutory qualification, it is undoubtedly the general rule that "decrees of divorce may, when obtained by fraud, be vacated in the same manner and under the same circumstances which would warrant the vacation of any other decree, although the party who obtained the fraudulent judgment has contracted another marriage:" *Freeman on Judgments*, sec. 439; and see *Harding v. Alden*, 9 Greenl. 140; S. C., 23 Am. Dec. 549. There can certainly be no question that a decree of divorce obtained by fraud, and without the libelee's knowledge, may be set aside on the application of the libelee during the same term: *Carley v. Carley*, 7 Gray, 545; and it is held that if, during the term, it is shown that the divorce was the result of collusion, or was aided or brought about by a collusive agreement of the parties, the court, on motion of either party, should vacate the decree and let in the defense: *Danforth v. Danforth*, 105 Ill. 603. So under article 6, section 13, of the Alabama constitution of 1819, which provided that "divorces from the bonds of matrimony shall not be granted but in cases provided by law, by suit in chancery; and no decree for such divorce shall have effect until the same shall be sanctioned by two-thirds of both houses of the general assembly," the marriage tie is not dissolved before a decree of divorce has received legislative sanction, and therefore such decree may be impeached for fraud by an original bill in the nature of a bill of review, filed for that purpose; distinguishing the principal case (page 457), in that the decree which was there sought to be annulled operated a dissolution of the marriage and fixed a status of the parties, and holding (page 460) that, upon its authority, if the divorce in the case at bar were confirmed by the legislature, the power of the court to annul the decree was open to question: *Ex parte Smith*, 34 Ala. 455. Where, also, a libelee or defendant has, through the fraud of the libelant or plaintiff, been prevented from putting in an answer or making a defense to a libel or suit for divorce, there should be no question of the right of the injured party, at a subsequent term or at any time, provided there has been no laches, by appropriate proceedings, to vacate or annul the decree or judgment: *Edson v. Edson*, 108 Mass. 590; S. C., 11 Am. Rep. 393; *Johnson v. Coleman*, 23 Wis. 452; *Crouch v. Crouch*, 30 Id. 667; *Holmes v. Holmes*, 63 Me. 420; *Adams v. Adams*, 51 N. H. 388; S. C., 12 Am. Rep. 134; *Rawlins v. Rawlins*, 18 Fla. 345; *True v. True*, 6 Minn. 458; *Young v. Young*, 17 Id. 181; *Mansfield v. Mansfield*, 26 Mo. 163; *Allen v. Maclellan*, 12 Pa. St. 328; S. C., 51 Am. Dec. 608; *Boyd's Appeal*, 38 Pa. St. 241; *Wanamaker v. Wanamaker*, 10 Phila. 466; *Nickerson v. Nickerson*, 13 Week. Notes Cas. 210; and this, although the party who perpetrated the fraud has married again, and issue of such marriage is born: *Allen v. Maclellan*, *Crouch v. Crouch*, *Holmes v. Holmes*, *supra*; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Rush v. Rush*, Id. 648; S. C., 26 Am. Rep. 179. The neglect of the plaintiff in a divorce suit to proceed to trial in two previous divorce suits brought by him, where issues had been formed, his procuring publication of the summons in a paper

most unlikely ever to notify the defendant, and his untrue affidavit that he could not with due diligence find her residence or post-office address, were held, in *Everett v. Everett*, 18 N. W. Rep. 637, to be evidence of fraud and bad faith, which warranted the setting aside of the decree so obtained. And where a divorce was granted in a suit brought in the name of an insane wife, in confinement in an asylum in another state, it was held, on a bill filed on her behalf to set aside the divorce, alleging that it was procured by fraud of the husband, that whether there was fraud in fact or not, the law would presume fraud and set aside the divorce, no matter by whose advice it was obtained: *Bradford v. Abend*, 89 Ill. 78; S. C., 31 Am. Rep. 67.

Bigelow, C. J., in *Edson v. Edson*, *supra*, thus states the law on this question: "It is no doubt true that a decree or judgment which stands unreversed and in force, can not be called in question or impeached in collateral proceedings by one of the parties to the original suit; it is a very different proposition to maintain that an innocent party can not invoke the power of the court by which the original judgment or decree was rendered, to vacate and annul it on the ground that it was produced by a fraud practiced on the court to his gross injury. We believe it to be an established principle of jurisprudence that courts of justice have power, on due proceedings had, to set aside or vacate their judgments and decrees, whenever it appears that an innocent party without notice has been aggrieved by a judgment or decree obtained against him without his knowledge by the fraud of the other party. Nor is this principle limited in its operation to courts which proceed according to the course of the common law. It is equally applicable to courts exercising jurisdiction in equity, and to tribunals having cognizance of cases which are usually heard and determined in the ecclesiastical courts. In tribunals of the last-named description, whose decrees can not be revised by writ of error or review, the proper form of proceeding is by petition to vacate the former decree as having been obtained by fraud upon the party and imposition upon the court." It is plain that the conclusion reached in the principal case is not opposed to the doctrine laid down by the preceding decisions. Thus, in *Edson v. Edson*, *supra*, in holding that upon petition of the party aggrieved a decree of divorce obtained at a former term against the petitioner by false testimony, on a libel of which she had no actual notice, knowledge of which was fraudulently kept from her by the libellant, and of which the court had only apparent jurisdiction, founded on false allegations of domicile, might be vacated, it is said: "The case of *Greene v. Greene*, 2 Gray, 361, which is cited and relied upon by the respondent, is not in conflict with the general current of authorities. Some of the general expressions used by the court, when disconnected from the facts of the case then in adjudication, have been thought to give sanction to the doctrine that a decree of divorce, when once obtained, could not be impeached in any form or mode of proceeding, or set aside by one of the parties to the original suit, however fraudulent and collusive may have been the conduct of the party in its procurement. But such a conclusion is not a fair and legitimate result of the language and reasoning of the court, when considered, as it ought to be, solely with reference to the actual case before the court for adjudication. The attempt there was, upon a new libel for divorce, to try over again a case which had before been adjudicated between the same parties, after due notice and opportunity for a full hearing on the merits. Strictly speaking, the decision is an authority only for the proposition that a decree of divorce can not be called in question or invalidated, on the ground of fraud in its procurement, in a separate and independent libel, subsequently brought be-

tween the same parties, when it appears that the first decree was entered after due notice to the adverse party, followed by an adjudication upon evidence offered in support of the allegations in the libel. To this extent there can be no doubt that the decision is in harmony with sound principle and with adjudicated cases. But beyond this, which was the precise point adjudicated, the authority of the case can not be properly extended." So, in *Adams v. Adams, supra*, where it was held, on motion to set aside a decree of divorce granted more than seven years before, that courts have power to set aside or vacate such decrees, as in case of other judgments, and will exercise that power when fraud or imposition is clearly established, the following observation is made: "The case of *Greene v. Greene* merely decides that on an original bill filed at a subsequent term a decree of divorce will not be set aside for fraud and false testimony; and distinctly declines to give an opinion on the point whether such decree is open to revival by review, writ of error, *certiorari*, or any other proceeding in the nature of an appeal, the court taking the ground that such decree, when the court has jurisdiction, is conclusive between the parties, unless revised on some legal proceeding instituted directly for that purpose, although third persons might be allowed to attack it collaterally. And besides, it would seem that *Greene v. Greene* has been overruled in Massachusetts, in *Edson v. Edson*;" but the learned court is clearly mistaken in regard to the import of the last case which it cites. See also the principal case explained in an able article in 4 Am. Law Reg. 1. In this connection it may be well to notice the following pertinent criticism on the view taken of *Allen v. Maclellan, supra*, by Shaw, C. J., in the principal case, found in a note to a report of the latter in the periodical last cited, page 48: "The facts of the case of *Allen v. Maclellan*, 12 Pa. St. 323, referred to in the foregoing opinion, seem to have been somewhat misapprehended. The action there, though in form upon a promissory note, was in fact brought to test the power of the common pleas of Philadelphia to vacate, on the ground of fraud, a decree of divorce which had been granted at a previous term. This was the main question before the supreme court, and it was decided in the affirmative, in a very able opinion; the conclusions of which are, to some extent, adverse to those of *Greene v. Greene*." The case of *Parish v. Parish*, 9 Ohio St. 534, seems to be the only authority clearly opposed to the foregoing views, and is based upon a wrong understanding of the principal case. It was there held that a decree of divorce, although obtained by fraud and false testimony, without notice of the pendency of the petition, the published notices being willfully suppressed, can not set aside on an original bill filed at a subsequent term, citing the principal case (page 538) as decisive—an extreme doctrine not warranted by the conclusion there reached.

In accordance with the decision in the principal case, it is held that, in the absence of fraud in obtaining it, a decree of divorce *nisi* will not be opened three years after it was granted to let in evidence to contradict the facts upon which it was founded: *Whiting v. Whiting*, 114 Mass. 494, citing the principal case 496, to this point; and a decree of divorce will not be vacated by the court after the term at which it was entered, without clear proof that the libelee was prevented, by fraud of the libellant or imposition upon the court, from being heard in the original suit upon some matter which, if then proved, would have constituted a good defense; thus a decree will not be vacated after the lapse of twelve years, upon the ground that the adverse party suborned witnesses, when all the evidence to sustain that charge was known to the party making it at the time of the trial; nor upon the ground

that the adverse party induced the petitioner's witnesses to secrete themselves and avoid testifying, when it does not appear that the petitioner took any means to procure their attendance, or to obtain a postponement of the trial; nor is it any ground for vacating the decree that the petitioner has since been made, by a change in the law, a competent witness to testify to his own innocence: *Holbrook v. Holbrook*, Id. 568. So a virtual retrial of a libel for divorce can not be granted upon an original petition, on the ground that the decree was obtained by the fraud and perjury of the libellant and his witnesses, no fraud of the libellant being shown, except by implication from the charge of perjury: *Folsom v. Folsom*, 55 N. H. 78, citing the principal case 82. A decree of divorce will not be set aside or opened upon the service of a subpoena upon the defendant, who was confined in the state prison, unless it appears that the defendant, by reason of his situation, was deprived of a legal and meritorious defense: *Phelps v. Phelps*, 7 Paige, 150; and under similar circumstances, the decree will not be opened for the purpose of enabling the defendant to set up a condonation of the adultery as a defense. *Hofmire v. Hofmire*, Id. 60; S. C., 32 Am. Dec. 611. So the fact that a wife who had obtained a divorce on the ground of adultery had herself committed adultery before the divorce was granted, by marrying again, she believing at the time that she had been legally divorced from her first husband and had a right to marry, is not a ground for setting aside a decree of divorce to which she was otherwise beyond question entitled: *Robertson v. Robertson*, 9 Daly, 44. If a judgment or decree of divorce is rendered without jurisdiction of the person, as where the summons or subpoena is served on the defendant in another state, it will be set aside, on motion, at a subsequent term: *Weatherbee v. Weatherbee*, 20 Wis. 499; *Dunn v. Dunn*, 4 Paige, 425; so where no summons at all is issued or served, an action to annul and set aside the judgment will lie: *Willman v. Willman*, 57 Ind. 500; and a judgment may be vacated on motion for irregularity affecting the jurisdiction of the person, in that the affidavit on which the order for publication of the summons was made did not state any facts to show that the defendant could not with due diligence be found or served with the summons in the state; and this, even after the prevailing party has married again, but it should be done with hesitation, and only after the gravest and most careful consideration: *Wortman v. Wortman*, 17 Abb. Pr. 66; and where a bill for divorce was, upon default, taken as confessed, and the next day the defendant filed affidavits showing satisfactorily that the person with whom the copy of the summons was left was not a member of his family, it was held error to overrule a motion to set aside the default and permit the defendant to answer: *Brown v. Brown*, 59 Ill. 315. A decree improvidently entered under a statute which has been repealed may be vacated: *Wales v. Wales*, 119 Mass. 89. So a decree may be vacated and the complaint dismissed, on the joint petition of the parties, after the decree has been enrolled; but the rights of third parties acquired under such decree will not be disturbed: *Colvin v. Colvin*, 2 Paige, 385; S. C., 22 Am. Dec. 644. But a decree setting aside a sentence of divorce adjudged against a wife, and declaring the same void in part, or only so far as to give the wife her dower, and a distributive share in the personal estate of the deceased husband, leaving so much of the decree as dissolved the marriage contract in force, is inconsistent and can not be supported either upon principle or authority; there can not be two widows lawfully entitled to dower, any more than there can be two wives legally entitled to the support, care, protection, and name of the husband: *McCraney v. McCraney*, 5 Iowa, 232, citing the principal case 253.

GOOD MOTIVES AND DILIGENCE REQUIRED.—A party seeking to vacate or annul a judgment or decree of divorce must be actuated by good motives: *Zoellner v. Zoellner*, 46 Mich. 511; S. C., 9 N. W. Rep. 831; *Singer v. Singer*, 41 Barb. 139; S. C., 17 Abb. Pr. 66, note; *Potts v. Potts*, 10 Week. Notes Cas. 102; and must proceed with due diligence: *Zoellner v. Zoellner*, *Singer v. Singer*, *Potts v. Potts*, *supra*; *Burge v. Burge*, 88 Ill. 164; and see *Davis v. Davis*, 30 Id. 180, 184; and if these requirements are not observed, they will be fatal to the application. These requisites are thus clearly set forth by Ingraham, J., in *Singer v. Singer*, *supra*: "Independent of any other considerations, if the motion was properly made, and in due season, the court would order any judgment of divorce obtained by collusion or fraud to be set aside, not from any regard to the parties concerned, but from motives of public policy. In such a case, however, it should be made apparent that the party so moving was acting from good motives, and not from any expected personal advantage. But where the judgment of divorce has been acquiesced in for the period of several years, and the plaintiff has again been married, some better reason than the mere gratification of personal feeling, or the desire to obtain a further sum of money from the plaintiff, should be made clearly to appear, before the court would be warranted in granting such an application." But upon sufficient cause shown, a decree of divorce may be vacated, although the libellant is dead, and more than twelve years have elapsed since the decree was made: *Fidelity Ins. Co.'s Appeal*, 93 Pa. St. 242; S. C., 8 Week. Notes Cas. 395. So where the plaintiff marries again after obtaining a divorce, the defendant can not be said to acquiesce therein, if she does not know of the divorce for more than a year after the second marriage, and had not the means to set it aside immediately after knowledge thereof: *Everett v. Everett*, 18 N. W. Rep. 637.

DIVORCE OBTAINED BY COLLUSION.—In *Prudam v. Phillips*, Hargrave's Law Tracts, 456, note; S. C., 2 Amb. 763; 20 Howell's State Trials, 479, note, it is said that if both parties colluded in the cheat upon the court, it was never known that either of them could vacate the judgment; so it is held that where a wife obtained a divorce on a sworn bill containing the usual allegation that there was no collusion, she could not maintain a subsequent bill to set aside the decree on the ground that it was procured by collusion: *Simmons v. Simmons*, 47 Mich. 253; S. C., 10 N. W. Rep. 360; and that a party to a collusive divorce obtained in another state was bound by it, and could not in another suit for divorce take advantage of the fraud and illegality of the proceedings upon which the decree was based: *Nichols v. Nichols*, 25 N. J. Eq. 60, citing the principal case 65. The question of public policy is apparently overlooked in these cases, although it seems to us that it should be considered. In *Danforth v. Danforth*, 105 Ill. 603, it is held that if during the term it is shown that the divorce is the result of collusion, or was aided or brought about by a collusive agreement between the parties, the court, on motion of either party, should vacate the decree. A decree of divorce will not be set aside on account of fraud and collusion between the plaintiff's attorney and the defendant, when the plaintiff was not a party to such fraud and was entitled to the decree: *Harst v. Harst*, 16 N. Y. Week. Dig. 461.

RATIFICATION OF DIVORCE.—A party against whom a decree of divorce has been granted can not, after his subsequent marriage with another, prosecute an appeal: *Stephens v. Stephens*, 51 Ind. 542; *Garner v. Garner*, 38 Id. 139. By his marriage after his divorce he admits the legality of the divorce proceedings. This principle will evidently apply where, after a divorce, the

libelee or defendant marries and then seeks to vacate or annul the decree or judgment: See *Webster v. Webster*, 54 Iowa, 153.

PARTIES TO PROCEEDINGS.—Certain questions have arisen with reference to parties in actions to vacate or annul divorces. Thus, where infant children of divorced parents sought to set aside the decree of divorce on the ground of collusion, it was held that they were strangers to the record, and could not maintain the bill: *Baugh v. Baugh*, 37 Mich. 59; S. C., 26 Am. Rep. 495; but see *Rawlins v. Rawlins*, 18 Fla. 345. So the second husband of a divorced woman can not maintain an action to have the judgment of divorce canceled, on the ground that it was obtained through fraud and collusion: *Ruger v. Heckel*, 85 N. Y. 483; S. C., 12 Rep. 183; 12 N. Y. Week. Dig. 381; and where, after the rendition of a decree of divorce in Iowa, at the suit of the wife, the husband, who was a resident of New York, obtained a divorce there, it was held that he had no interest in the subject-matter of the wife's action which entitled him to a reopening of the case on the ground that the decree was fraudulently obtained, it not appearing that the parties had any children, or that property rights were involved: *Webster v. Webster*, 54 Iowa, 153. But on the other hand, in *Rawlins v. Rawlins*, 18 Fla. 345, it was held that where a divorce was obtained by a husband through fraud and imposition, and the wife continued to live with her husband, she and the children born to the parties after the decree may proceed by original bill in the nature of a bill of review, against the husband's administrator and the children born before the decree, to set the decree aside and recover their interest in the estate; and such bill is not objectionable upon the ground either of misjoinder of parties plaintiff or of multifariousness. So in *Johnson v. Coleman*, 23 Wis. 452, it is decided that in a suit in equity instituted by a wife after her husband's death to have a judgment of divorce, obtained by him through fraud, set aside, both the administrator and heirs at law of the husband were proper parties defendant.

PROCEDURE.—In the absence of any statute to the contrary, the manner of proceeding to set aside or annul decrees or judgments of divorce is evidently not different from that in other cases. It will be seen, from the examination of the foregoing decisions, that the decrees or judgments were attacked in two ways: by motions, and by original actions in equity. In regard to an original bill in the nature of a bill of review being a proper proceeding, see particularly *Rawlins v. Rawlins*, 18 Fla. 345; *Ex parte Smith*, 34 Ala. 455; *Bamford v. Bamford*, 4 Or. 30, 37. In *Watson v. Watson*, 47 How. Pr. 240; S. C., 1 Hun, 267; 3 Thomp. & C. 667, in which it was held that where a judgment of divorce was obtained, and subsequently the plaintiff died, a motion made upon the administrator to set aside the judgment for fraud and irregularity was properly denied, and that the only mode in which the relief sought could properly be obtained seemed to be an action in the nature of a bill of review, Mullin, P. J., said: "A court of chancery has power, on bill filed, to vacate a judgment of a court of law obtained by fraud; resort to a court of equity becoming necessary because of the difficulty there formerly was in courts of law in trying questions of fact arising on motions, and particularly questions of fraud; and when discovery was necessary, it was powerless to grant relief. When, however, none of these difficulties presented themselves, the court granted relief on motion, and only turned the parties over to the expensive and tedious remedy of a suit in chancery where it found itself unable to determine the questions of fact arising on the motion. But now courts of law are authorized to refer it to a referee to take proof on disputed questions of fact arising on motion, and in that way to afford the par-

ties an opportunity to ascertain the truth by the examination of the witnesses produced before such referee. On the coming in of the evidence thus taken, the court of law is as capable of passing upon the questions of fact as would be a judge sitting in equity. There is not, therefore, ordinarily any necessity now for sending a party seeking to set aside a judgment for fraud in obtaining it to a court of equity. There may, however, be cases in which that course may still be not only proper but necessary." In *Johnson v. Coleman*, 23 Wis. 452, it was held that a suit in equity might be instituted, although it was possible the judgment might be set aside on motion. In Iowa, where, it will be remembered, the statute providing for setting aside defaults granted upon service by publication only is decided to have no application to proceedings for divorce, a court of equity may vacate a decree of divorce obtained by fraud: *Whitcomb v. Whitcomb*, 46 Iowa, 437. In Indiana, the case of *McQuigg v. McQuigg*, 13 Ind. 294, holds that the common-law right to set aside a judgment of a superior court for fraud, by bill in chancery, or by complaint in the nature of such bill, is entirely superseded by the various provisions of the code for the vacation of judgments; and therefore judgments of divorce could only be set aside upon a motion for a new trial, made within the time allowed therefor; and see *Woolley v. Woolley*, 12 Id. 663; but the later case of *Willman v. Willman*, 57 Id. 500, decides that there may be an action to annul and set aside a judgment of divorce, which is void for want of jurisdiction, no summons having been issued or served. In Missouri, the rule is held to be that a judgment of divorce can not be attacked for fraud otherwise than in a direct proceeding in the court in which it was rendered; therefore, where a divorce was granted a husband by the circuit court of one county, the decree can not be attacked in another circuit court by making it one of the issues in another suit brought by the wife: *De Grauw v. De Grauw*, 7 Mo. App. 121, citing the principal case 131, and *Parish v. Parish*, 9 Ohio St. 534, as denying the jurisdiction of courts to interfere with the parties, from grounds of public policy, in cases of the grossest and most cruel fraud, after a divorce has been granted.

EVIDENCE.—Before a court will set aside a decree of judgment of divorce for fraud, the fraud must be clearly established: *Lord v. Lord*, 66 Me. 265; *Holbrook v. Holbrook*, 114 Mass. 568; *Adams v. Adams*, 51 N. H. 388; S. C., 12 Am. Rep. 134; and see *Gechter v. Gechter*, 51 Md. 187. And the burden of proof is upon the party seeking the relief: *Hopkins v. Hopkins*, 36 Wis. 167.

EFFECT OF SETTING ASIDE OR ANNULING DIVORCE.—"If a decree of divorce be annulled, the marital rights, obligations, and status of the parties are revived, although one of them has in the mean time married and borne children of the last marriage:" Freeman on Judgments, sec. 333; *Comstock v. Adams*, 23 Kan. 513; S. C., 33 Am. Rep. 191; 12 Chicago Legal News, 259. So a decree of divorce subsequently adjudged void on the ground of fraud is no defense to an indictment for adultery through a second marriage contracted in reliance upon the validity of the decree: *State v. Whitcomb*, 52 Iowa, 85; S. C., 35 Am. Rep. 258.

THE PRINCIPAL CASE IS CITED in the following instances, in addition to those given in the foregoing note: In *Sparhawk v. Willa*, 5 Gray, 427, to the point that a matter in controversy, which has been inquired into and settled by a court of competent jurisdiction, can not be drawn in question in another suit between the same parties; and in *Hood v. Hood*, 11 Allen, 200, to the point that where a divorce had been obtained in another state by a husband, it was not competent, in a libel for divorce brought by the wife in Mas-

sachusetts, to offer evidence to contradict that judgment, and show that it was obtained by fraud. The quotation made by Shaw, C. J., in the principal case, from *Prudam v. Phillips*, Hargrave's Law Tracts, 456, note, to the effect "that fraud was a matter of fact, and if used in obtaining judgment, was a deceit on the court and hurtful to strangers, who, as they could not come in to reverse or set aside the judgment, must of necessity be admitted to aver it was fraudulent," is likewise quoted with approval in *De Armond v. Adams*, 25 Ind. 458; *Lee v. Back*, 30 Id. 153, in holding that a stranger to a judgment might, in a collateral proceeding, attack it for fraud. And the rule laid down that "the maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been either actually tried, or so in issue that it might have been tried, it is not again admissible," etc., is quoted and approved in *United States v. Throckmorton*, 98 U. S. 63; *Brooks v. O'Hara*, 8 Fed. Rep. 534. The principal case is also referred to in *Lucas v. Lucas*, 3 Gray, 140, in discussing the alarming and dangerous consequences of the reversal of a decree of divorce *a vinculo*.

THURBER v. MARTIN.

[3 GRAY, 394.]

RIPIARIAN PROPRIETOR'S CONSTANT USE OF WATERS OF STREAM for mill purposes for fifty years or more does not deprive a proprietor above of the right to enjoy a similar use, provided that use is reasonable and does not deprive the proprietor below of its enjoyment substantially according to its natural flow, although it subjects him to such disturbance as necessarily and unavoidably follows.

TORT by the owner of a mill against the owner of another mill, situated half a mile above on the same stream, to recover damages caused by the defendant's use of the water in such a manner as to disturb its natural flow, and divert it from the plaintiff's mill. The plaintiff showed, at the trial, that his mill had been erected fifty or sixty years before that of the defendant, and was in constant use ever since. He requested the judge to instruct the jury that by such use for such a length of time he acquired an absolute right to have the waters of the stream come to his mill, according to their natural flow, without any interruption or disturbance whatever; but the judge declined to give the instruction, and charged that every riparian proprietor had a right to use the waters of a running stream for mill purposes; that priority of occupation secured to the first occupant the exclusive right to the use of the waters to the extent of his occupation; but that priority of use at any particular point, however long continued, could never deprive the owner of lands bounded on the stream, at any point above the mill-pond of the first

occupant, of the right to have and enjoy a similar use of the water as it passed by his lands; this right, however, was limited to using the water in a reasonable and proper manner for working a mill of such magnitude only as was adapted and appropriate to the size and capacity of the stream, and the quantity of water flowing therein; that he had no right to detain the water an unreasonable length of time, nor discharge it in such excessive quantities that it would run to waste and be lost to the riparian proprietors below; but that he was bound to so use the water that every riparian proprietor below would have its enjoyment and use substantially according to its natural flow, but still subject to such interruption as was necessary and unavoidable in working a mill of suitable magnitude, adapted and appropriate to the size and capacity of the stream, and the quantity of water flowing therein. A verdict was returned for the defendant, and the case was reported for the consideration of the whole court, judgment to be entered on the verdict, if the instructions given were correct, and if not, a new trial to be granted.

N. Morton, for the plaintiff.

C. I. Reed, for the defendant.

By Court, *SHAW*, C. J. The court are of opinion that the law was rightly stated by the judge at the trial; that it was laid down with fullness and accuracy, and with proper qualifications. Every man has a right to the reasonable use and enjoyment of a current of running water, as it flows through or along his own land, for mill purposes, having a due regard to the like reasonable use of the stream by all other proprietors above and below him. In determining what is such reasonable use, a just regard must be had to the force and magnitude of the current, its height and velocity, the state of improvement in the country in regard to mills and machinery, and the use of water as a propelling power, the general usage of the country in similar cases, and all other circumstances bearing upon the question of fitness and propriety in the use of the water in the particular case. If any party claims a special right to the use of the water, more beneficial to himself and more burdensome to the riparian proprietors above or below, than what may be called the natural or general right to the reasonable use of the stream, he must establish such right by grant or prescription.

In the present case, there seems to have been nothing to show any use of the stream by the defendant beyond a reasonable

use; or if there was, the instructions were such as to leave the question of fact fully to the jury, whose province it was to pass upon it.

Judgment on the verdict.

PRIOR APPROPRIATION OF WATER OF STREAM, RIGHTS ACQUIRED BY: See *Heath v. Williams*, 43 Am. Dec. 265, and where the question is discussed at length; *Olney v. Fenner*, 57 Id. 711; *Eddy v. Simpson*, 58 Id. 408; *Stein v. Burden*, 60 Id. 453; see also *Elliot v. Fitchburg R. R.*, 57 Id. 85; *Newhall v. Ireson*, 54 Id. 790, and cases collected in note. The right acquired by a riparian proprietor who first erects and establishes a mill is not so absolute as to give him the control of the whole stream, or deprive other proprietors of the reasonable enjoyment of the privileges to which they are naturally entitled; the latter may still construct and maintain dams across the stream at any point, for the purpose of raising heads of water to work mills of their own, provided that they do not thereby unreasonably detain the water above, or throw it back from below, so as to interfere with the previously existing mill: *Smith v. Agawam Canal Co.*, 2 Allen, 357; but the right to an exclusive use of the water may undoubtedly be acquired by adverse possession and enjoyment where it is real and actual; thus the proprietor who first lawfully erects his dam across the stream to create a fall to operate his mill has a right afterwards to maintain it against all other proprietors both above and below; and to this extent priority of occupancy gives priority of title: *Pratt v. Lamson*, Id. 238, both citing the principal case. And in *City of Springfield v. Harris*, 4 Id. 496, the principal case is cited to the point that each riparian proprietor has a right to the natural flow of the stream for any hydraulic purpose he may see fit to apply it, and therefore such proprietor can not be held responsible for any injurious consequences which result to others, if the water is used in a reasonable manner, and the quantity used does not exceed what is reasonably and necessarily required for the operation of works of such magnitude as are adapted to the size and capacity of the stream, and the quantity of water usually flowing therein.

USE OF WATER BY RIPARIAN PROPRIETOR REQUIRED TO BE REASONABLE: Note to *Newhall v. Ireson*, 54 Am. Dec. 794; note to *Heath v. Williams*, 43 Id. 275; *Elliot v. Fitchburg R. R.*, 57 Id. 85, and note; and see the principal case cited to this point in *Chandler v. Howland*, 7 Gray, 350; *Merrifield v. City of Worcester*, 110 Mass. 219; see also *Smith v. Agawam Canal Co.*; *City of Springfield v. Harris*, cited *supra*; and *Union Mill and Mining Co. v. Ferris*, 2 Saw. 196. And in determining the question of reasonable use of water by a riparian proprietor, the jury may consider, among other things, the general usage of the country in similar cases: *Dumont v. Kellogg*, 29 Mich. 425, referring to the principal case.

CLARKE v. MAY. WHIPPLE v. KENT.

[2 GRAY, 410.]

JUSTICE WHO EXCEEDS JURISDICTION WITH COGNIZANCE OF FACTS CONSTITUTING EXCESS is liable as a trespasser to any party injured; although he may not be liable where the defect or want of jurisdiction is occasioned by some facts or circumstances applicable to a particular case of which he had neither knowledge nor means of knowledge.

OFFICER IS NOT LIABLE FOR ACTS DONE IN EXECUTION OF PROCESS, issued by a justice without jurisdiction, where the excess of jurisdiction does not appear on the face of the process.

TORT for false imprisonment. There were two cases, the first of which was brought against May, a justice of the peace, and the second against May and Kent, a constable. The plaintiffs, on August 30, 1853, were summoned to appear before May, as witnesses in a criminal prosecution, in which the defendant was tried and acquitted on the same day, but they failed to obey the summons. On September 7, 1853, the plaintiffs were arrested by Kent on a *capias* issued by May, for failing to appear as witnesses, were adjudged guilty of contempt, and on refusing to pay a fine were committed to jail by Kent, under a *mittimus* issued by May; but on the next day the plaintiff Clarke was released upon *habeas corpus*, and thereupon the defendants discharged the plaintiff Whipple.

C. B. Farnsworth, for the plaintiffs.

C. I. Reed, for the defendants.

By Court, BIGELOW, J. The ground on which Clarke, the plaintiff in the first-named suit, was discharged, on the return of the writ of *habeas corpus*, from the imprisonment to which he had been sentenced by the defendant May, was that, under the revised statutes, chapter 94, sections 5, 6, and statute of 1838, chapter 42, by virtue of which justices of the peace are empowered to punish for contempt persons duly summoned to testify before them who fail or neglect to appear without reasonable excuse, no authority was conferred to punish contempt by a separate and independent proceeding; but that the power and jurisdiction of magistrates in such cases was only incidental and auxiliary to the trial of the cause, in which the witnesses were summoned; and could not be legally exercised, except during the pendency of such cause; that after its final disposition by a judgment the authority to punish such contempt ceased, and that Clarke was therefore illegally committed.

The decision in that case is decisive of the liability of the defendant May in the present actions. Although he had jurisdiction of the subject-matter, he was empowered by law to exercise it only in a particular mode, and under certain limitations. Having disregarded these limitations, and exercised his authority in a manner not sanctioned by law, he has been guilty of an excess of jurisdiction, which renders him liable as a trespasser to the party injured. The rule of law by which magistrates

are held responsible in such cases, and the authorities in support of the rule, are fully stated in *Piper v. Pearson*, 2 Gray, 120 [*ante*, p. 438].

It is undoubtedly true that judges and magistrates can not be held liable in trespass for acting without jurisdiction, or for exceeding the limits of their authority where the defect or want of jurisdiction is occasioned by some facts or circumstances applicable to a particular case of which the judge or magistrate had neither knowledge nor the means of knowledge. In other words, if the want of jurisdiction over a particular case is caused by matters of fact, it must be made to appear that they were known, or ought to have been known, to the judge or magistrate, in order to hold him liable for acts done without jurisdiction. Otherwise the maxim, *Ignorantia facti excusat*, applies: *Pike v. Carter*, 3 Bing. 78; S. C., 10 Moo. 376; *Lowther v. Earl of Radnor*, 8 East, 113; *Calder v. Halket*, 3 Moo. P. C. 77. But the case at bar does not fall within this qualification of the general rule. The defendant May was cognizant of all the facts which constituted the defect of jurisdiction in the proceedings against the plaintiff.

In regard to the liability of the other defendant, Kent, who as a constable served the *capias* and committed the plaintiffs to jail upon the *mittimus*, a different rule is applicable. The magistrate had jurisdiction of the subject-matter; the irregularity, which constituted an excess of jurisdiction in him, and for which he is liable, did not appear on the face of the *capias* or the *mittimus*, which were regular in form, and contained nothing from which any defect or excess of jurisdiction could be known or inferred by the officer. He was therefore serving a process, regular on its face, in a matter of which the magistrate had apparently entire and perfect jurisdiction, which he had properly exercised. In such cases, the rule is well settled that the officer can not be held liable. His warrant, being regular on its face, and being issued by a magistrate having jurisdiction over the subject-matter, affords a full justification for all acts done by him in its lawful execution: 1 Ch. Pl., 11th Am. ed., 182, note 2; *Donahoe v. Shed*, 8 Met. 326; *Fisher v. McGirr*, 1 Gray, 45, 46 [*ante*, p. 381]; *Kennedy v. Duncklee*, Id. 71.

The result is, therefore, that the plaintiffs in both cases are entitled to judgment for their damages against the defendant May; and in the second case, the defendant Kent is entitled to judgment.

LIABILITY OF JUDICIAL OFFICERS.—See *Piper v. Pearson*, *ante*, p. 438, and note. This case and the principal case are cited as companions in *Ela v. Smith*, 5 Gray, 136; *Kelly v. Bemis*, 4 Id. 84; *Vanderpool v. State*, 34 Ark. 176, 177; Cooley on Torts, 416; and for a particular mention of the latter authorities, see the note above referred to. The principal case is also referred to in *Piper v. Pearson*, *supra*, to the point that if a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; and if he attempts to enforce any process founded on any judgment, sentence, or conviction in such case, he thereby becomes a trespasser; and in *Sullivan v. Jones*, 2 Gray, 572, it is cited to the point that justices of the peace have always been held responsible to individuals for all the injurious consequences arising from every illegal act they may have done, either in the adjudication of causes of which they had no jurisdiction, or in the exercise of their ministerial powers, or in the discharge of their ministerial duties.

OFFICER EXECUTING PROCESS, WHEN PROTECTED THEREUNDER: See *State v. Weed*, 53 Am. Dec. 188, and prior cases in note; also *Breck v. Blanchard*, 51 Id. 222; *McDonald v. Wilkie*, 54 Id. 423; *State v. McNally*, 56 Id. 650; *Coleman v. McAnulty*, 57 Id. 229; *Wallace v. Holly*, 58 Id. 518; *Gurney v. Tufts*, Id. 777; *Sprague v. Birchard*, 60 Id. 393; *Fisher v. McGirr*, *ante*, p. 381. The principal case is cited in *Dynes v. Hoover*, 20 How. 81, to the point that where a court has no jurisdiction over the subject-matter, or having such jurisdiction is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered *coram non judice*, an officer executing the process is liable.

SHEPARD v. RICHARDS.

[2 GRAY, 424.]

ASSUMPTI LIES BY TENANT IN COMMON AGAINST CO-TENANT, in Massachusetts, to recover from the latter any surplus in money received by him over and above his share of the profits of the estate; but to maintain the action it must appear that he has received more than his proportion of the proceeds, not of a single article, but of the entire products of the estate, after deducting all proper charges, and that the plaintiff, and no other co-tenants, is entitled to the surplus.

MORTGAGEE OF UNDIVIDED PART OF LAND IS CO-TENANT OF ESTATE, has a right to enter and take possession to the extent of his title under the mortgage, and being in possession, has a right to the perception of his share of the rents and profits, although his entry was for the purpose of foreclosure, and was informal and invalid for that purpose.

CONTRACT by a guardian to recover for apples gathered and sold by the defendant from land of which the children owned two undivided fifteenths. It appeared at the trial that of thirty barrels of apples which grew on the land in 1852, the defendant gathered fourteen barrels, of which he sold twelve; that during the same season the plaintiff sold from six to twelve tons of grass that grew on the land; and that the parties each

paid some taxes; but it did not appear how much. The defendant gave in evidence a mortgage of an undivided fifth of the land, executed to him in 1850 by a co-tenant of the plaintiff's wards, on which was indorsed a certificate to the effect that the defendant had entered upon the land for condition broken, and for the purposes of foreclosure, signed and sworn to by two witnesses, and recorded. It was ruled, upon this evidence, that the defendant had shown himself to be a tenant in common with the plaintiff, and that the latter could not maintain this action, and a verdict for the defendant was directed. Exceptions by the plaintiff.

N. Morton, for the plaintiff.

E. Ames, for the defendant.

By Court, BIGELOW, J. The general rule of the common law, that one partner or tenant in common can not sue his copartner or co-tenant in an action *ex contractu*, but must proceed by action of account or bill in equity, is not the law of this commonwealth. Long before the action of account was abolished by revised statutes, chapter 118, section 43, and when the courts of this state had no jurisdiction in equity of suits between copartners and tenants in common, it was held that *assumpsit* would lie by a tenant in common to recover from his co-tenant any surplus in money over and above his share of the profits. This remedy was said to be consonant to the ancient practice in this commonwealth: *Brigham v. Eveleth*, 9 Mass. 538; *Jones v. Harraden*, Id. 540, note. The same doctrine has been since affirmed in several cases: *Bond v. Hays*, 12 Id. 34; *Wilby v. Phinney*, 15 Id. 116; *Brinley v. Kupfer*, 6 Pick. 179. And it has been held that the remedy in equity now given by the statute does not affect the application of the rule to cases where the remedy by action at law is plain and adequate: *Fanning v. Chadwick*, 3 Id. 420, 424 [15 Am. Dec. 233].

But although this is the well-settled rule of law in this commonwealth, we think the plaintiff fails to bring his case within its operation. The evidence does not show that the defendant has received more than his share of the proceeds of the entire crops and products of the estates owned in common, or that there is any surplus thereof in his hands for which he is bound to account to the plaintiff or his ward. It is not enough for the plaintiff to show that the defendant has taken more than his proportion of a single article raised on the estate; but it must be made to appear that he has received more than his ali-

quot part of the proceeds of all the products of the common property, after deducting all reasonable and proper charges. There must be a balance due at the commencement of the plaintiff's action, in the hands of the defendant, as the result of a final settlement of the account between the parties relating to the estate owned in common. This the evidence on the part of the plaintiff entirely fails to establish. The only fact distinctly proved is, that the defendant gathered and took away more than his share of the apples which grew on the estate in the year 1852. But it does not appear that the plaintiff did not also receive the full share belonging to his wards, out of those which were left on the estate by the defendant; nor that the defendant has received more than his proportion of the entire products of the estate.

Besides, in the present state of the proof, the rights of the other co-tenants to the income and profits of the common property are left wholly indeterminate, and for aught that appears, they may have claims adverse to those of the parties in this action. In such a case, an action of *assumpsit* does not afford an adequate remedy. Where a case is complicated by having three or more parties with adverse interests, the only suitable remedy is by a bill in equity, in which the conflicting claims of all persons interested in the joint property can be adjusted and settled: See Report of Commissioners on Revised Statutes, c. 118, sec. 89, note.

The objection urged by the plaintiff that the defendant can not be regarded as a co-tenant of the estate is not tenable. By virtue of his mortgage, he had the right to enter and take possession of the estate, to the extent of his title under it, both as against the mortgagor and all other persons. Being in possession under a legal title and seisin, he had the right to the perception of his share of the rents and profits: *Goodwin v. Richardson*, 11 Mass. 469; *Welch v. Adams*, 1 Met. 494. It is wholly immaterial that his entry was informal and invalid for the purpose of foreclosure. It is sufficient that it gave him legal possession of the estate under the mortgage.

Exceptions overruled.

ASSUMPSIT LIES BY TENANT IN COMMON AGAINST CO-TENANT, in Massachusetts and certain other states, to recover a share of rents and profits: Note to *Chambers v. Chambers*, 14 Am. Dec. 567; *Fanning v. Chadwick*, 15 Id. 233; *Gardiner Mfg. Co. v. Heald*, 17 Id. 248; see also note to *Dickinson v. Williams*, 59 Id. 144. The principal case is cited to this point in *Badger v. Holmes*, 6 Gray, 119; *Brown v. Wellington*, 106 Mass. 319; and when a tenant

In common recovered the entire loss on a policy of insurance to which he and his co-tenants were entitled, he recovered to their uses respectively, in proportion to their aliquot parts of the common estate, and an action at law will lie on their behalf: *Starks v. Sikes*, 8 Gray, 612; but it is only when a tenant in common has received in money more than his share of the rents and profits of the common estate that an action at law can be sustained in Massachusetts by his co-tenant to recover the surplus: *Peck v. Carpenter*, 7 Id. 284; and see *Blood v. Blood*, 110 Mass. 547, to nearly the same effect. The principal case was cited to all the foregoing points. As to actions of account between co-tenants to recover a share of rents and profits, see *Ruffners v. Lewis' Ex'rs*, 30 Am. Dec. 513; *McPherson v. McPherson*, 53 Id. 416; *Puckett v. Smith*, Id. 686.

THE PRINCIPAL CASE IS FURTHER CITED IN *White v. Maynard*, 111 Mass. 250, to the point that in case of copartners, neither a settlement of the accounts nor an express promise to pay need be proved, where the suit is *assumpsit* for the final balance; and in *Cook v. Johnson*, 121 Id. 323, to the point that although the first entry of a mortgagee was ineffectual for the purpose of foreclosure, yet that entry, with the notice to the tenant, was sufficient to entitle the mortgagee to the rents under a lease made since the mortgage.

COMMONWEALTH v. GREY.

[2 GRAY, 501.]

COMPLAINT OR INDICTMENT ALLEGING SALE OF "SPIRITUOUS OR INTOXICATING LIQUOR," without authority or license therefor, is bad for uncertainty, and insufficient sustain to a judgment.

COMPLAINT made to a justice of the peace, alleging that the defendants at a certain time and place, "without any authority or license therefor duly had and obtained according to law, did sell spirituous or intoxicating liquor" to a certain person. The defendants, having been found guilty, appealed to the court of common pleas, where they pleaded *nolo contendere*. The plea was received by the court, and the defendants then moved in arrest of judgment. The case was reported, with the consent of the defendants, for the decision of the whole court.

E. Wilkinson, district attorney, for the commonwealth.

B. Sanford, for the defendants.

By Court, METCALF, J. It is a general rule that an indictment, information, or complaint must not charge a party disjunctively, so as to leave it uncertain what is relied on as the accusation against him: 2 Hawk. P. C., c. 25, sec. 58; 1 Ch. Crim. L. 231; 1 Stark. Crim. Pl., 2d ed., 245. Thus an indictment which averred that S. made a forcible entry into two-closes of meadow or pasture was held to be bad: *Speart's Case*, 2 Roll.

Abr. 81. So of an information which alleged that N. sold beer or ale without an excise license: *Rex v. North*, 6 Dowl. & Ry. 143; see also *Rex v. Morley*, 1 You. & Jer. 221; *Ex parte Pain*, 5 Barn. & Cress. 251; *Rex v. Sadler*, 2 Chit. 519; *Davy v. Baker*, 4 Burr. 2471.

When the word "or" in a statute is used in the sense of "to wit," that is, in explanation of what precedes, and making it signify the same thing, a complaint or indictment which adopts the words of the statute is well framed. Thus it was held in *Brown v. Commonwealth*, 8 Mass. 59, that an indictment was sufficient which alleged that the defendant had in his custody and possession ten counterfeit bank bills or promissory notes, payable to the bearer thereof, and purporting to be signed in behalf of the president and directors of the Union Bank, knowing them to be counterfeit, and with intent to utter and pass them, and thereby to injure and defraud the said president and directors; it being manifest from the statute of 1804, chapter 120, section 2, on which the indictment was framed, that "promissory note" was used merely as explanatory of "bank bill," and meant the same thing. So in *State v. Gilbert*, 13 Vt. 647, an information was held sufficient which alleged that the defendant feloniously stole, took, and carried away a mare "of a bay or brown color;" the court saying that the colors named in the information were the same. And if spirituous liquor and intoxicating liquor were the same, and the word "intoxicating" had been used in the statute of 1852, chapter 322, as a mere explanation of the word "spirituous," the complaint in the present case would have been rightly drawn. But the two words are not synonymous. All spirituous liquor is intoxicating; yet all intoxicating liquor is not spirituous. In common parlance, spirituous liquor means distilled liquor; and such, we believe, is its meaning in the statute. Fermented liquor, though intoxicating, is not spirituous.

A complaint or indictment, on the statute, should charge the defendant either with selling spirituous liquor or with selling intoxicating liquor, or with selling spirituous liquor and intoxicating liquor. The latter form is usually adopted; and it is well settled that it is a proper form, and that proof of the defendant's having sold either spirituous liquor or intoxicating liquor, as well as proof of his having sold both, will support the indictment: 1 East P. C., 402; *Angel v. Commonwealth*, 2 Va. Cas. 231; *State v. Price*, 6 Halst. 203.

As the complaint against these defendants leaves it uncertain

whether they are charged with having sold spirituous liquor or intoxicating liquor which is not spirituous, we must hold it, upon the authorities above cited, to be insufficient to sustain a judgment.

Judgment arrested.

INDICTMENTS CONTAINING DISJUNCTIVE ALLEGATIONS ARE BAD FOR UNCERTAINTY: *People v. Tomlinson*, 35 Cal. 509; thus where a statute describes an offense as a vending, etc., of "spirituous, ardent, or intoxicating liquors or intoxicating drinks, viz., rum, gin, brandy, whisky, ale, and beer, or wine," the words connected by "or" in the first and third places are not synonymous, and a complaint in the very words of the statute does not charge an offense with sufficient certainty to sustain a judgment after a verdict for the state: *Clifford v. State*, 29 Wis. 330; but when the word "or" in a statute is used in the sense of "to wit," that is, in explanation of what precedes, and making it signify the same thing, an indictment is well framed which adopts the words of the statute: *Biemer v. People*, 76 Ill. 271; *Clifford v. State*, 29 Wis. 329. An indictment for unlawful sales of "spirituous and intoxicating liquors" is likewise not supported by proof of sales of liquors which are intoxicating but not spirituous: *Commonwealth v. Livermore*, 4 Gray, 20; but where an indictment is for being a common seller of "intoxicating liquors and mixed liquors, part of which is intoxicating," the sale of either constitutes the offense: *Commonwealth v. Burns*, 9 Id. 288. The principal case was cited to all the foregoing points.

COMMONWEALTH v. SMITH.

[2 GRAY, 616.]

WANT OF RELIGIOUS BELIEF IN WITNESS MUST BE ESTABLISHED by other means than an examination of the witness himself.

INDICTMENT for the unlawful sale of intoxicating liquors. At the trial, the counsel for the defendants asked a witness, upon cross-examination, "Do you believe in the existence of God?" to which the witness answered in the affirmative. The court then interposed and refused any further questions to be put, in reference to the religious belief of the witness. The defendants were convicted, and alleged exceptions.

J. H. Clifford, attorney general, for the commonwealth.

W. D. Northend, for the defendants.

By COURT. The proposed questions were properly excluded. While a belief in the existence of a God is held by us necessary to the competency of a witness, yet the want of such religious belief must be established by other means than an examination of the witness upon the stand. He is not to be questioned as

to his religious belief, nor required to divulge his opinions upon that subject in answer to questions put to him while under examination. If he is to be set aside by want of such religious belief, the fact is to be shown by other witnesses, and by evidence of his previously expressed opinions, voluntarily made known to others.

Aside, therefore, of the question of the propriety of allowing further inquiry, after the witness had answered affirmatively the general question of his belief in the existence of God, in the opinion of the court the whole inquiry of the witness upon this matter was irregular and unauthorized: 1 Greenl. Ev., sec. 370, and notes.

Exceptions overruled.

WITNESS CAN NOT BE EXAMINED AS TO HIS RELIGIOUS BELIEF, either upon his *voir dire* or upon cross-examination: *Commonwealth v. Burke*, 16 Gray, 24, following the principal case; and see *Curtis v. Strong*, 4 Am. Dec. 179, 181. The opinions held by a person offered as a witness as to his obligation of an oath, may be proved by his previous declarations; and the witness himself can not be admitted to explain or deny such declarations: *Curtis v. Strong*, *supra*.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

TANNAHILL v. TUTTLE.

[3 MICHIGAN, 104.]

MORTGAGE OF CHATTELS PASSES WHOLE LEGAL TITLE OF PROPERTY CONDITIONALLY TO MORTGAGEE, and to defeat such title the mortgagor, or those claiming under him, must show a performance of the condition. Upon the breach of the condition, the title is absolute at law in the mortgagee, although the mortgagor may be entitled in equity to a redemption.

MORTGAGEE OF CHATTELS IS ENTITLED TO IMMEDIATE POSSESSION OF PROPERTY, to hold until condition broken, unless the parties otherwise stipulate in the mortgage.

MORTGAGOR'S POSSESSION OF CHATTELS MORTGAGED IS DEEMED POSSESSION OF MORTGAGEE, where the mortgagor is suffered to retain the property without an agreement to that effect, so that the mortgagee may reduce the property to his possession at any moment, and may maintain trespass, trover, or replevin for any intermeddling with or taking of the property by a third party.

MORTGAGEE'S RIGHT OF ACTION FOR UNLAWFUL INTERFERENCE WITH CHATTELS MORTGAGED EXISTS, as well when the property is taken by an officer under color of legal process as when it is taken without color of authority of law.

MORTGAGOR'S INTEREST IN CHATTELS MORTGAGED MAY BE SEIZED AND SOLD only when he is entitled to the possession under an agreement to that effect, and not when his possession is by permission, nor after condition broken.

MORTGAGOR OF CHATTELS, WITHOUT RIGHT OF POSSESSION, HAS NO LEGAL INTEREST WHICH CAN BE SOLD, under section 23, page 476, of the Michigan revised statutes, providing that "when goods or chattels shall be pledged by way of mortgage or otherwise," "the right and interest in such goods of the person making such pledge may be sold on execution against him;" the section was not designed to create rights and subject

them to seizure, but only to extend the remedy by execution over rights in existence.

DISTINCTION BETWEEN MORTGAGE OF CHATTELS AND PLEDGE IS, that the former passes the legal title, which becomes absolute at law upon breach of the condition; while a pledge only passes the possession, with a right of retainer until the obligation is fulfilled, and the title does not become absolute in the pledgee, who has only a right of foreclosure, or of sale after notice.

MORTGAGOR'S INTEREST IN CHATTELS MORTGAGED CAN BE SEIZED UPON ATTACHMENT, if at all, only when the mortgagor has possession by agreement with the mortgagee, and before condition broken, and it would seem not even in that case.

STATUTE AUTHORIZING SALE OF INTEREST OF PLEDGEE OR MORTGAGOR ON EXECUTION DOES NOT AUTHORIZE AN ATTACHMENT OF SUCH INTEREST.

REFLEVIN. The property in question had been mortgaged by Crane & Folger to the plaintiffs, to indemnify them for indorsing a note for the accommodation of the mortgagors. The plaintiffs were obliged to pay the note at maturity, and they thereupon took possession of the mortgaged property. Subsequently the right and title of the mortgagors in the property was attached, and the property seized by the defendant, under a writ issued by a justice of the peace, upon a debt alleged to be due to one Henry Barns from the mortgagors. The plaintiffs had a judgment, and the defendant brought error.

C. I. and E. C. Walker, for the plaintiffs.

L. Bishop, for the defendant.

By Court, **MARTIN, J.** The first question made in this case is, whether Crane & Folger, the mortgagors, have an interest in the property which was liable to an attachment, and levy and sale upon execution, and whether the defendant, in suing the writ of attachment, had a right to hold the property in order that such interest might be disposed of. By a mortgage of chattels, the whole legal title of the property passes to the mortgagee conditionally, and to defeat such title the mortgagor, or those claiming under him, must show a performance of the condition. Upon its breach, the title is absolute in the mortgagee, as the general owner, and can not be questioned in a court of law: Story on Bailm., sec. 287; 2 Hill on Mort. 315, 344; *Butler v. Miller*, 1 Denio, 407; *Sumner v. Batchelder*, 30 Me. 39; *Thornhill v. Gilmer*, 4 Smed. & M. 153; *Brown v. Bement*, 8 Johns. 98; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. 548; *Langdon v. Buel*, 9 Wend. 83, 84; *Ackley v. Finch*, 7 Cow. 292; *Wood v. Dudley*, 8 Vt. 435; *Gifford v. Ford*, 5 Id. 532; *Melody v.*

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Chandler, 12 Me. 282; *Flanders v. Barstow*, 18 Id. 357; *Badlam v. Tucker*, 1 Pick. 389 [11 Am. Dec. 202]; *Pickard v. Low*, 15 Me. 48; *Howland v. Willett*, 3 Sandf. 607; *Spriggs v. Camp*, 2 Spears, 181; *Burdick v. McVanner*, 2 Denio, 170; *Charter v. Stevens*, 3 Id. 33 [45 Am. Dec. 444]; *Bank of Rochester v. Jones*, 4 N. Y. 498 [55 Am. Dec. 290]; *Alden v. Lincoln*, 13 Met. 204; *Hall v. Snowhill*, 2 Green, 8.

And whether at common law such mortgagor has an equity of redemption, or whether courts of equity will interfere and allow a redemption, where there is no statutory provision relating to redemption, is not definitely settled, although the latter opinion seems to be that equity will interfere to prevent gross injustice: 1 Parsons on Cont. 452; 2 Hill on Mort. 314; 2 Story's Eq. Jur., sec. 1031; *Brown v. Lipscomb*, 9 Port. 472; Story on Bailm., sec. 287, and cases cited; *White v. Cole*, 24 Wend. 116, 142; The general title then being in the mortgagee, he is entitled to immediate possession of the property, to hold it until condition broken, unless the parties otherwise stipulated in the mortgage; without such agreement, the possession of the mortgagor (if suffered to retain the property) is deemed the possession of the mortgagee, so that he may reduce the property to possession at any moment, and may maintain trespass, trover, or replevin, as the case may be, for any intermeddling with or taking of the property by a third party while in the possession of the mortgagor, equally as though such possession were actually in himself: See cases above cited; also *Welch v. Whittemore*, 25 Me. 86; *Paul v. Hayford*, 9 Id. 234; *Brackett v. Bullard*, 12 Met. 310; *Alden v. Lincoln*, 13 Id. 204; *Ferguson v. Thomas*, 26 Me. 499; *Case v. Winship*, 4 Blackf. 425 [30 Am. Dec. 664]. And so absolute is this title, and consequent right to immediate possession held, that even the agreement that the mortgagor may retain possession until condition broken is personal, and the mortgagee may maintain trover for the property, before condition broken, against a purchaser from such a mortgagor. Such agreement is not assignable to others, either by the mortgagor, or by sale or levy on his property for debts: See *Bullen v. Wallace*, 2 Rich. 80. So, upon condition broken, the mortgagee may immediately sell or otherwise dispose of the property: See *Wood v. Dudley*, 8 Vt. 438; *Burdick v. McVanner*, 2 Denio, 170; *Charter v. Stevens*, 3 Id. 33 [45 Am. Dec. 444]; *Holmes v. Bell*, 3 Cush. 322. Indeed, this necessarily follows from the foregoing principles, for it is inconsistent with an absolute title to hold that the power of sale, or other dispo-

sition of the property, does not exist in the person holding it; nor is this inconsistent with the right of the mortgagor to resort to equity to redeem the property at any reasonable time before such sale or other disposition of the property shall be made: See *Palchin v. Pierce*, 12 Wend. 61.

The right of action in the mortgagee for an unlawful interference or intermeddling with the property mortgaged exists, as well when the property is taken by an officer under color of legal process as when it is taken without color of authority of law, as will be seen by reference to nearly all the cases I have above cited.

It is a singular fact that very much of the law determining the rights of parties to chattel mortgages has been settled in adjudications between mortgagees and the ministerial officers of the law, who have attempted to make the title of the mortgagor subservient to the claims of his creditors. When the condition of the mortgage has become broken, and the title in the mortgagee becomes absolute, his right to reduce the property to possession, and to hold it against all the world, as a principle of common law, is beyond question. That he can not be disturbed in that possession, except through the intervention of the courts of equity, is equally clear. In the case at bar it is found that the condition of the mortgage was to indemnify the plaintiffs against the consequences of their indorsement of a note for the accommodation of the mortgagors; that the note was dishonored and then taken up the plaintiffs, who immediately afterwards took possession of the property mortgaged, and held it under such possession, until it was seized by the defendant, by virtue of a writ of attachment issued by a justice of the peace some sixteen days after such acquisition of the possession by the plaintiffs, upon a debt claimed to be due to one Henry Barns from the mortgagors. The defendant attached the right and title of said mortgagors, but seized the property and retained it from the possession of the plaintiffs, to satisfy any judgment which might be rendered in their attachment suit.

It is contended by the defendant's counsel that this right of seizure and possession is given to the defendant by the provisions of the revised statutes. By the provisions of chapter 93, section 26, the officer serving a writ of attachment is required to seize so much of the goods and chattels of the defendant—excepting such as are by law exempt from execution—as will be sufficient to satisfy the plaintiff's demand, and safely keep the same to satisfy any judgment that may be recovered by the

plaintiff in such attachment, etc. This lien of the officer necessarily continues until after judgment and execution, and a levy by virtue of such execution. See also R. S. 550, sec. 38. If, then, the defendant had a right to make the seizure in this case, his lien was perfect at the time of the institution of this suit. Had he such right? At the common law, goods and chattels mortgaged, whether in possession of the mortgagor or mortgagee, were not subject to levy and sale upon execution either before or after condition broken: See opinion of Story, J., in *Conard v. Atlantic Ins. Co.*, 1 Pet. 440, 441; *Marsh v. Lawrence*, 4 Cow. 467; *Holbrook v. Baker*, 5 Greenl. 312 [17 Am. Dec. 236]; *Melody v. Chandler*, 12 Me. 282; *Badlam v. Tucker*, 1 Pick. 389 [11 Am. Dec. 202]. It is said in *Bailey v. Burton*, 8 Wend. 347, that when the mortgagor had a right to redeem and a right to the possession for a definite period, before the property can become forfeited, the mortgagor has an interest which may be sold on execution. The purchaser in such case takes the property subject to the incumbrance; he purchases the right of the mortgagor, which is a right to the possession and the absolute ownership, subject to the incumbrance; but if the mortgage at the time of the sale on execution had been forfeited, the mortgagor had not the right to possession for a moment; all the right he has is in equity. See also *Wheeler v. McFarland*, 10 Id. 322, where Savage, C. J., in speaking of the right to sell the interest of the possessor of personal property, says: "Such is the case possibly of a mortgagor in possession before forfeiture." See also *Charter v. Stevens*, 3 Denio, 33 [45 Am. Dec. 444]; *Bank v. Crary*, 1 Barb. 543.

At the most, then, a right to seize and sell the interest of a mortgagor only exists when he is entitled to the possession, under an agreement to that effect, and not when his possession is by permission, nor after condition broken: See also *Perkins v. Mayfield*, 5 Port. 182; *King v. Bailey*, 8 Miss. 332. But we are told that all property not exempt by law from execution is liable to attachment; and by the provisions of section 23, page 476, of the revised statutes, the interest of the mortgagor was liable to seizure and sale. The section is as follows: "When goods or chattels shall be pledged by way of mortgage or otherwise, for the payment of money or the performance of any agreement or contract, the right and interest in such goods of the person making such pledge may be sold on execution against him, and the purchaser shall acquire all the rights and

interest of the defendant, and shall be entitled to the possession of such goods and chattels on complying with the conditions and terms of the pledge;" and by section 32, sales of personal property are prohibited, except the same be present and exposed to the view of those attending the sale.

We have already shown that the mortgagor after condition broken has nothing left, unless it may be an equity of redemption, which is not a legal interest and is not the subject of levy and sale. The statute was not designed to create rights, and subject them to seizure, but only to extend the remedy by execution over rights in existence. Such is the only construction which can be placed upon it, consistent with law and the rights of parties. The language of the section relates to goods pledged by way of mortgage or otherwise, authorizes a sale of the pledgor's interest, and confers upon the purchaser at such sale all the rights and interest of the pledgor, and entitles him to possession only upon complying with the terms and conditions of the pledge. Now although it is said "a mortgage is a pledge—and more: it is an absolute pledge to become an absolute interest, if not redeemed at a certain time"—yet there is a broader distinction than this between them, for a mortgage passes the legal title, subject to be defeated upon performance of a condition, while a pledge only passes the possession, or at most a special property, to the pledgee, with a right of retainer until the debt is paid or the other engagement is fulfilled: See cases above cited. In the one case the title becomes absolute at law upon breach of the condition; while in the other case the title never becomes absolute in the pledgee, and he has only a right to foreclose against the pledgor by proceedings in equity, or sale of the chattel after notice: See Story on Bailm., sec. 308.

In the view of equity, a mortgage may be regarded as a "pledge and something more," and hence the jurisdiction courts of equity assume in relation to its redemption; but the law regards it rather as a grant or sale of the property, by which, unlike a pledge, a title passes, which becomes absolute upon breach of condition, without the intervention of any legal proceedings, or a decree of a court of equity. Now a mortgagor, unless he have a right of possession, has no legal title or interest in the property mortgaged. He has nothing which can be seized or sold, and by performance of the condition of the mortgage he acquires a title and right of possession; of both which he was divested up to that period. What rights, then, at all analogous to those of a pledgor, has a mortgagor, which are legally tangible and sub-

ject to seizure and sale? The words "by way of mortgage," in section 23, therefore, can only relate to the right of possession, if any, which exists in the mortgagor, upon which right the property may be seized before condition broken, and the mortgagor's interest therein sold, and along with which the right to redeem is carried, according to the rule of *Bailey v. Burton*, 8 Wend. 347. This construction of the statute harmonizes it with the common law, accords with the decisions of other states, and preserves the rights of the parties; while any other will impair the rights of parties, be utterly unavailing for the purposes contemplated, and as we shall presently see, be absolutely impracticable in execution. We are referred to section 32 as prescribing the manner in which this power must be executed. That provides that personal property shall not be sold unless it be present and within view of those in attendance, and shall be offered for sale in such lots and parcels as shall be calculated to bring the highest price. If the mortgagor have neither the possession nor the right to possession, nor the title—nothing but a duty to perform, upon which the title to property may revert—he has in fact only an equity of redemption. What has he which may be taken into possession, produced at the sale, exposed to view, and parceled out for sale, or delivered to the purchaser? To seize the property, it would be necessary to dispossess the mortgagee, whose possession is rightful, and by virtue of a legal title—a proceeding without a parallel in law, and without any positive authority in the statute. It is hardly necessary, I imagine, to argue that no person can be deprived of his property, even for a temporary purpose, except by authority of law exercised directly against him, according to the course of judicial proceedings, or in the exercise of the right of pre-eminent sovereignty, and upon compensation being made.

Under a statute of New York, and precisely like that of this state, except that the words "by mortgage or otherwise" are not found in it, it is yet an unsettled question whether the pledgee can be deprived of his possession for the purpose of sale under execution: *Stief v. Hart*, 1 N. Y. 20. The court of appeals of that state are equally divided upon the question, and the judgment of the court below sustaining the proposition that property pledged might be taken into possession on an execution against the pledgor, for the purpose of sale of the pledgor's right, was by such decision affirmed. If the solution of that question is so difficult, how much less free from doubt is the present. In the case of a pledge, the title remains in the

pledgor, and the sale of his interest is the sale of the title, subject to the pledgee's lien. In that of a mortgage, the title is not in the mortgagor, and the sale is of an equity. The one is susceptible of being seized and taken into possession and restored; the other is not. In the one case, the possession alone passes by compliance "with the terms and conditions of the pledge," the title passing by the sale; in the other, the title passes, reverts, by performance of the condition, and does not by the sale. The pledgor has the general property in the thing pledged; a mortgagor has not before performance of condition. But if the mortgagor has the possession of the goods mortgaged, under an agreement to that effect, then he has a property which may be seized and sold, and by force of the statute draws with it the right to redeem; while if there be no such agreement, he is but the bailee of the mortgagee. These views are fully sustained by the authorities above cited, and give the statute a reasonable and practicable construction. These observations apply, in my judgment, as well to the sale of a mortgagor's interest before as after condition broken, when no right of possession is reserved to him. But after condition broken, the absolute title is in the mortgagee; there can, from the very nature of things, be no legal interest remaining in the mortgagor which can be sold. In New York, the statute allowing the interest of a pledgor to be sold under execution has never been understood as extending to the interest of mortgagors: See *Mattison v. Bancas*, Id. 295; *Howland v. Willett*, 3 Sandf. 607; *White v. Cole*, 24 Wend. 116, 142.

In Massachusetts, by the provisions of statute, chapter 90, section 78, any personal property of the debtor which is subject to a mortgage, pledge, or lien may be attached and held, etc., provided the attaching creditor shall pay to the mortgagee, pawnee, or holder of the property the amount for which it is so liable, within twenty-four hours after the same is demanded. If such payment be not made, the attachment is dissolved and the property restored, and the attaching creditor held liable for any damages the mortgagee may have sustained. Thus in that state, by force of its statute, the right of attachment upon mesne process is contingent upon the right of redemption, and can not be exercised after that is lost; and although the right of seizure is given in the first instance, yet there can be only a continued possession by the attaching officer upon payment of the debt secured, so that sale upon final process shall be of the title, and not a right of redemption. So, also, the statute being in dem-

gation of the common law, a strict compliance with its provisions is required to protect the officer and attaching creditor from liability for taking it. A very similar law exists in Maine, and the same rules and principles govern its execution.

In Kentucky it is provided by statute that when estate, real, personal, or mixed, is held or covered by mortgage, deed of trust, or other incumbrance, all the right, title, and interest, legal or equitable, which the mortgagor or grantor has in such real estate, shall be subject to be levied upon and sold by execution, in the same manner as such property might have been sold if no such incumbrance had existed; and the purchaser shall take it subject to such incumbrance, and may pay off and discharge such incumbrance, and thereby perfect his title thereto, in the same manner as the grantor, mortgagor, or any other person having an equity of redemption therein might do, provided (in cases other than the sale of real estate) that the purchaser or purchasers of any such mortgaged property shall, before he takes possession of the property, give bond and security that he will not within twelve months sell or remove the property out of the state, but that he will during that time have the property at all times forthcoming, unavoidable accidents excepted, to any order or decree of any court of competent jurisdiction. Under this statute it was held, in *McIsaac v. Hobbs*, 8 Dana, 268, and *Fugate v. Clarkson*, 2 B. Mon. 41 [36 Am. Dec. 589], that the property should be taken into possession by the officer upon execution and held for sale; and to these decisions our attention was called by the defendant's counsel. Such, indeed, is the clear import of the act itself, as it requires a levy and sale in the same manner as though no such incumbrance existed. But our statute makes no such provision, and no rule of construction can be drawn from these cases in aid of the power claimed to seize the property in possession of the mortgagee, and hold it for the purpose of selling the mortgagor's interest, even before condition broken. This statute of Kentucky has received a construction in the case of *Swigert v. Thomas*, 7 Dana, 220, relative to the rights of possession of the purchaser and of the mortgagee, which strongly fortifies many of the views heretofore expressed, and the rights of a mortgagee, as established at the common law, most fully maintained. "We have no statute," says the court, "qualifying this right; and we are not prepared to decide that the prevailing practice of permitting mortgagors to enjoy the possession and profits of the mortgaged property until foreclosure should operate as a constructive abro-

gation of the mortgagee's common-law right, or as an implied stipulation entitling the mortgagor, as a matter of right, to that possession which, as a matter of favor or of convenience, he is generally permitted to enjoy." See also *Dougherty v. Linthicum*, 8 Id. 198.

We have heretofore treated this question as though the interest of a mortgagor, if subject to sale upon execution, would be liable to seizure upon attachment. It is clear that such liability could only exist, if at all, when the possession of the mortgagor is by agreement with the mortgagee, and before condition broken. It is not so clear, however, that such interest of the mortgagor is liable to attachment in any event. The remedy by attachment is a special remedy unknown to the common law. No rights or powers are to be acquired by implication. The goods and chattels of the defendant not exempt from execution are subject to seizure under the writ. The interest of a mortgagor is neither goods nor chattels subject to seizure at the common law: it is an equity of redemption, intangible and incapable of delivery. What we have already said respecting the nature of the rights of a mortgagee, and the inability of an officer to divest him of his possession, applies with still greater force to an attachment. The property must be kept to satisfy any judgment which may be rendered against the defendant. Thus it may be detained from the mortgagee for an indefinite period of time, and if of a perishable nature, he may become thereby deprived of his title as well as his possession, and the whole security of the mortgage defeated. No provision is made by law for such contingency, nor for the discharge of the debt due the mortgagee by the attaching creditor. It is only upon execution sale that a creditor can acquire any rights over the property; no judgment can be rendered against such defendant, and thus no sale under execution had. Everything conspires to show that the remedy by attachment could not have been intended to extend to such interest of a mortgagor. The statute which authorizes the sale of a pledgor's interest upon execution is in derogation of the common law, and must be strictly construed. Its provisions can not be extended by implication to any other remedy than that by execution sale, and especially not to a special statutory remedy which is silent in respect to it. The directions and provisions of this statute clearly assume that such right or interest can only be sold upon final process. The seizure by attachment is altogether different in its nature; it being a seizure

upon mesne process, and not necessarily accompanied by a right to execution and sale.

In *Lyon v. Coburn*, 1 Cush. 278, the question was, whether under the statutes of Massachusetts the interest of a mortgagor, which might be seized in attachment, in which case ample provisions were made to protect the mortgagee's rights, could be seized upon execution in the first instance, and the courts held that it could not, as the language of the statute was appropriate to an attachment upon mesne process, but not to a seizure or taking upon execution. So in *Snyder v. Hill*, 2 Dana, 204, it was held that the interest of a mortgagor was not liable to be sold under a distress for rent. The court say: "An equity of redemption was not distrainable at common law, and the statutes which subjected equities to sale under execution can not consistently be so construed as to embrace distress warrants. The policy of these enactments was to substitute the liabilities of equities and choses in action for the *ca. sa.*, and a distress warrant is within neither the letter nor spirit of the provisions."

In looking through the reports of all the states, it will be found that statutes respecting the sale of a mortgagor's interests have received a most strict construction, and no right not clearly within their letter has been built upon them.

The judgment of the court below must therefore be affirmed, with costs to the plaintiffs.

DOUGLASS, J., did not participate, having decided the cause below.

CHATTEL MORTGAGE VESTS WHOLE TITLE AT LAW CONDITIONALLY IN MORTGAGEE: *Charter v. Stevens*, 45 Am. Dec. 444, and *note*; *Luckett v. Townsend*, 49 Id. 723; *Bank of Rochester v. Jones*, 55 Id. 290, 298; but see the criticism on the principal case in *Flanders v. Chamberlain*, 24 Mich. 312, 313; and in *Gardner v. Matteson*, 38 Id. 203, it was said—where the theory upon which the court below proceeded was that within the doctrine of the principal case a mortgage of chattels operated as an absolute transfer of the title to the property mortgaged, and that the debt was thereby paid—that this was not the correct doctrine, citing *Lucking v. Wesson*, 25 Id. 445. As to the mortgagee's right of redemption after default, see *Charter v. Stevens*, *supra*.

MORTGAGEE OF CHATTELS IS ENTITLED TO IMMEDIATE POSSESSION, unless there is a stipulation to the contrary: *Eggleston v. Mundy*, 4 Mich. 297; *Gay v. Bidwell*, 7 Id. 531; *Heyland v. Badger*, 35 Cal. 410, all citing the principal case; *Case v. Winship*, 30 Am. Dec. 664; and without such agreement, the possession of the mortgagor, if suffered to retain the property, is deemed the possession of the mortgagee, so that the latter may reduce the property to his possession at any moment, and he may maintain trespass, trover, or replevin against a third party: *Eggleston v. Mundy*, *supra*. But parol evidence

is inadmissible to prove an understanding between the parties that the possession should remain with the mortgagor: *Case v. Winship, supra*.

PROPERTY COVERED BY CHATTEL MORTGAGE, WHETHER LIABLE TO EXECUTION OR ATTACHMENT AGAINST MORTGAGOR: See *Fugate v. Clarkson*, 36 Am. Dec. 589. The principal case is cited in *Gay v. Bidwell*, 7 Mich. 531, to the point that the mortgagor has no right in the mortgaged property that can be taken and sold on execution; and in *Bacon v. Kimmel*, 14 Id. 201, 206, to the point that personal property in the possession of a mortgagee by virtue of a chattel mortgage, after the time for payment has expired, is not subject to attachment by a creditor of the mortgagor, and a sale on execution in such attachment is void. But in *Cary v. Hewitt*, 26 Id. 233, where it was contended that as a chattel mortgage was past maturity when an execution was levied, there was no leviable interest remaining in the mortgagor, and that a seizure on execution while in his hands was consequently a naked trespass, conferring no right and giving rise to no interest under the execution in favor of any one—to which, with other Michigan cases, the principal case was cited—the court did not deem it necessary to examine into the cases, because the statute of 1861 was believed to have a positive application. So long as the mortgage may be regarded as a mere incumbrance, with a continuing right in the mortgagor, the right to levy by an execution creditor is plainly given. In *Saunders v. Vance*, 18 Am. Dec. 167, it is held that a mortgagee of chattels may maintain trover against the sheriff and the plaintiff in execution for seizing the mortgaged property under a *fiat facias* issued against the mortgagor.

PEOPLE EX REL. LAKE v. HIGGINS.

[3 MICHIGAN, 233.]

EVIDENCE IS INADMISSIBLE TO SHOW INTENTION OF PERSONS VOTING for "H. I. Higgins" to vote for "Henry I. Higgins," and to show the identity of "H. I. Higgins" with "Henry I. Higgins."

STATUTE OF MICHIGAN PRESCRIBING MANNER OF KEEPING BALLOTS AFTER ELECTION IS DIRECTORY, and a compliance with its provisions is not requisite.

INFORMATION filed in the name of the people, on the relation of Warner Lake, alleging that the defendant, Henry I. Higgins, had unlawfully entered into and held the office of judge of probate of the county of Genesee, and that at an election held November 2, 1852, the relator was elected to that office. The plea of the defendant admitted the holding of the election, and other formal parts of the declaration, but claimed that he received the greatest number of votes for the office, and was duly elected. An issue of fact being joined on the plea, the court found that at the election for judge of probate for the county of Genesee, held November 2, 1852, Henry I. Higgins received one thousand one hundred and ninety-five votes, Warner Lake one thousand two hundred and four, Henry L. Higgins two,

H. I. Higgins seven, and W. Lake one. The defendant offered to prove by certain persons that they voted for H. I. Higgins, intending to vote for Henry I. Higgins for judge of probate, and also the identity of H. I. Higgins with Henry I. Higgins; but the court excluded the testimony. The relator offered in evidence the ballots of the townships of Genesee, Davidson, and Fenton, in the county of Genesee, on proof that they had been kept under the charge of the township clerks, locked up in ballot-boxes. The orifice on the top of the box of Genesee township was unsealed, while those of the other townships were sealed with paper. The defendant objected to the testimony, but the objection was overruled, and he excepted to the rulings, as above.

W. Hale, attorney general, and Wilcox and Gray, for the relator.

Lothrop and Duffield, for the defendant.

By Court, MARTIN, J. The court properly excluded evidence explanatory of the intentions of persons voting for H. I. Higgins, and of the identity of H. I. Higgins and Henry I. Higgins. This question was expressly decided in the *People v. Tisdale*, 1 Dougl. 59, and to that decision we adhere. It is true, in the *People v. Van Cleve*, 1 Mich. 362, Mundy, J., in delivering the opinion of the court, says: "You may go to the ballots, if not beyond them, in search of proof of the due election of either the person holding or the person claiming the office." But this remark was not called for in the case, and is *obiter dictum*.

The court also properly allowed the ballots of the townships of Genesee, Davidson, and Fenton to be given in evidence. Whether there had been a substantial compliance with the statute in respect to the manner in which the votes were kept, it is immaterial to inquire, as we are clearly of opinion that this statute must be held directory, and that a non-compliance with its provisions alone can not defeat the right of the relator.

BALLOTS CONTAINING ONLY INITIALS OF CHRISTIAN NAME CAN NOT BE COUNTED: *People v. Cicott*, 16 Mich. 283, 307, 310, following the principal case. But in Cooley's Const. Lim. 608, it is said: "It would seem that where a ballot is cast which contains only the initials of the christian name of the candidate, it ought to be sufficient, as it designates the person voted for with the same certainty which is commonly met with in contracts and other private writings, and the intention of the voter can not reasonably be open to doubt," commenting upon the principal case with others; and see *People v. Cook*, 59 Am. Dec. 451.

THE PRINCIPAL CASE IS FURTHER CITED, among others, in *People v. Cicott*, 16 Mich. 324, *per* Cooley, C. J., to the point that statutory provisions prescribing the conduct of elections are to be regarded as directory only, except where they are of such a character that a failure to comply with them would have the effect to prevent or obstruct the complete expression of the popular will, or the production of satisfactory evidence thereof; and where an information was sworn to by a county clerk, who, in signing the jurat, gave the initials only of his christian name, it was held that the signing of the clerk was sufficient, and that *People v. Tisdale*, 1 Dougl. 59, and the principal case, laying down the rule that ballots containing only the initials of the person voted for can not be counted as they are, nor aided by parol evidence, would not be extended to embrace other cases: *Rice v. People*, 15 Id. 18.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

ST. MARTIN v. DESNOYER.

[1 MINNESOTA, 188.]

WORDS ARE ACTIONABLE PER SE, when they charge a person with having committed an act for which, if the charge were true, he would be punishable criminally by indictment.

WORDS "YOU HAVE STOLEN MY BELT" ARE ACTIONABLE PER SE.

INTENT WITH WHICH WORDS WERE SPOKEN IS QUESTION THAT MAY BE LEFT TO JURY, in an action for slander, where the words are of doubtful import, with the instruction that if there was an intent to charge the crime of stealing, the words were actionable.

VERDICT WILL BE SET ASIDE WHEN JURY AGREE EACH TO SPECIFY SUM as due to the plaintiff, and divide the aggregate by twelve, and take the quotient as the result.

AFFIDAVITS OF JURORS ARE INCOMPETENT TO SHOW MISCONDUCT on the part of the jury, and thus impeach and avoid the verdict.

AFFIDAVITS OF THIRD PERSONS OF JURORS' DECLARATIONS ARE INCOMPETENT TO SHOW MISCONDUCT on the part of the jury, and thus impeach and avoid the verdict.

COUNSEL'S COMMENT IN ADDRESSING JURY, UPON AMOUNT OF VERDICT given in a former trial of the same action, if assignable as error at all, must be objected to at the time when made, and not alleged as error upon an *ex parte* affidavit after verdict.

VERDICT WILL NOT BE INTERFERED WITH ON GROUND OF EXCESSIVE DAMAGES, unless the sum be so excessively large and disproportionate as to warrant the inference that the jury were swayed by prejudice, preference, partiality, passion, or corruption.

JUDGMENT CAN NOT BE AFFIRMED WITH TWELVE PER CENT DAMAGES AND DOUBLE COSTS by the supreme court of Minnesota, under the statutes, upon an appeal from an order refusing a new trial.

CASE for slander. The words charged in the declaration were: "You stole my belt." "You have stolen my belt. You might

as well have stolen my belt, as you broke open my two cassetts [trunks] two years ago." Plea, the general issue. After the close of the testimony, the counsel for the defendant asked the court to charge the jury that the words "you have stolen my belt" were not actionable, and proof of special damage was necessary for a recovery; and that the words "you have stolen my belt; you might as well have stolen my belt, as you broke open my two cassetts two years ago," were likewise not actionable, and proof of special damage was necessary; but the judge refused so to charge, and instructed the jury that if they believed the defendant intended to charge the plaintiff with stealing, the words were actionable. The plaintiff had a verdict for two hundred and twelve dollars and fifty cents. The defendant moved for a new trial, and appealed from the order refusing the same. The causes urged for a new trial are set forth in the opinion.

Rice, Hollinshead, and Becker, for the appellant.

I. Atwater, for the appellee.

By Court, CHATFIELD, J. This is an action on the case for verbal slander, and it is brought into this court by appeal from an order made therein overruling the defendant's motion for a new trial. The causes urged for a new trial will be considered in the order in which they are stated in the motion.

The first point is, that "the judge [before whom the cause was tried] erred in charging the jury that the words 'you have stolen my belt' are actionable." The rule is, that words charging a person with having committed an act for which, if the charge were true, he would be punishable criminally by indictment, are actionable *per se*: *Young v. Miller*, 3 Hill (N. Y.), 21, and the cases there referred to by the court. Stealing or larceny is an act, a crime, thus punishable. All larcenies were at common law felonies. The words "you have stolen my belt" contain a direct and unequivocal accusation of the crime of larceny, and are therefore actionable. This instruction to the jury, given as it was in the abstract, and without assuming that the words were proved, was correct.

The second point is, that "the judge erred in charging the jury that the words 'you have stolen my belt; you might as well steal my belt, as you broke open my cassetts two years ago,' are actionable."

This point is not accurately stated according to the instruction given by the judge, as contained in the bill of exceptions.

It is there stated that upon these words the judge charged the jury "that if they believed the defendant intended to charge the plaintiff with stealing, the words were actionable." He thus left it to the jury to ascertain and determine the meaning and intent of the words—to give them construction and application; and in effect instructed them, as a matter of law, that the words were actionable or not as they should or should not find that the defendant intended thereby to charge the plaintiff with the crime of stealing—that if the defendant did so intend, the words were actionable; otherwise, not. The question of intent was properly left to the jury, and the rule of law thereon was correctly given to them.

The third point is, that "the jury made up their verdict by agreeing each to specify a sum as due to the plaintiff, and divide the aggregate of the sums so specified by twelve, and to take the quotient as the result." If this point, in the form in which it is stated, is sustained by competent proof, it is conclusive against the verdict. The evidence adduced in support of it is: 1. The affidavit of Mr. Hollinshead, one of the counsel for the defendant, that two of the jurors of the said jury informed him that the verdict "was made up by agreeing that each juror should specify a sum as due to the plaintiff, that the sums so specified should be added together, and the aggregate amount divided by twelve, and that the quotient should be their verdict; that the agreement thus made was carried out, and the verdict rendered by the jury was the result thereof." 2. The affidavits of two of the said jurors to the same effect and extent; one of whom was one of the informants of Mr. Hollinshead. The plaintiff objects that these affidavits are neither admissible nor competent evidence to prove the fact sought to be established thereby. Are they?

It is now quite conclusively settled that the affidavits of jurors will not be received when offered to prove misbehavior in the jury with regard to the verdict: 1 Greenl. Ev., sec. 252 a. This rule is stated in very strong language in *Graham's Practice*, 2d ed., 315: "In no case will the affidavits of jurors be received to impeach their verdict; the fact must be established by other evidence." The affidavits of the jurors offered in this case to show misconduct on their part, and thus impeach and avoid the verdict, must be excluded.

The policy and reasons which exclude, in such cases, the affidavits of jurors apply with increased force against their declarations without oath to third persons. If it is not properly

allowable to put a verdict within the power of the affidavits of jurors, how much less allowable it must be to place the same verdict at the mercy of their mere declarations. It would be to receive, as competent evidence, hearsay, the acknowledged source of which is incompetent. The proposition palpably exposes its own error and impropriety. The affidavit of Mr. Hollinshead must also be excluded.

The affidavits upon which this allegation against the verdict is founded being excluded, the point is without support, and must be disregarded. And it would seem to be unnecessary to refer to the joint affidavit of three members of the jury, produced by the plaintiffs, to controvert it. It may, however, be proper to say that this affidavit was admissible to support the verdict had the evidence to impeach it been competent. It shows that the amount of the verdict was arrived at in the manner alleged by the defendant, but it very explicitly denies that there was any agreement among the jurors by which they were to be bound by the result or precluded from objecting to it. It states, substantially, that each juror was at perfect liberty to object to the result—and they did object—if not satisfied; and that the operation was several times repeated; that it was proposed as a means of arriving at a fair measure of damages; and that the verdict, as finally rendered, was agreed to by discussion among the jurors as to its justice and correctness, which took place after the sum had been so found. The facts stated in this affidavit do not vitiate the verdict. To have that effect, it should appear that the jury, before ascertaining the quotient, agreed among themselves to abide at all events by the contingent result as their verdict, and that it was made up and rendered accordingly: Graham's Practice, 2d ed., 315. Such seems to be the rule.

The fourth point is, "that the attorney for the plaintiff, in addressing the jury, referred to and urged, in support of his case, the amount of the verdict given on the former trial." This point rests solely upon an affidavit stating the fact urged as error. The point is not of that kind or character that ought to be allowed to stand upon *ex parte* affidavits. The fact alleged must have transpired in the course of the proceedings upon the trial in court, and in the presence of the counsel for the opposite party. Errors thus occurring are the proper subjects to be included in a bill of exceptions or case to be settled by the judge upon notice to the opposite party. To make this allegation of error—if good at all—effectual, however presented, it

should appear that the act complained of was objected to at the time, the objection overruled, and exception taken. The rules governing the admission of evidence apply to and control the question made by this point; and it can not be contended that the admission of improper evidence to the jury, without objection, can be alleged as error upon affidavit after verdict.

The fifth point is, that "the damages allowed by the jury are excessive." The action is for slander. The damages assessed by the verdict are two hundred and twelve dollars and fifty cents. It does not appear that there was any evidence in the case to show what was the defendant's personal or pecuniary rank and influence in society at the time when the slanderous words are alleged to have been spoken. The words were therefore given to the jury without any detracting from or aggravation to the injury of the plaintiff, which their common and ordinary meaning and effect would naturally produce. It was exclusively the right and duty of the jury to determine the extent of such injury, and the amount of damages which the plaintiff had sustained thereby; and in this, as in all kindred cases, the liquidation by the jury is conclusive: unless the sum be so excessively large and disproportionate as to warrant the inference that they were, in making up their verdict, improperly swayed by prejudice, preference, partiality, passion, or corruption. The circumstances of this case will not warrant this court in drawing any such inference. The order from which the appeal in this case was taken must be affirmed with costs. The plaintiff asks that the judgment be affirmed with twelve per cent damages, and double costs. If this court was disposed to grant this request, it has not the power to do it: 1. Because the appeal is not from the judgment, but from the order refusing a new trial; and 2. Because the section of the statute under which the plaintiff claims these allowances (R. S. 416, sec. 26) does not apply to appeals. Double costs may, in the discretion of the court, be awarded to "the party prevailing on a writ of error," not on an appeal. That section of the statute has been so amended as to preclude the recovery of damages by the prevailing party on a writ of error: Amendments, p. 13, sec. 52.

WORDS WHEN ACTIONABLE PER SE AS IMPUTING CRIME: See *Coburn v. Harwood*, 12 Am. Dec. 37, and note 41, where the principal case is criticized; *Brite v. Gill*, 15 Id. 122; *Arnold v. Cost*, 22 Id. 302; *Wenson v. Sayward*, 23 Id. 691; *Gilman v. Lowell*, 24 Id. 96; *Thompson v. Lusk*, 26 Id. 91; *Commons v. Wallers*, 27 Id. 635; *Waters v. Jones*, 29 Id. 261; *Hobkins v. Tarrance*, 35 Id. 129. The principal case is cited in *McCarty v. Barrett*, 12 Minn.

496, as laying down the rule that words to be actionable in themselves must charge an indictable offense; and in *West v. Hanrahan*, 23 Id. 386, to the point that in an action of slander, if the words alleged to have been spoken, when taken in their plainest and most natural sense, and as they would be ordinarily understood, obviously import the commission of a crime punishable by indictment, such words are actionable *per se*; this seems to be the rule in Minnesota.

AFFIDAVITS OF JURORS CAN NOT BE RECEIVED TO IMPEACH VERDICT: *Clark v. Carter*, 58 Am. Dec. 485; see also *Nelms v. State*, 53 Id. 94; but see *Packard v. United States*, 48 Id. 375, and notes to these cases. The principal case is cited in *Knowlton v. McMahon*, 13 Minn. 387, to the point that on motion for a new trial a juror's affidavit will not be received to impeach the verdict.

VERDICT WHEN SET ASIDE FOR EXCESSIVE DAMAGES: See *McDaniel v. Baca*, 56 Am. Dec. 339, and prior cases in note; *Nicholson v. New York etc. R. R.*, Id. 390; also *Milburn v. Beach*, 55 Id. 91. A new trial will not be granted on the ground of excessive damages, where there is any evidence to support the verdict, unless it be manifest that the jury were swayed by prejudice, partiality, passion, or corruption: *Beaulieu v. Parsons*, 2 Minn. 44, citing the principal case; and in *City of St. Paul v. Kuby*, 8 Id. 171, the principal case is also cited as one in which the court refused to interfere with the jury's allowance of damages.

WHERE NO EXCEPTION WAS RESERVED ON REFEREE'S RULING, on the question of the admissibility of evidence, the point will not be considered by the Minnesota supreme court: *Kusler v. Ferguson*, 22 Minn. 118, citing the principal case.

CASES
IN THE
HIGH COURT OF ERRORS AND APPEALS
OF
MISSISSIPPI.

CURRIE v. STEWART.

[27 MISSISSIPPI, 52.]

STRICT COMPLIANCE WITH STATUTE AUTHORIZING PROBATE COURT TO ORDER SALE OF LANDS belonging to the estate of a deceased person must be shown in order to render such order and the sale made pursuant to it valid. This is particularly the case where a special and extraordinary power, not legitimately belonging to the jurisdiction of the court, is conferred upon it by statute.

WHERE STATUTE REQUIRES ADMINISTRATOR TO GIVE BOND, upon the sale by him of the lands of his intestate, conditioned to apply the proceeds of the sale in the same way that the lands would have gone, his omission to give such bond renders the sale void.

ERROR to the circuit court of Hinds county. The opinion states the case.

T. J. and F. A. R. Wharton, for the appellant.

D. W. Adams, for the appellees.

By Court, **HANDY, J.** The plaintiff in error brought this action against the defendants upon a writing obligatory, executed by them to him for the purchase money of a tract of land sold by the plaintiff under an order of the probate court of Hinds county. The defense in the court below was, in substance, that the sale was made without rightful authority, the proceedings and order of sale in the probate court being irregular and void. The material facts necessary to be noticed appear in the petition and proceedings in the probate court. The petition is in the name of the plaintiff, as administrator of Abraham Whitaker and the adult and minor heirs at law of the deceased, and states that

the-deceased left a will, and thereby gave the whole of his estate, real and personal, to his wife for life, and after her death "to be equally divided between his children and the heirs of their bodies;" that the widow had released her life estate to the lands in question, and that commissioners were appointed by that court to divide the lands, who reported that they were requested not to make the division, because it could not be made equally and beneficially between all the parties. It states "that it is to the interest of the heirs and distributees aforesaid that said land should be sold, and the proceeds distributed according to law," and "to promote the interest of the heirs and distributees," an order for the sale is prayed, as required by the statute. An order for the sale was afterwards made, but no bond was taken from the administrator who was directed to make the sale, conditioned to apply the proceeds in the same way the lands would have gone if no such order had been made. The sale was made and reported to the court, the report confirmed, and a deed executed by the administrator to the purchaser, the defendant Stewart. The verdict and judgment being for the defendants, the plaintiff has brought the case here by writ of error.

Many incidental questions were raised in the court below, and have been presented here. But the merits of the case manifestly depend upon whether it was necessary to the validity of the order of sale that the administrator should have executed a bond for the application of the proceeds of the sale, as is required by the act of 1830: Hutch. Code, 677.

It has been repeatedly held by this court that a strict compliance with the statute authorizing the probate court to order a sale of lands of a deceased person's estate must be shown in order to render such an order and the sale under it valid. It was regarded as a matter of special jurisdiction, which can only be exercised upon condition that everything has been done which the statute requires should be done preceding the order of sale: *Planters' Bank v. Johnson*, 7 Smed. & M. 454; *Gwin v. McCarroll*, 1 Id. 351; *Smith v. Denson*, 2 Id. 326; *Steavenson v. McReary*, 12 Id. 9 [51 Am. Dec. 102]. This is the rule applied to sales of land by order of that court, when made in the due course of administration of the estate of the deceased, for the payment of his debts; and it applies with greater force to cases like the present, where a special and extraordinary power, not legitimately belonging to the jurisdiction of the court, is conferred upon it by statute. If this order of sale, then, was made in virtue of the act of 1830, Hutch. Code, 677, it is clear, upon these principles,

that it was unauthorized and void, for want of the bond which the second section of that act imperatively requires to be taken by the court at the time of ordering the sale.

It is insisted in behalf of the plaintiff that the order of sale should be referred to the act of 1833, Hutch. Code, 679, and is justified by that act. That act gives to the court the power to order a sale of lands at the instance of parties claiming as joint tenants, tenants in common, or coparceners, and showing that an equal division thereof can not be made. It is said by this court, in *Smith v. Craig*, 10 Smed. & M. 451, to apply only to cases in which, by the death of a joint tenant, tenant in common, or coparcener, his land may descend to his minor heirs; that it contemplates a division of the proceeds of sale between living parties and the representatives of a deceased party. The petition in this case shows nothing to bring it within that rule. On the contrary, it is presented in the names of the administrator and the heirs and distributees of the estate, claiming as such, and not as joint tenants, tenants in common, or coparceners. The object is stated to be "to promote the interest of the heirs and distributees," and "that the proceeds should be distributed according to law." But it is said that, although they do not claim in the petition under the exact designation named in the statute, yet that from the facts stated showing their claim, they appear to be joint tenants. If this principle were correct, still the facts on which it is based are not sustained by the record, for the petitioners are the administrator and heirs and distributees, who together could in no sense claim the character of joint tenants or tenants in common of the land. But it is proper to consider the claim of the parties upon the ground on which they have chosen to place it.

It is also said that the application for the sale was made on the ground that an equal division of the land could not be made. But this alone would not give jurisdiction to the court to order the sale under the act of 1833, as is above shown; but that fact might constitute a very good reason for the exercise of the power to order a sale in virtue of the act of 1830. For these reasons, we think the order of sale can not be sustained under the act of 1833.

The petition and proceedings seem to be founded on the act of 1830. The parties petitioning, the character of their interest as set forth, and the reasons assigned, "to promote the interest of the heirs and distributees," and to have "the proceeds distributed according to law," all show that the act of 1830 was had in view.

But an important requisite under that act was omitted, an error of very frequent occurrence in such proceedings, and often resulting in great hardship; and it follows from what is said above that the order of sale and proceedings under it are void, and that no title passed by the sale.

The judgment below is in accordance with this view, and it is therefore affirmed.

STATUTES AUTHORIZING SALES OF DECEDENT'S LANDS MUST BE STRICTLY FOLLOWED: *Tucker v. Harria*, 58 Am. Dec. 588, note 503; *Merrill v. Harria*, 57 Id. 359; *Worthy v. Johnson*, 52 Id. 399, note 406, where other cases are collected.

THE PRINCIPAL CASE IS CITED IN *Root v. McFerrin*, 37 Miss. 46, to the point that a decree of the probate court and a sale of the land of a decedent, made without the citation and notice required by the statute appearing either by positive evidence or a recital in the record, is void; and in *Haynes v. Meeks*, 20 Cal. 312, to the point that the authority of a probate court to order a sale of the real property of an intestate is derived entirely from the statute, that such authority is limited, and can be exercised in the cases designated, and in no others.

SCOTT v. NICHOLS.

[37 MISSISSIPPI, 94.]

ALL ISSUES OF FACT MUST BE TRIED BY JURY, if a party desires to have them so tried; and the court should grant him the privilege of such a trial, although the statute which gives him the remedy he is pursuing, may be silent on the subject.

STATUTE OF LIMITATIONS, AS BETWEEN PRINCIPAL AND SURETY, BEGINS TO RUN from the time of the payment of the debt by the surety, and not from the date of the maturity of the original contract.

ERROR to the circuit court of Madison county. The opinion states the case.

Samuel Scott, for the appellant.

Lawson, for the appellee.

By Court, FISHER, J. The defendant in error made a motion in the circuit court of Madison county for a judgment against the plaintiff in error, as administrator *de bonis non* of Johnson Silverberg, deceased, to recover the sum of one thousand one hundred and seventy dollars, which the defendant in error had been compelled to pay as surety for the intestate on a judgment recovered in favor of the Commercial Bank of Natchez. It was contended on the part of the defendant in the court below that the statute giving this summary remedy is unconsti-

tutional, and the case of *Smith v. Smith*, 1 How. (Miss.) 102, was relied on as authority to support this position. That case was, in the case of *Woodward v. May*, 4 Id. 389, overruled by the majority of the court. The principles upon which it rested have certainly failed in many subsequent cases to receive the sanction of this court, and the statute may now be regarded as free from all constitutional objection. In practice, the court should never refuse the party the privilege of a trial by jury, if desired. This is unquestionably the parties' right, and the court will not be departing from its well-established rules of practice in granting it, though the statute may be silent on the subject. Issues of fact in this class of cases must be tried, as all other issues of fact are tried in the circuit courts, by a jury which may be impaneled under the authority of the court, for the purpose of ascertaining the truth of the facts upon which the judgment is to be pronounced.

We will notice but another question, and it arises upon the sixth instruction asked by the defendant below and refused by the court; the instruction is in these words: "That if the jury believe from the evidence that the claim of the creditor, the Commercial Bank of Natchez, against the estate of Johnson Silverberg, deceased, was barred by the statute of limitations, at the time it was paid by the plaintiffs, then they ought to find for the defendant," etc. This point has been directly decided by the supreme court of Tennessee, in the cases of *Marshall v. Hudson*, 9 Yerg. 57, and *Maxey v. Carter*, 10 Id. 521; and it is held that the statute, as between the principal and surety, begins to run from the payment of the debt by the surety, and not from the maturity of the original contract. These authorities have both reason and justice to recommend them, and we accordingly follow them in the present case.

Judgment affirmed.

STATUTE OF LIMITATIONS IN ACTIONS BETWEEN SURETIES, CO-PROMISORS, ETC.—The statute of limitations begins to run against a surety who, having paid the debt of his principal, seeks to recover from him what he was compelled to pay for him, not from the time when the principal debtor became liable, but only from the time when the surety actually paid the creditor. "An action by a person who has incurred the obligation of a surety, against the principal debtor, for his default, is not barred by the time which has elapsed since the principal debtor became liable, but from the time only when the surety has paid the creditor:" Angell on Lim., sec. 131; Wood on Lim., sec. 145; Brandt on Sur. & Guar., sec. 199; *Garrett v. Garrett*, 27 Ala. 687; *Preslar v. Stallworth*, 37 Id. 402; *Sherwood v. Dundar*, 6 Cal. 63; *Ward v. Henry*, 5 Conn. 595; *Reid v. Flippen*, 47 Ga. 273; *Walker v. Lathrop*, 6 Iowa, 516; *Gillespie v. Creswell*, 12 Gill & J. 36; *Bullock v. Campbell*, 9 Gill, 182;

Wood v. Leland, 1 Met. 387; *Thayer v. Daniels*, 110 Mass. 345; *Barnesback v. Reimer*, 8 Minn. 59; *McLean v. Ragsdale*, 31 Miss. 701; *Mages v. Leggett*, 48 Id. 144, citing the principal case; *Singleton v. Townsend*, 45 Mo. 379; *Burton v. Ruthersford*, 49 Id. 255; *Odlin v. Greenleaf*, 3 N. H. 270; *Conn v. Coburn*, 7 Id. 368; S. C., 26 Am. Dec. 746; *Powell v. Johnson*, 8 Johns. 249; *Hale v. Andrus*, 6 Cow. 225; *Bennett v. Cook*, 45 N. Y. 268; *Ponder v. Carter*, 12 Ired. L. 242; *Wesley Church v. Moore*, 10 Pa. St. 273; *Peters v. Barnhill*, 1 Hill (S. C.), 234; *Knott v. Butler*, 10 Rich. Eq. 143; *Thompson v. Stevens*, 2 Nott & M. 493; *Macey v. Carter*, 10 Yerg. 521; *Reeves v. Pulliam*, 7 Bart. 119; *Hammond v. Myers*, 30 Tex. 375. And the same rule applies in actions between co-sureties. The statute of limitations begins to run between them from the time when the debt is paid, and not from the time when the obligation was entered into or became due: *Brandt on Sur. & Guar.*, sec. 259; *Broughton v. Robinson*, 11 Ala. 922; *Stallworth v. Preslar*, 34 Id. 505; *Preslar v. Stallworth*, 37 Id. 402; *May v. Vann*, 15 Fla. 553; *Wood v. Leland*, 1 Met. 387; *Singleton v. Townsend*, 45 Mo. 379; *Sherrod v. Woodard*, 4 Dev. L. 360; *Camp v. Bostwick*, 20 Ohio St. 337; *Knotts v. Butler*, 10 Rich. Eq. 143; *Davies v. Humphreys*, 6 Mee. & W. 153. And even where a surety obtains an extension of time from the holder of a note, and gives collateral security for its payment, and afterwards pays the debt, the statute does not begin to run against him until he has actually paid the debt: *Wood on Lim.*, sec. 145; *Norton v. Hall*, 41 Vt. 471. *Wilson, J.*, delivering the opinion of the court in *Norton v. Hall*, *supra*, said: "It is clear, we think, that when the liability of the surety has, in good faith, continued more than six years from the time the note became due, and the payment of the note is made by him, such continued liability of the surety carries with it the relation of principal and surety, and the liability of the principal to reimburse the surety for the money so paid by him. The defendant's liability to his surety, the plaintiff, was not barred by the statute of limitations at the time the plaintiff paid the note; but as between these parties, the statute began to run on the plaintiff's claim when he paid the note." The reason for the rule stated above is thus succinctly given by *Ames, J.*, delivering the opinion of the court in *Thayer v. Daniels*, 110 Mass. 346: "There was an implied promise on the part of the defendant, as principal, to indemnify the surety, and to repay to him all the money that he might be compelled, in consequence of his liability as surety, to pay to the creditor. Until the surety has been compelled to make such payment, there is no breach of this implied promise. The cause of action accrues then for the first time, and the statute of limitations then begins to run." The statute begins to run against the right of sureties to be subrogated to the payee's right to securities, etc., from the time of the payment of the debt by them: *Wood on Lim.*, sec. 145; *Bennett v. Cobb*, 45 N. Y. 268. A surety, as such, can not call on his principal at law until he has actually paid the money. Although a judgment be recovered against him, and he be imprisoned upon a *ca. sa.*, still that is no satisfaction to the creditor for his debt, nor discharge of the principal debtor, and therefore it does not entitle the surety to call upon the principal for money paid to his use: *Rodman v. Hedden*, 10 Wend. 408.

The statute of limitations begins to run in the case of indorsees, not from the time when they become liable to pay, but from the time when they pay: *Wood on Lim.*, sec. 145; *Bowman v. Wright*, 7 Bush, 375; *Pope v. Bowman*, 27 Miss. 194. The condition of a mortgage, executed by a principal debtor to his surety, to indemnify the latter against loss or damage arising from the payment of the debt, is not broken until actual payment made by the

surety, and his right to foreclose the mortgage does not accrue until that date: *McLean v. Ragdale*, 31 Id. 701. Where an agent suffers damage from a failure of the consideration of a contract made for his principal, the statute of limitations begins to run in bar of his action against the principal to be refunded his loss, not from the breach of the contract, but from the time when the damage was incurred: *Legare v. Frazer*, 3 Strobb. 377. In the case of *Graves v. Johnson*, 48 Conn. 160; S. C., 40 Am. Rep. 162, the plaintiff, at the defendant's request and for his accommodation, signed as surety a note held by the defendant and payable to his order, upon a secret agreement between them that the defendant would not transfer it, and that if the principal did not pay it the plaintiff should not be held. The defendant transferred the note, and the plaintiff was compelled to pay it; and in an action to recover the amount paid, it was decided that the statute of limitations did not attach until the plaintiff was compelled to pay the note.

If a surety pays in land or other property, he may recover as well as if he paid in money: *Ainslee v. Wilson*, 7 Cow. 662. And a surety who pays his principal's debt by giving his own note may recover from him the amount equitably due to him: *Jordan v. Adams*, 7 Ark. 348; especially where such note is expressly received as money: *Elwood v. Deifendorf*, 5 Barb. 398. But in Indiana it seems he can not maintain an action until he has paid the money: *Pitzer v. Harmon*, 7 Blackf. 112; *Bennett v. Buchanan*, 3 Ind. 47; *Romine v. Romine*, 59 Id. 348. As to when the giving of a note is considered payment of a pre-existing debt, see *Ralston v. Wood*, 58 Am. Dec. 604, note 609; *Hatch v. Barnum*, 56 Id. 59, note 61; *Melledge v. Boston Iron Co.*, 51 Id. 59, note 73; *Arnold v. Delano*, 50 Id. 754, note 760; *Costar v. Davies*, 46 Id. 311, note 314; *Wolf v. Fink*, 44 Id. 141, note 144, where the prior cases are collected. Where a surety, an accommodation indorser, pays part of a judgment obtained against him and gives his note for the balance, which is accepted by the plaintiff in satisfaction of the judgment and in full of his claim, the cause of action of such surety against his principal to recover as for money paid is perfect, and the statute of limitations then begins to run: *Rodman v. Hedden*, 10 Wend. 498. And "the rule may be said to be that so long as any liability on the maker's part upon the original debt remains, the surety has no right of action against him, and consequently the statute does not begin to run against him; but although the surety may not have paid the debt in money, yet if he has in any manner assumed the debt, so that the maker's liability upon it is at an end, from that time the statute begins to run against the surety:" *Wood on Lim.*, sec. 145; *Hill v. Sharer*, 34 Ill. 9.

The statute begins to run in favor of sureties on the bonds of executors or administrators, on account of the devastation of their principals, from the time of the judicial ascertainment of their liability, not from the date of their actual acts of negligence or maladministration: *Rivers v. Flinn*, 47 Ala. 481; *Fretwell v. McLemore*, 52 Id. 124; *Wright v. Lang*, 66 Id. 389; *Bonner v. Young*, 68 Id. 35; *Adams v. Jones*, Id. 117. And a right of action on a guardian's bond, to recover from the sureties the amount remaining in the guardian's hands, first accrues to the ward when such amount is judicially ascertained by the probate court on the settlement of the guardian's final account: *Newton v. Hammond*, 38 Ohio St. 430. So where the name of the payee of a draft is forged, the statute does not begin to run in favor of intermediate indorsers, against the drawee who has paid the debt and charged the drawer, until judgment has been obtained by the drawer against the drawee for the amount charged and paid: *Merchants' National Bank of Baltimore v. First National Bank of Baltimore*, 4 Hughes, 9.

The statute of limitations begins to run in favor of a surety or guarantor from the time when he becomes liable to suit. *Brandt on Sur. & Guar.*, sec. 120; *Governor v. Stonum*, 11 Ala. 679; *Keller v. Rhoads*, 39 Pa. St. 513; *Bank of S. C. v. Knott*, 10 Rich. L. 543. It begins to run in favor of the guarantor when the promisee has taken all the requisite steps to charge him with liability, and his liability under his contract to pay the debt is complete, and this period can not be prolonged by the promisee by his unreasonably delaying to take these steps: *Wood on Lim.*, sec. 146; *Colvin v. Buckle*, 8 Mee. & W. 680.

Where the guaranty is absolute, the guarantor's liability to suit arises at the same moment that the action accrues against the principal, or if a period is fixed in the guaranty itself, then when that time arrives: *Wood on Lim.*, sec. 146; *Lane v. Levi*, 4 Ark. 76; *Breed v. Hillhouse*, 7 Conn. 523; *Dickerson v. Derricks*, 39 Ill. 574; *Beebe v. Dudley*, 28 N. H. 249; *Simons v. Steele*, 36 Id. 73; *Brown v. Curtiss*, 2 N. Y. 225; *Ege v. Barnitz*, 8 Pa. St. 304; *Koch v. Melhorn*, 25 Id. 89; *Roberts v. Riddle*, 79 Id. 468; *Yancey v. Brown*, 3 Sneed, 89; *Smith v. Ide*, 3 Vt. 301; *Noyes v. Nichols*, 28 Id. 160. But in case of a contingent guaranty, the statute begins to run in favor of the guarantor only from the time when the necessary steps to fix his liability have been taken: *Wood on Lim.*, sec. 146.

Where a note payable by installments is paid by a surety, the statute begins to run against him from the time he pays each installment: *Bullock v. Campbell*, 9 Gill, 182. Sureties who have each paid a part of the debt for the principal have a several right of action against him for indemnity, and the statute runs against each from the time he pays his part: *Wood on Lim.*, sec. 145; *Peabody v. Chapman*, 20 N. H. 418. "A party acquires a right to contribution as soon as he pays more than his share, but not till then; and consequently the statute of limitations does not begin to run until then:" 1 *Parsons on Cont.* 36; *Ponder v. Carter*, 12 Ired. L. 242; *Reeves v. Pulliam*, 9 Baxt. 153; *Davies v. Humphreys*, 6 Mee. & W. 153. If an infant purchases necessaries, and gives a promissory note signed by himself and a surety, and the surety afterwards pays the note, he is entitled to recover of the infant the amount so paid, and the cause of action arises when the surety pays the note: *Cox v. Coburn*, 7 N. H. 368; S. C., 28 Am. Dec. 746. When a surety on a promissory note pays the holder before the note is payable, a cause of action against his principal for indemnity accrues at the time when the note becomes payable, and not before, and the statute of limitations begins to run from that time: *Wood on Lim.*, sec. 145; *Tillotson v. Rose*, 11 Met. 299. But a surety must be under some legal obligation to pay the debt in order to be able to sue for contribution. A surety who pays a debt after it is barred by the statute of limitations can not compel his co-surety to contribution: *Wood on Lim.*, sec. 145; *Kimble v. Cummins*, 3 Metc. (Ky.) 327; *Cocke v. Hoffman*, 5 Lea, 105; S. C., 40 Am. Rep. 23.

Where two persons execute a note, one as principal and the other as surety, and a judgment obtained upon the note is paid by the surety, the obligation of the principal to repay the surety is not founded upon a written instrument," within the meaning of the California statute of limitations. And if more than two years have elapsed after payment before the bringing of the suit, the action is barred: *Chipman v. Merrill*, 20 Cal. 130.

THE PRINCIPAL CASE IS CITED IN *Isom v. Mississippi Central R. R. Co.*, 36 Miss. 310, to the point that issues of fact, in cases where the statute authorizes summary judgment, should be tried as in other cases by a jury.

RIGHT TO TRIAL BY JURY: See *Inhabitants of Saco v. Wentworth*, 58 Am. Dec. 786, note 791.

DECISION OF ALL QUESTIONS OF FACT MUST BE LEFT TO JURY: See *State v. Croteau*, 54 Am. Dec. 90, note 119, where other cases are collected.

WILLIAMS v. CAMMACK.

[27 MISSISSIPPI, 209.]

ACT AUTHORIZING LEVY FOR LEVEE PURPOSES OF UNIFORM TAX of not exceeding ten cents per acre on all lands in a certain county lying within ten miles of the Mississippi river, and a uniform tax of not exceeding five cents per acre on all lands in said county lying ten miles from said river, prescribes a rule of taxation for all the taxable lands in the county, as well for those lying beyond the range of ten miles from the river as for those lying within ten miles of it.

ACT WHICH EXEMPTS FROM TAXATION FOR LEVEE PURPOSES lands lying between the river and the levee does not confer exclusive privileges upon the owners of such lands, and does not violate the constitutional provisions "that all freeman are equal in rights," and "that no man or set of men are entitled to exclusive, separate, public emoluments or privileges from the community but in consideration of public services." These provisions declare that honors, emoluments, and privileges of a personal and political character are alike free and open to all the citizens of the state; but they have no reference to the private relations of the citizens, nor to the action of the legislature in passing laws regulating the domestic policy and business affairs of the people, or any portion of them.

POWER OF TAXATION AND MANNER OF EXERCISING IT BELONG TO LEGISLATURE, subject to such restrictions as the constitution imposes; and such power, while exercised within the scope of the grant, is subject alone to the legislative discretion, with which the judicial tribunals have no right to interfere, simply because in their judgment the action of the legislature is contrary to the principles of natural justice.

WHERE JURISDICTIONAL FACTS DO NOT APPEAR OF RECORD, their existence may be proved *aliunde*. And where it sufficiently appears that a special meeting of the board of police was held after the notice required by law had been given, such meeting is shown to have been legally held, notwithstanding the record does not show that previous notice was given.

LEGISLATURE MAY SUBMIT TO DETERMINATION OF THOSE INTENDED TO BE AFFECTED BY ACT, whether they will carry out its provisions or not. And an act which provides that if a majority of the legal voters of the county to be affected thereby, within a certain time, enter a written protest against its provisions, before the board of police, the act shall become void and of no binding force, is not unconstitutional.

IMPOSITION OF TAX UPON ALL LANDS WITHIN CERTAIN COUNTY, for the purpose of establishing a work of improvement for the general good and benefit of all persons interested in such lands, is not a taking of private property for a public use, but is a legitimate exercise of the power of taxation by the legislature.

POWER TO SELL LANDS UPON FAILURE TO PAY TAX levied thereon is a mere incident to the power of taxation.

LEGISLATURE HAS POWER TO IMPOSE TAX ON LOCAL DISTRICT for the construction of local public improvements.

SALE OF LAND FOR TAXES, AFTER SERVICE OF INJUNCTION upon the commissioners who levied the tax, enjoining them "from collecting or proceeding to collect" the tax on such land, is irregular and will be set aside.

ERROR to the superior court of chancery. The opinion states the case.

W. C. and A. K. Smedes, for the appellant.

D. O. Williams, pro se.

By Court, **HANDY, J.** The appellant filed this bill in the superior court of chancery, to enjoin the collection of a tax of five cents per acre, assessed upon his lands lying in Issaquena county, by the board of police of that county, by virtue of an act passed by the legislature, and approved on the twentieth of February, 1850, "to provide for the erection, repair, and preservation of levees on the Mississippi river, in the county of Issaquena."

The bill charges, in substance, that the proceedings of the board of police were not in accordance with the act authorizing the levy of the tax, in many respects: 1. It was made the duty of the board, immediately after the passage of the act, to appoint the levee commissioners, freeholders and residents of the county. But this duty was not performed until the month of July, and the persons appointed are believed not to be freeholders. 2. That the act made it the duty of the commissioners when appointed "to estimate the probable cost of said levee or levees, and report the same to the president of the board of police, who shall levy and assess a uniform tax, not exceeding ten cents per acre, upon all lands lying on or within ten miles of said Mississippi river in said county subject to taxation; and a uniform tax of not exceeding five cents per acre on all lands in said county subject to taxation lying ten miles from said Mississippi river," etc. But the board of police assessed the tax upon complainant's lands, and were proceeding to collect it, without any estimate of the probable cost of the work, or of the facts upon which it was based, being made by the commissioners and reported to the board of police. 3. That complainant's lands lying more than ten miles from the Mississippi river were not subject to the tax, the act only applying to lands lying ten miles from the river. 4. That the eleventh section of the act which exempts from tax lands

lying between the line of the levee and the Mississippi river, so as to be without protection from the levee, is unconstitutional, because it confers "exclusive privileges" on the owners of such lands. 5. That the twelfth section of the act provides "that if a majority of the legal voters who are landholders or householders in said county shall enter a written protest against the provisions of the act before the board of police, at their first meeting after the fourth of July next (after its passage), setting forth their objections to the act, then the act should be void, and of no binding force;" and the board was also required to make this protest a matter of record, to have it published in the newspapers, and to furnish a certified copy of it to the secretary of state. The bill charges that at the time specified in the act a written protest, signed by twenty-four of the qualified voters of said county, who constituted a majority of said voters, was presented, objecting to the provisions of the act; but that the board determined that they did not constitute a majority of such voters. The bill prays for discovery as to the means by which the board ascertained that the twenty-four signers were not a majority of the voters of the county.

The complainant alleges that his lands subjected to this tax lie from eleven to fourteen miles from the Mississippi river; that a portion of them lies on the east side of Deer creek, and consists of a cypress brake, subject to overflow, and valuable only on that account, and much the larger portion of the lands are above overflow, and in no wise benefited by the levee, only a small part of the back land being subject to overflow; and that the cypress brake is greatly injured by the levee.

The answers of the defendants, the president of the board of police and the levee commissioners, admit that the levee commissioners were not appointed until the month of July, 1850, but state that the appointments were made as soon after an authentic copy of the act could be procured by the board as they conveniently could, all due diligence being used to have the appointments made at an earlier date, and that they were made in ample time; and they aver that the persons so appointed were at the time, and still are, freeholders, according to the provisions of the act. They deny that the commissioner did not make an estimate of the probable cost of the work, and report the facts on which the board were authorized to make the assessment, and aver that the estimate and report were made, and the action of the board predicated thereon, according to the provisions of the act. They insist that by a just and proper construction of the

act, the complainant's lands, though lying more than ten miles from the Mississippi, are subject to the tax of five cents per acre assessed upon them; and admit the statements of fact in relation to the situation and character of the lands as set forth in the bill, but deny that they entitle him to any relief against the payment of the tax.

They admit that a written protest in opposition to the act, signed by twenty-two of the qualified voters of the county, was presented to the board, as stated in the bill, and state that no other protest was presented. They admit that this protest was not published in any manner, because they aver that it was not signed by a majority of the legal voters of the county, who were more than three times the number of the signers to this protest, and that this was a notorious fact throughout the county, known personally to every member of the board of police, and made manifest by every election which has taken place in the county since its organization. They insist that the act is valid and constitutional, and that the proceedings under it have all been regular.

The complainant afterwards filed a supplemental bill, stating that after the issuing and service of the injunction granted on the original bill, upon the president of the board of police and the levee commissioners, the sheriff and tax collector of Issaquena county proceeded to sell the lands mentioned in the bill, in violation of the injunction for the payment of the taxes in controversy, and has executed a deed for the same to George N. Parks, one of the defendants, for the use of said levee commissioners, which deed and sale he prays may be set aside and declared void. It further states that it was at a special term of the board of police that the lands in question were assessed, and that the record of said board of police does not show that ten days' previous notice, posted at the court-house door of said county, had been given for the convention of said board of police, and that no such notice was given as is required by law.

The defendants answer and admit the sale of the land by the sheriff, but can not state whether it was after he had received and served the injunction. They claim that the sale was made in good faith and in accordance with the law, and should stand. They admit that the lands were assessed at a special term of the board of police, and that the record of the board does not show that ten days' previous notice of the meeting of the board had been given as stated by complainant, and they aver that such notice was duly and legally given, and insist that it is not required to be shown by the record that it was given.

It appears by an exhibit in the record that the levee commissioners made their estimate and report to the board of police, which was received and acted upon by the board. The facts stated in the original bill, in relation to the situation and character of the complainant's lands, were established by testimony; and it is also shown that the complainant's lands were sold by the sheriff for the levee taxes, after the injunction had been received and served by him on the defendants; that the sale was made in the presence of two of the defendants, the levee commissioners, one of whom was Parks, to whom the deed was made, and that they used no effort to prevent the sale, but permitted it to be made. Upon the final hearing the chancellor dismissed the bill, and the complainant took this appeal. Several of the grounds of relief set up in the original bill are met and obviated by the answers, and appear not to be insisted upon here by the appellant. Our attention will therefore be directed to such points of objection only as have been presented here in his behalf.

The first of these objections is, that the act did not authorize a tax for levee purposes, upon land lying more than ten miles from the Mississippi river. The act authorizes "a uniform tax, not exceeding ten cents per acre, upon all lands lying on or within ten miles of the river in said county subject to taxation; and a uniform tax of not exceeding five cents per acre on all lands in said county subject to taxation lying ten miles from the Mississippi river." Taking these two clauses of the act together, we do not think that there is any room for doubt as to the intention of the legislature. It is clear that a rule of taxation was prescribed for all taxable lands in the county: 1. As to the lands lying on the river or within ten miles of it; and 2. As to all the lands in the county lying beyond that range. Neither the language nor the purpose of the act, nor the practical application of it to cases upon which it might operate, would justify the construction that lands lying more than ten miles from the river were not embraced by the latter clause. Such a construction would render the clause nugatory, for if the lands lay within ten miles from the river, they would be covered by the prior clause, and be subject to a tax of ten cents per acre; and by this construction, if they lay beyond the line of ten miles distance from the river they would be subject to no tax, so that there would be no lands upon which this clause could operate but those immediately on the line at ten miles distance from

the river, which, being practically incapable of measurement, could not be subject to taxation.

The next objection is that the eleventh section of the act, exempting from taxation lands lying between the river and the levee, confers exclusive privileges upon the owners of such lands, and is therefore in violation of the first section of the first article of our constitution.

If this were admitted, it would not destroy the whole act, for it is well established that one part of an act may be unconstitutional and void, and other parts of the act not necessarily dependent upon it be valid. And this objection, while it might be good ground for subjecting the property referred to to the tax, furnishes no sufficient reason why the appellant's lands not embraced by the obnoxious section of the act should not be subjected to the operation of those parts of the act embracing them, and which are in themselves not liable to constitutional objection.

But the section in question is not liable to the objection urged against it. The clause of the constitution referred to declares, as a part of the organic law of this state, "that all freemen are equal in rights," and "that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services." The principle here announced is that of equality in political rights, and a denial of all title to individual privileges, honors, and distinctions from the community but for public services. It was directed against superiority of personal and political rights, distinctions of rank, birth, or station, and all claims to emoluments from the community, by any man or set of men, over any other citizen of the state. It declares that honors, emoluments, and privileges of a personal and political character are alike free and open to all the citizens of the state. But it has no reference to the private relations of the citizens, nor to the action of the legislature in passing laws regulating the domestic policy and business affairs of the people, or any portion of them. Such matters are left, with but few limitations, to the discretion of the legislature. Nor has this doctrine any application to the act of the legislature under consideration, because no "exclusive, separate public emoluments or privileges" are conferred by the act upon "any man or set of men." The act simply exempts certain property from taxation. It operates upon the thing, not upon the person, and is neither an emolument nor a privilege to any particular individual or class of men in the community, for it passes with

the property to any and all persons to whom the land may be conveyed. The legislature, for reasons that appear to be just, have seen proper to exempt from the burdens of this act a certain description of property which could not in all human probability be in any wise benefited by the work proposed. In the operation of the act, it appears also that other lands subject to its provisions are not benefited, but are even injured. So the exemption of every species of property from taxation, which is so frequently done by legislative acts, operates prejudicially upon those not having such property, and who are subjected to increased burdens by reason of the exemption. It is also of common occurrence that legislative acts designed for the general good work the most serious injury to the interests of individuals. These may be hardships, but they are inconveniences incident to society, and a part of the sacrifices which every one must make in order to enjoy the greater advantages of law and government. These hardships may be a very good reason to induce the legislature to repeal the oppressive act, but they do not therefore render the act unconstitutional; for it is universally conceded that the power of taxation, whether for general or local purposes, and the mode and manner of exercising the power, not within the prohibitions of the constitution, appropriately belong to the legislatures of the states. This power may be unwisely exercised or abused, yet it is a power intrusted by the constitution to the legislature, which, while exercised within the scope of the grant, is subject alone to their discretion, with which the judicial tribunals have no right to interfere because in their judgment the action of the legislature is contrary to the principles of natural justice: *Calder v. Bull*, 3 Dall. 386; *Lansing v. Smith*, 8 Cow. 146; *Providence Bank v. Billings*, 4 Pet. 514; *Wilson v. Mayor of New York*, 1 Denio, 595 [43 Am. Dec. 719]; *Godden v. Crump*, 8 Leigh, 120; *Thomas v. Leland*, 24 Wend. 65; *Talbot v. Dent*, 9 B. Mon. 526. Another objection is that the protest in opposition to the act was not recorded and published as was required by the act. This was only required to be done in case a protest, signed by a majority of the legal voters who were landholders or householders in the county, should be presented to the board of police; and the answers, in response to the allegations of the bill, state that the protest presented was signed by less than one third of such voters. The answers, not being disproved, are competent evidence upon the point, and show that no such protest was presented as was required by the act or could be regarded by the board of police.

Again: the assessment of the appellant's land is said to be irregular, because it was done at a special term of the board of police, and the record of the proceedings of the board does not show that the meeting was held upon legal notice given. It is admitted by the answers that the notice does not appear affirmatively by the record; but the allegation of the bill that the meeting was held without legal notice being given is emphatically denied by the answers, which aver that due and legal notice of the meeting was given, and of this there is no proof to the contrary.

It is insisted by the appellant that the jurisdiction of the board depended upon the notice of its meeting, and that that fact must affirmatively appear of record, otherwise there was no jurisdiction, and the proceedings are therefore void. We can not sanction this proposition. It is true, with respect to courts of special and limited jurisdiction, that nothing is to be presumed in their favor in point of jurisdiction. But it is equally true that a party asserting the jurisdiction may show that it existed: 3 Phill. Ev., 2d ed., Cowen & Hill's notes, 906, and cases there cited. It is incumbent on the party alleging the existence of the jurisdictional facts in such cases to show them. If they appear affirmatively of record, there is much diversity of opinion as to whether that is conclusive or merely *prima facie* evidence of the jurisdictional facts. But if they do not appear of record, it is well settled that their existence may be proved *aliunde*: Id. 1013-1015; *Rex v. All Saints*, 1 Man. & Ry. 668; *Mills v. Martin*, 19 Johns. 33; *Rex v. Hulcott*, 6 T. R. 583.

The statute providing for special meetings of the boards of police does not require that the record shall show that the meeting was held upon notice given. It would certainly be more regular and advisable that the record should contain such an entry. But such records are too often kept in an informal manner and by inexperienced persons, and should be considered with every indulgence that the law will permit. To apply rigid, technical rules to such proceedings would seriously embarrass the administration of the business appertaining to such tribunals, and produce most unjust and mischievous consequences. If the substantial requirements of the law have been complied with, we do not think it proper to countenance technical objections to the proceedings of tribunals like these; and as it sufficiently appears here that the meeting was held after the notice required by law had been given, we think the meeting is thereby shown to have been legally held, notwithstanding the record did not show that previous notice was given.

Again: the appellant insists that the act in question was not a valid legislative act, because, by the twelfth section, its operation depended upon the determination of a majority of the voters of the county as to whether it should become a law or not. This objection is founded in a misapprehension of the provision of the twelfth section. The act in its terms possessed every essential quality of a complete and operative legislative act. Nothing was required to be done by the people to give it force and effect. Being thus complete and effective, the twelfth section provided that if a majority of the legal voters who were landholders or householders of the county should enter a written protest against its provisions before the board of police, at their first meeting after the fourth of July, the act should become void, and of no binding force. This protest certainly gave no force to the act, but was intended expressly to put an end to its operation. If the provision had been that the act should not have any effect until a majority of the voters should sign their written assent to it, the objection would have more force. But no such condition was annexed to it. Being a local act, affecting only the property holders of the particular county and intended for their benefit, it was provided that they should have the privilege of putting an end to its operation in the manner prescribed by the act, otherwise that it should continue. It derived no legislative force from the action of the voters, but quite the reverse. While the act, therefore, is liable to no technical objection by reason of its depending for its legislative force upon the sanction of the voters, we can perceive nothing unjust or illegal in the policy of submitting to the determination of those intended to be affected by it whether they will carry out its provisions. We think, therefore, that there is no force in this objection.

Another objection urged against the constitutionality of the act is, that under it private property is taken for public use without the consent of the owners and without just compensation, in violation of the thirteenth section of the first article of the constitution. In determining the validity of this objection, we have but to consider the scope and object of the act, the end intended, and the means by which it was designed to be accomplished. It is manifest, from an examination of the act, that its sole object was to establish a work of improvement to the lands in the county of Issaquena, for the general good and benefit of all persons interested in lands lying within the county. This end was proposed to be effected by a tax imposed upon the property in-

tended to be benefited by the work. In this there is certainly no semblance of taking private property for public use, either within the letter or the spirit of the constitution. The object was to raise the money to construct the work, not to take the lands for the public use; and this was a legitimate object for legislative action, and was attempted to be effected by the exercise of the power of taxation, which, whether for local or general purposes of a public nature, was within the undoubted competency and discretion of the legislature: *Thomas v. Leland*, 24 Wend. 65; *Livingston v. Mayor etc. of New York*, 8 Id. 101 [22 Am. Dec. 622]; *Harrison v. Holland*, 3 Gratt. 347; *Norwich v. County Commissioners*, 18 Pick. 60; *Sharpless v. Mayor etc. of Philadelphia*, 21 Pa. St. 147 [59 Am. Dec. 759].

If the taxes authorized by the act, and assessed under its provisions, were paid, the means are supplied to accomplish the work as contemplated, and all difficulty is removed. But it was necessary and proper that provision should be made for the contingency of failure or refusal to pay the assessments; and this was done by the ordinary provision that in such cases the property should be sold for the taxes, and the means thereby furnished to carry on the work. What sound objection can there be to this? It is but a means to an end, legitimate and proper in itself—a mere incident to the power of taxation, and a remedy for its enforcement without which the power itself would fail. How else could the power be exercised and be free from the objection here urged? Not by ordinary suit, judgment, and execution at law; for if a party's land were levied upon under such an execution, and sold for the taxes, the same objection would arise, that private property was thereby taken for public use without just compensation. And there is as much reason for saying that just compensation was not made in the one case as in the other. If, then, the remedy for collecting delinquent taxes had been fixed by the act to be by suit at law, instead of sale by the sheriff in a summary manner, this objection could be urged with equal force to that mode of proceeding. The consequence of this would be that there would be no mode of collecting the tax under our constitution and laws; and thus a tax duly and constitutionally imposed would fail for want of a means of enforcing it, and we would be brought to the absurd and anomalous conclusion that the government would be without power to collect taxes imposed for the public good, and for purposes authorized by the constitution, whenever it should become necessary to the collection to sell the property of a recusant citizen, because it would be

taking private property for public use without just compensation. In point of principle and constitutional power, there is no difference between taxes imposed for a general purpose and those imposed for a public local purpose. The same power exists in both cases, as is abundantly shown by the authorities above cited, and the same means of enforcing it must also exist; so that this objection would equally apply to all laws for the collection of revenue for the support of government or for general public works, and if permitted to prevail, would destroy all government.

The authorities above cited show that it has been repeatedly held by courts of great learning and ability in states whose constitutions contain provisions similar to our own, and sometimes identical with the terms under consideration, that the legislature has the power to impose a tax on a local district for the construction of local public improvements, and that such acts were not in conflict with these constitutional restrictions. To these many other learned and conclusive decisions may be added: *People v. Brooklyn*, 4 N. Y. 419 [55 Am. Dec. 266]; *Shaw v. Dennis*, 5 Gilm. 405; *Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475; *Cincinnati etc. R. R. Co. v. Clinton County*, lately decided in the supreme court of Ohio, 1 Ohio St. 77; and which have recently been sanctioned by this court in the case of *Strickland v. Mississippi Central R. R. Co.* (MS. opinion).

Nor is it any objection to the constitutionality of the act that it operates injuriously upon the appellant. Every revenue bill, and every work of public improvement, must more or less have such an effect. But they must be submitted to as the necessary action of the machinery of government, and as individual sacrifices to the general good, in order that the advantages of the social compact may be enjoyed. This principle rests in the very foundations of society, and is illustrated in every day's experience of the citizen yielding his natural rights, even of life, liberty, or property, to the public good. But he can only claim immunity when it is secured to him by the principles of the constitution.

Having thus disposed of the objections taken to the act, and the proceedings in assessing the tax, the only remaining point to be noticed is the regularity and validity of the sale of the appellant's lands pending the injunction. By this process, the defendants, the president of the board of police and the levee commissioners, were enjoined "from collecting, or proceeding to collect," the tax upon the specified lands of the appellant. Notwithstanding this, and after service of the process, and

while the bill contesting the validity of the tax was pending, the appellant's land was sold by the sheriff in the presence of two of the commissioners, who used no effort to prevent it, and was struck off and conveyed to one of them. This was obviously a violation of the injunction; for even if it was the duty of the sheriff to sell notwithstanding the injunction, that duty was to the commissioners, and it was a violation of the injunction on their part to permit the sale to be made. But the sheriff was not required by the act to perform any act which the commissioners were prohibited by legal means from doing. The sale was therefore irregular, and should be set aside, and the sheriff's deed canceled, upon the appellant paying to the levee commissioners the amount of tax due at the time of filing the bill, and such further taxes as were assessed and due upon the lands for levee purposes, in virtue of the act, up to the time of the final decree of the chancery court in the case.

The decree is reversed, and a decree in this court ordered accordingly.

POWER OF LEGISLATURE IN REFERENCE TO TAXATION is limited only by their own discretion: See *Sharpless v. Mayor etc. of Philadelphia*, 59 Am. Dec. 759; *People v. Mayor etc. of Brooklyn*, 55 Id. 286, note 287, where other cases are collected. The imposition of taxes is wholly intrusted to the legislature, and the judiciary can not enforce a scheme of its own devising because it thinks the law imposing the tax is unjust: *Daily v. Swope*, 47 Miss. 389, citing the principal case.

QUO MODO OF TAXATION IS SUBJECT TO LEGISLATIVE CONTROL: See *De Witt v. Hays*, 56 Am. Dec. 352, note 355; *People v. Mayor etc. of Brooklyn*, 55 Id. 286, note 287, where other cases are collected.

DISTINCTION BETWEEN POWER OF EMINENT DOMAIN AND THAT OF TAXATION: See *People v. Mayor etc. of Brooklyn*, 55 Am. Dec. 286, note 285, where other cases are collected. A tax sale is not an appropriation of private property to public use within the meaning of the constitution: *Griffin v. Doyan*, 48 Miss. 20, citing the principal case. Assessing property for street improvements is an exercise of the power of taxation, and not that of eminent domain: *Emery v. San Francisco Gas Co.*, 28 Cal. 352, citing the principal case.

DELEGATION OF LEGISLATIVE POWER: See *Parker v. Commonwealth*, 47 Am. Dec. 480, note 500, where other cases are collected.

LEGISLATURE MAY IMPOSE LOCAL TAX for local purposes on a district less than the whole state: *Alcorn v. Hamer*, 38 Miss. 752, citing the principal case. And the leveeing of the Mississippi river is a proper local object to justify local taxation: *Daily v. Swope*, 47 Id. 377, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Barnes v. Supervisors of Pike County*, 51 Miss. 307, to the point that an act submitting to a vote of the people the question what place shall be the seat of justice of a county is not unconstitutional; and in *Martin v. Dix*, 52 Id. 61, to the point that a clause in the constitution requiring compensation for lands taken for public use to be paid in before the lands are appropriated does not apply to the taxing power.

ROBERTSON v. CRANE.

[27 MISSISSIPPI, 362.]

AGENT MAKING DEMAND FOR DELIVERY OF PROPERTY BELONGING TO HIS PRINCIPAL must, as a general rule, prove his authority to make the demand; where, however, the party upon whom the demand is made makes no objection to the authority of the agent to make the demand, but puts his refusal to deliver upon other grounds which can not in point of law be supported, such refusal is a clear waiver of all objection to the authority of the agent, and amounts in law to a conversion.

ERROR to the circuit court of Lauderdale county. The opinion states the case.

R. McElroy, for the appellant.

D. C. Glen, for the appellee.

By Court, **HANDY, J.** This was an action of trover brought by the plaintiff, a minor, by her next friend, to recover the value of certain articles of wearing apparel belonging to her, and converted by the defendant to his use. Pleas, not guilty, and property not in the plaintiff. On the trial below, the plaintiff offered evidence to the following effect: that the witness went with Cains, the next friend of the plaintiff, to the defendant's house, and Cains demanded of the defendant the articles, which he then admitted were in his possession; that defendant did not ask for Cains' authority, and did not refuse to give up the articles for want of authority in Cains to make the demand; that the defendant stated that the plaintiff had left his house without his knowledge or consent, and that he refused to permit her to return, and that he would only give up her clothing at the end of the law; that she had been living with him for several years, and that he believed she had been persuaded off by her relatives; that she was then a minor, and living at Cains' house. This being all the evidence, the defendant demurred to it, and the court decided that it was not sufficient in law to maintain the action. Judgment was accordingly rendered for the defendant, and the case is thereupon brought here by writ of error. The admissions of the defendant sufficiently show that the articles sued for were the property of the plaintiff and in the possession of the defendant; and the only ground then relied upon to sustain the judgment is, that no legal demand of the goods was shown, there being no evidence that Cains was the agent of the plaintiff, or purported to act for her.

The general rule certainly is, that if the demand is made by

an agent, the plaintiff must prove his authority to make it; and otherwise that the refusal will not be evidence of a conversion: 2 Greenl. Ev., sec. 644. But the conduct of the defendant may be a recognition of the authority of the agent and the sufficiency of the demand. It is said by Judge Story: "If the refusal do not turn upon the supposed want of authority, if the party waives any inquiry into the authority, or admits its sufficiency, and puts his refusal upon another distinct ground, which can not in point of law be supported, the refusal under such circumstances is presumptive evidence of a refusal:" *Watt v. Potter*, 2 Mason, 81. If he claims to detain the property on the ground of ownership in himself, or by arbitrary and unjustifiable means, or under a frivolous or fraudulent pretext, without question of the right of the agent making the demand, it is a waiver of all objection to the validity of the demand, and evidence of a conversion, unless the ground on which his refusal is placed is a sufficient justification for the refusal. Thus, if upon demand made the defendant said he would retain the goods and that he knew a suit would be brought against him, this is evidence of a conversion, sufficient to maintain the action: *Allen v. Ogden*, 1 Wash. 174; *Ratcliff v. Vance*, 2 Mill Const. 241.

This principle is decisive of the present question. The defendant made no objection to the authority of the agent to make the demand. It appears that the plaintiff was living at the agent's house when the demand was made, and that the defendant was aware of that fact. In reply to the demand, he merely complained of her having quit his house, but refused to give up the articles demanded, except at the end of the law. This conduct was a clear waiver of all objection to the authority of the agent, and placed the defendant on the ground of an arbitrary refusal to deliver the property, which in law amounts to a conversion.

The judgment of the circuit court is therefore reversed; and this court, proceeding to render the judgment on the demurrer which should have been rendered by that court, directs that judgment be entered here for the plaintiff, for the value of the articles mentioned in the declaration, and that a writ of inquiry be awarded in the circuit court of Lauderdale county, to assess the damages to the plaintiff by reason of the trover and conversion complained of; and for the purpose of having said writ of inquiry executed, the case is remanded.

AUTHORITY OF AGENT TO MAKE DEMAND can only be questioned at the time: *Ham v. Boody*, 51 Am. Dec. 235. Demand is waived when the party entitled to it shows that it would be useless to make it: *Heard v. Lodge*, 32 Id. 197.

JOHNSON v. JACKSON.

[27 MISSISSIPPI, 498.]

CONTRACT FOR SALE OF LAND, WHEN VENDOR CAN NOT PUT END TO.—

Where, on the sale of land, part of the purchase money is paid, and notes for the balance are executed, and the vendor gives to the vendee a bond to convey the title to him upon the punctual payment of the notes, and the vendee goes into possession, the contract is mutual and dependent, and the vendor can not put an end to it without performance or a valid offer to perform on his part.

VENDOR CAN NOT ABANDON CONTRACT WITHOUT REFUNDING to the vendee the money paid by the latter in part performance of it.

WHERE VENDEE OF LAND GIVES HIS NOTES TO VENDOR, who agrees to convey the land to him upon payment of the notes, the vendor will not be decreed to convey the land until an account is taken of the amount of principal and interest due on the notes, and a day is fixed for the payment of such amount into court for the party entitled.

ERROR to the chancery court at Hernando. The opinion states the case.

D. Mayes, for the appellant.

J. H. Unthank, for the appellee.

By Court, **HANDY, J.** This was a bill filed in the district chancery court at Hernando. The material facts of the case are, that one Irwin purchased the land in controversy in January, 1850, from Healy & Whiting, for which he paid one hundred and fifty dollars in cash at the time, and gave three promissory notes, each for the sum of one hundred and ninety dollars, payable in one, two, and three years, and received from the vendors a bond for title to be conveyed "on the punctual payment of said notes," and went into possession. In February, 1851, he executed a deed in trust conveying the land to Jackson as trustee for the use of Pryor, but subsequently he delivered up to the agent of Healy & Whiting the title bond, in derogation of the rights of Jackson, as trustee of Pryor. Afterwards Healy & Whiting undertook to sell the land to Johnson for six hundred and forty-four dollars, of which one hundred dollars was paid in money, and the balance secured by notes on time, and gave him a bond for title to be conveyed on the payment of the notes executed by him. It appears that Johnson had notice of the previous purchase, and that he purchased the land under the advice that, as Irwin had failed to pay his notes as they fell due, Healy & Whiting had the right to put an end to the contract. Johnson, therefore, made the purchase; and after the exe-

cution of the trust deed by Irwin to Jackson, and with notice of it, he obtained a transfer of the title bond of Healy & Whiting to Irwin, from a third person, to whom Irwin had assigned it subsequently to the execution of the trust deed by him.

The bill is filed by Jackson as trustee for Pryor against Healy & Whiting and Johnson, and prays that they be decreed to convey the legal title to the land to the complainant, upon his complying with the terms of the contract of Irwin, which he offers to do. A decree was rendered accordingly, from which this appeal is prosecuted by Johnson. The ground on which the decree is alleged to be erroneous is, that Irwin, having failed to pay the notes for the whole of the purchase money at their maturity, his vendors had a right to disaffirm the contract, and resume their proprietorship of the land, and make a resale of it.

We think that this position can not be maintained under the circumstances of this case, for two reasons: 1. The obligation of Irwin to pay the purchase money must be regarded as dependent upon the duty of the vendors to convey the land, so far as to disable the vendors from putting an end to the contract, without a performance, or a valid offer to perform, on their part. In other words the contract was a mutual and dependent one, and neither party can insist upon a performance by the other, without performance, or readiness to perform, on his part. This point has been repeatedly held by this court upon contracts similar to this, and in some cases where the essential terms are identical with those here used: *Wadlington v. Hill*, 10 Smed. & M. 560; *Peques v. Mosly*, 7 Id. 340; *Mobley v. Keyes*, 13 Id. 678. And it is in accordance with the just and well-established rule, which has also been sanctioned by this court, that covenants of this nature must be held to be mutual and dependent, unless a contrary intention clearly appears: *Liddell v. Sims*, 9 Id. 596. 2. The vendors could not abandon the contract and treat it as at an end, without refunding to the vendee the money he had paid in part performance of it. For it is a general rule that in order to disaffirm a contract, and entitle the party to the rights resulting therefrom, both parties must be placed *in statu quo*. It would certainly be unjust to permit the vendors, after having received part of the purchase money from the vendee at the time of the contract, to put an end to the contract upon failure to pay the residue of the purchase money, and to make a resale to a third person, without refunding the money paid, and without even tendering performance on his part.

We think, therefore, that the decree is correct, and it is affirmed in its principal feature. But there should have been an account taken of the amount of the principal and interest due upon the notes of Irwin for the purchase money, and a day fixed for the payment thereof by the complainant into court, for the use and benefit of the parties entitled thereto; upon compliance with which by the complainant, the vendors, Healy & Whiting, should have been decreed to convey to the complainant, for the uses and purposes declared in the trust deed to him, the lands and premises in controversy, and that the defendant Johnson should also, upon such payment into court, deliver possession of the premises to the complainant for the uses and purposes aforesaid; and upon failure by the vendors to make such conveyance, that the same should be made by a commissioner to be appointed for that purpose.

The decree is reversed, and the cause remanded to the court below, with directions that it be proceeded with in conformity with this opinion; the appellant to pay the costs.

VENDOR CAN NOT RESCIND CONTRACT AND RETAIN CONSIDERATION that he has received under it: *Jennings v. Gage*, 56 Am. Dec. 476; *Fay v. Oliver*, 49 Id. 764, note 768; *Davis v. Smith*, 48 Id. 279, note 297, where other cases are collected.

WHERE CONTRACT IS ONE OF MUTUAL AND DEPENDENT COVENANTS, the vendor can not put the vendee in default without a performance or a valid offer to perform: *Walton v. Wilson*, 30 Miss. 580; *Jones v. Loggins*, 37 Id. 552; *Moak v. Bryant*, 51 Id. 564, all citing the principal case.

VENDEE INTENDING TO RESCIND HIS CONTRACT SHOULD RELINQUISH CLAIM to the vendor and abandon possession: *Smith v. Busby*, 57 Am. Dec. 207.

UPON SETTING ASIDE CONVEYANCE, COURT SHOULD TAKE ACCOUNT, and the defendant should be allowed for the money consideration paid by him, with interest: *Leach v. Leach*, 58 Am. Dec. 642.

HODGE v. MITCHELL.

[27 MISSISSIPPI, 560.]

SALE OF LAND UNDER EXECUTION ISSUED AND TESTED AFTER DEATH OF DEFENDANT, without a revival, is not void, but merely voidable, and is valid until regularly set aside in a direct proceeding for that purpose by the heir or terre-tenant.

IN ACTION OF EJECTMENT BY MORTGAGEE FOR LAND MORTGAGED, evidence that a bill filed by him against the same defendant to foreclose the same mortgage was dismissed after a hearing on the merits ought to be admitted. The decree dismissing such bill would bar the plaintiff from setting up any title under the mortgage, and be in effect a discharge of

it; and even if this decree was erroneous, still it stands as an adjudication of his right until reversed on error or otherwise duly set aside.

SALE OF LAND UNDER EXECUTION, AFTER EXPIRATION OF LIEN OF JUDGMENT under which it was issued, is sufficient to convey the title of the defendant, at least from the time it is made, except as to a superior title or prior liens.

ERROR to the Yazoo circuit court. The opinion states the case.

N. G. and S. E. Nye, for the appellant.

Lawson and Henry, for the appellee.

By Court, **HANDY, J.** This was an action brought by the defendant in error against the plaintiff in error in Yazoo circuit court, to recover certain lands lying in that county. On the trial, the plaintiff below offered and read in evidence a mortgage executed February 3, 1841, by D. G. & R. Moore, to him, for the lands in controversy, and registered February 4, 1841. It was admitted that the defendant below was in possession, and that both parties claimed title through D. G. & R. Moore. The defendant then offered in evidence a judgment against D. G. Moore, rendered on a forfeited forthcoming bond in Yazoo circuit court, on the sixth of May, 1839; an execution thereon tested of November term, 1844, under which the lands were levied upon but not sold; and a writ of *venditioni exponas* under which the lands were sold to the defendant on the sixteenth of March, 1846; also a deed to him from the sheriff for the same, acknowledged in November, 1846, and recorded in October, 1847. This record and deed were excluded from the jury as evidence, upon proof being made that D. G. Moore, as whose property the lands were sold thereunder, died in the fall of 1843, and before the teste of the execution under which the levy was made, to which the defendant excepted.

The defendant then read in evidence a deed for the lands from Robert Moore to D. G. Moore, executed in May, 1839. He also offered in evidence the record of a bill in chancery filed by the plaintiff in this action against several parties, including the defendant in this suit, to foreclose the mortgage upon the same property, for the recovery of which this suit was brought; the answers of the defendant to that bill, and the final decree of the chancery court showing that the bill was dismissed. This record was excluded from the jury, as not being pertinent to the issue, and the defendant excepted.

The judgment being for the plaintiff, the defendant sued out

this writ of error. The first error assigned is the rejection of the execution under which the defendant claimed title, on the ground that the defendant, against whom it issued, was dead when it issued, and at the time at which it was tested. •

This point has been fully settled by this court in the case of *Doe ex dem. Shelton v. Hamilton*, 23 Miss. 496 [57 Am. Dec. 149], which holds that a sale of land under execution, issued and tested after the death of a defendant, without a revival, is not void, but merely voidable; and that a sale under it is valid until regularly set aside in a direct proceeding for that purpose by the heir or terre-tenant. The same principle had been previously held, and may now be considered the settled doctrine of this court. Of course the rejection of this evidence was erroneous.

Again: it was error to reject the record of the suit in chancery for the foreclosure of the mortgage upon the same lands sought to be recovered in this action. That suit was submitted, on final hearing upon its merits, and the decree was against the plaintiff, that he was not entitled to foreclose the mortgage against the defendant. This was an adjudication of his right and title under the mortgage, which, while it remained unreversed and in full force, would bar him from setting up any title under the mortgage; for though the right both to file a bill to foreclose and to bring ejectment for the land exists, yet if he is not entitled to a foreclosure, and his bill for that purpose is dismissed on its merits, it would in effect be a discharge of the mortgage. If the decree dismissing the bill on its merits were erroneous, still it would stand as an adjudication of his right until reversed on error or otherwise duly set aside.

But it is insisted, in behalf of the defendant in error, that although the court erred in these particulars, yet that the judgment was correctly rendered in his favor, because the judgment, under which the plaintiff in error purchased and claimed title, had lost its lien by not having been enrolled under the act of the twenty-fourth of February, 1844, and by the sale not having been made until the lapse of more than two years from the twenty-fourth of February, 1844.

But although the lien of the judgment was gone, the sale under the execution was sufficient to convey the title of the defendant at least from the time it was made, except as against the superior title or prior liens. If the mortgage was discharged by the decree in chancery, no superior title was shown to that acquired by the plaintiff in error under the execution sale. Upon

the case as presented by the record, the judgment could not, therefore, have been properly rendered for the plaintiff below.

The judgment is reversed, and the case remanded.

SALE UNDER EXECUTION ISSUED AFTER DEATH OF DEFENDANT, without a revival of the judgment, is only voidable, and is valid until regularly set aside in an action for that purpose brought by the heir or terre-tenant: *Doe ex dem. Shelton v. Hamilton*, 57 Am. Dec. 149, note 151, where other cases are collected; *Hughes v. Wilkinson's Lessee*, 37 Miss. 491, citing the principal case. But a sale of a decedent's land, made without a revival of the judgment, may be set aside by a direct proceeding instituted by the heir for that purpose: *Cook v. Toumbe*, 36 Id. 689, also citing the principal case.

CONCLUSIVENESS OF JUDGMENTS AS TO PARTIES: See *Parkhurst v. Sumner*, 56 Am. Dec. 94, note 96, where other cases are collected.

LIEN OF SENIOR JUDGMENT IS LOST BY SALE UNDER JUNIOR EXECUTION: See *Harrison v. McHenry*, 52 Am. Dec. 435, note 442, where other cases are collected.

BUTLER v. CRAIG.

[27 MISSISSIPPI, 638.]

NO EQUITABLE EXCEPTIONS CAN BE INGRAFTED UPON STATUTE OF LIMITATIONS; and where there is no express exception, the court can not create one.

STATUTE PROVIDING "THAT NO WRIT OF ERROR SHALL ISSUE unless within three years from the rendition of the judgment or decree sought to be reversed," is positive and imperative, and the court can not allow any equitable exception to it.

ERROR to the chancery court at Holy Springs. The opinion states the case.

D. C. Glenn, for the appellant.

H. A. Barr, for the appellees.

By Court, HANDY, J. In this case the defendants in error pleaded in bar to the writ of error that it was not issued within three years next after the rendition of the decree; to which the plaintiff replies that within that time he filed his petition for the writ of error and his bond thereon, according to the statute, with the clerk of the court below; and to this replication the defendant demurs.

The plaintiff contends that, having done all that was within his power to obtain his writ of error, by filing his petition and bond in compliance with the act of 1837, Hutch. Code, 932, those acts amount virtually to an issuance of the writ, and should be considered as having that effect in law. But it has

long been the settled doctrine of this court that no equitable exceptions are to be ingrafted upon the statutes of limitation; and that where there is not an express exception, the court can not create one: *Robertson v. Alford*, 13 Smed. & M. 510. Here the statute is positive and imperative, "that no writ of error shall issue unless within three years from the rendition of the judgment or decree sought to be reversed:" Hutch. Code, 931.

It is impossible for this court to allow the equitable exception contended for, without virtually adding to the statute, "unless the clerk shall, within the time prescribed, fail or refuse to issue the writ, the plaintiff having complied with the provisions of the statute;" which, of course, this court has no more power to do by construction than by express enactment. And the defendant has the right, secured to him under the positive rule of the statute, to consider the litigation in that suit finally determined, unless continued and prosecuted according to the provisions of the act; of which right he can not be debarred.

The hardship to the plaintiff can not justify the court in setting at naught the established rules of law, nor can it be used to the prejudice of the legal rights of the defendants. Such hardship, if it has caused a loss or injury to the plaintiff, can be asserted against the person by whose neglect or violation of duty it was occasioned.

The demurrer is sustained, and the writ of error dismissed

NO EQUITABLE EXCEPTIONS ARE INGRAFTED ON STATUTE OF LIMITATIONS: *Crane v. French*, 38 Miss. 529, citing the principal case. General words in a statute of limitations must receive a general construction; and if there be no express exception, the court can make none: *Cocks v. McGinnis*, 17 Am. Dec. 809.

THE PRINCIPAL CASE IS DISTINGUISHED IN *Treadwell v. Herndon*, 41 Miss. 44.

EPPS v. HINDS.

[27 MISSISSIPPI, 657.]

WHERE MEANS PROVIDED BY FATHER FOR SUPPORT OF HIS MINOR SON while traveling and attending college are stolen from the latter's room while stopping at an inn, the father may maintain an action against the innkeeper to recover the amount so stolen.

INNKEEPER'S RESPONSIBILITY FOR PROPERTY OF HIS GUESTS extends to every part of his house into which it is usual for such property to be taken, and this responsibility can only be limited by his showing that there was a different understanding between him and his guest.

WHERE GUEST ORDERS HIS TRUNK CONTAINING MONEY TO BE TAKEN TO HIS ROOM at an inn, and during the night the money is stolen, the innkeeper is liable for the loss.

ERROR to the circuit court of Marshall county. The opinion states the case.

D. Mayes, for the appellant.

J. F. Cushman, for the appellee.

By Court, FISHER, J. This was a suit brought by the plaintiff below, against the defendant as an innkeeper in the town of Holly Springs, to recover the amount of money alleged to have been stolen from the son of the plaintiff, while a guest of the defendant in September, 1850. The son's trunk was, at his request, taken at night, on retiring to bed, to his room. After arriving at the room he proves that he put the money, which had been furnished to pay his traveling and collegiate expenses by his father, in the trunk; that after retiring to bed a stranger was brought into the room, and placed in another bed; that this stranger left very early next morning; that the son, after getting up next morning, discovered that his trunk had been, during the night, broken open, and his money, amounting to the sum of one hundred and eighty-five dollars, stolen. These are the important facts in the case, and are, in our opinion, sufficient to sustain the verdict found by the jury for the plaintiff.

It is, however, said that the money belonged to the son, and not to the father, and that the suit should therefore have been brought in the name of the former. The son was merely invested with a discretion as to the expenditure of the money. It was the means provided by the father for the son's support while traveling and attending college, and the loss necessarily fell upon the party who was bound to furnish other means for the same purpose.

The next objection is that the fact of the son's ordering his trunk to be taken to his bedroom exonerates the innkeeper from liability for a theft committed in the room. The rule is directly the reverse, and so stated and recognized by the authorities referred to by the counsel for the plaintiff in error. The son by such act only conformed to a general custom, and the innkeeper could only relieve himself by showing that he was to be responsible for the trunk and what might be put in it, when left at a particular place. *Prima facie* his responsibility for the property of his guests extends to every part of his house into which it is usual for such property to be taken. This is the gen-

eral rule, which can only be limited by the innkeeper showing that there was a different understanding between him and his guest in regard to the property of the latter.

Judgment affirmed.

LIABILITY OF INNKEEPER FOR LOSS OF GUEST'S PROPERTY: See *Shaw v. Berry*, 52 Am. Dec. 628, note 634; *Mateer v. Brown*, Id. 303, note 312, where other cases are collected; *Manning v. Wells*, 51 Id. 688; *Dickinson v. Winchester*, 50 Id. 760, note 764.

FATHER MAY RECOVER FOR LOSS OF MINOR SON'S BAGGAGE by an innkeeper, where he is sent on a journey by his father and the baggage belongs to the father: *Dickinson v. Winchester*, 50 Am. Dec. 760.

THE PRINCIPAL CASE IS APPROVED AND DISTINGUISHED in *The R. E. Lee*, 2 Abb. 52.

HAIRSTON v. HAIRSTON.

[27 MISSISSIPPI, 704.]

DOMICILE OF PERSON IS THAT PLACE WHERE HE HAS HIS TRUE, FIXED, PERMANENT HOME, and to which, when he is absent, he has the intention of returning. To constitute domicile, two things must concur: 1. Residence; and 2. The intention of the party to make it his home.

DOMICILE MAY BE ACQUIRED BY LONGER OR SHORTER RESIDENCE, no definite period of time being necessary to create it: the true basis and foundation of domicile is the intention, the *quo animo*, of the residence.

LONG-CONTINUED RESIDENCE IS CONTROLLING CIRCUMSTANCE in determining the question of domicile, in the absence of any avowed intention or of any acts evincing a contrary intention, and in most cases it is unavoidably conclusive.

WHERE PERSON CONTINUED TO RESIDE, TEN YEARS AT PLACE where a large part of his property was situated, declared that he expected to live and die there, and repeatedly voted there for state and county officers, these facts conclusively show that place to be his domicile.

WIFE'S LEGAL DOMICILE IS THAT OF HER HUSBAND, although she may be actually residing at another place.

WIFE IS ENTITLED TO DISTRIBUTION OF PERSONAL PROPERTY OF HER HUSBAND according to the law of the place where he has his domicile at the time of his death, whether the marriage was contracted in Virginia or in Mississippi.

APPEAL from the probate court of Lowndes county. The opinion states the case.

F. Anderson and F. A. Early, for the appellants.

James T. Harrison, for the appellee.

By Court, SMITH, J. This is an appeal from the probate court of Lowndes county. It appears from the record in this case

that in June, 1852, the appellee, widow of Robert Hairston, deceased, renounced before the said court all claim to the estate of her deceased husband, under his will, and declared her intention to demand dower in his estate, both real and personal, and applied, by petition, at the August term following of said court, for an allotment of dower in his real estate, and for her distributive share of his personal estate. She alleges in her petition that she is the widow of Robert Hairston, deceased, who died in March, 1852, at the place of his domicile in Lowndes county, leaving a will in which no provision was made for her; that George Hairston, one of the appellants, was the administrator with the will annexed, and that her said husband died possessed of a large estate, consisting of lands, slaves, stock, and other personal property. That he died unembarrassed; and that his personal property was not chargeable with any debts; and that he died, leaving no issue surviving, or lineal descendants, or heirs. The petitioner alleges, therefore, that she is entitled, as her dower and legal share of his estate, to a life estate in one half of his land, and to one half of the personal estate in fee simple. She prays for a writ of dower accordingly, and to have her share of the personal estate allotted to her.

At the succeeding term of the court, some of the heirs and distributees of the deceased filed their petition, in which they allege that the will of the deceased had been probated, by which he revoked all former wills, and devised his whole estate, real and personal, to one of his slaves, a child six years old, then in the state of Mississippi. They allege that the will was effective as a revocation of all former wills, but insist that the clause containing said devise was void, and that the real estate will descend, and the personal property will be subject to distribution, as if he had died intestate.

They further allege that the deceased left no child or lineal descendants, but left surviving his widow, the said Ruth S. Hairston, the petitioners, and others who were his heirs at law. They admit the right of the widow to dower in the land as claimed by her. They allege that the deceased and Mrs. Hairston were married in the state of Virginia, where they had their domicile, and where they continued to reside for many years; that in 1836 the deceased removed a large number of his slaves, and placed them upon lands which he had purchased in the state of Mississippi, and afterwards removed other slaves to the same state; that he frequently visited Mississippi to attend to his interest there, but did not remove his family, and kept re-

his establishment in the state of Virginia. In 1841 unpleasant relations sprung up between himself and Mrs. Hairston, and being a whimsical and capricious man, in a sudden fit of passion he left Virginia, where he owned several plantations, but without any intention of changing his domicile. After having left the state of Virginia he visited Europe, whence he returned to this state in 1842, where he remained attending to his business down to the time of his death, which occurred in 1852. They aver that at the time of his death his domicile was in the state Virginia, and insist that his wife, who never removed from that state, is not entitled to a share of his personal estate by the laws of Mississippi, but under that of Virginia, according to which she would be entitled to only an estate for life in one half the slaves of which he died possessed. They further insist that if it should be held that the domicile of the deceased was, at the time of his death, in this state, that she is entitled to her share of the slaves, which the deceased owned or possessed, before his change of domicile, according to the law of Virginia, and not under the statute of Mississippi, which would vest in her the absolute title in fee simple to one half of them.

It is not controverted, if Robert Hairston died having his permanent residence in Mississippi, that the rights of his widow, as to all the personal property acquired after his change of domicile, are to be determined by the law of this state, and not by that of Virginia. Our first inquiry, therefore, respects the place of his domicile, at the time of his death—whether it was in Virginia or Mississippi.

In its ordinary acceptation, by the term “domicile” is meant the place where a person lives or has his home. In this sense, where a person has his actual residence, inhabitancy, or commorancy is called his domicile. But in a strict and legal sense, says Judge Story, “that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishments, and to which, whenever he is absent, he has the intention of returning.” Conf. Laws, p. 39, sec. 41. This is perhaps the most comprehensive and correct definition of the term which could be given. Two things must concur, according to the same authority, to constitute domicile: “1. Residence; and 2. The intention of making it the home of the party. There must be the fact and the intent.” While it is certain that these conditions must concur to constitute a domicile, it is a matter frequently of difficulty to determine, from the facts in cases of contested domicile, the existence of such residence and the in-

tention to make it the permanent home of the party. From the nature of the subject, it is impracticable to lay down any very definite rule by which either the fact of a permanent residence or the intention of permanent residence is to be ascertained. In none of the decided cases on this subject is there a definite period of time recognized as being necessary to create a domicile. The time may be shorter or longer according to the circumstances; and in all cases the question whether a person has or has not acquired a domicile must depend mainly upon his actual or presumed intention. In the case of *Moore v. Darras*, 4 Hag. Ec. 346, it was said domicile does not depend upon residence alone, but upon a consideration of all the circumstances of the case; a person being at a place is *prima facie* evidence that he is domiciled there; but it may be explained, and the presumption rebutted. The place where a man carries on his business or professional occupation, and has a home or permanent residence, is his domicile; and he has all the privileges, and is bound by all the duties, flowing therefrom. As a domicile may be acquired by a longer or shorter residence, depending upon the circumstances of the case, its true basis and foundation must be the intention, the *quo animo*, of residence. The apparent or avowed intention of residence, not the manner of it, constitutes domicile: *Bradley v. Lowry*, 1 Spears Eq. 2. In the absence of any avowed intention, and of acts which indicate a contrary intention, a long-continued residence is regarded as a controlling circumstance in determining the question of domicile. In most cases it is unavoidably conclusive: *The Ship Ann Green*, 1 Gall. 274; *The Harmony*, Id. 123. In the matter of *Catherine Roberts' Will*, 8 Paige, 446, it was said: "The declarations of the party himself, where he can have no object or inducement to falsify the truth or to deceive those to whom such declarations are made, are the best evidence of his intention to make his actual residence his permanent residence also." But where acts, although unaccompanied by declarations, concur with long-continued residence or habitancy, evincing an intention of permanent residence, it is manifest that they furnish as satisfactory evidence of that intention as the express declarations of the party to that effect. So it is laid down by Judge Story, that even where a party has two residences at different seasons of the year, "that will be esteemed his domicile which he himself selects, or describes, or deems to be his home, or which appears to be the center of his affairs, or where he votes or exercises the rights and

duties of a citizen:" Conf. Laws, p. 45, sec. 47; *Shelton v. Tiffin*, 6 How. 163.

Let us apply these principles, which are sustained by undoubted authority, to those facts in the cause about which there is no controversy. It appears from the evidence that Robert Hairston and the appellee were natives of the state of Virginia, where they were domiciled at the date of their intermarriage, and where they continued to reside until 1841. Hairston was then the owner of a large property situated there, consisting of lands and slaves, with which he never parted. In 1841, having conceived an unconquerable aversion for the appellee, he abandoned his home, visiting New York and Europe, whence he returned to Mississippi in 1842. He had, in 1836, purchased land in Lowndes county in this state; and had, before he left Virginia, removed thither a sufficient number of his slaves to cultivate a large plantation. The appellee did not accompany him to Mississippi, but remained in Virginia and resided at the family mansion. After his return from Europe, in 1842, he resided upon some one of his plantations in this state, with occasional and temporary absences on business, until he died in 1852. After his return to this state, he purchased a large quantity of land, and added largely to his slave property. He never revisited Virginia after he came to this state in 1842, but continued his plantations there, and kept up the family mansion in a style suitable to his means. He sold many tracts of the lands which he had purchased in this state, and in the deed of conveyance for the lands sold by him, he described himself as of Lowndes county in this state. He had in operation in this state five plantations at the time of his death. About the year 1845 he purchased a healthy situation, which he called "Choctaw Spring," and built there an indifferent house, in which he resided. He said that place was his home, and that he expected to live and die there. He repeatedly voted for county and state officers in Lowndes county, where he lived; and he attended and voted at the two last elections preceding his death held in that county.

These facts, we think, conclusively show that when Hairston left Virginia in 1841 he intended to abandon his domicile in that state. But as a domicile, when once gained, continues until one is acquired in some other place, it is admitted that by his abandonment of his home in Virginia he did not destroy his domicile there. His departure from Virginia, under the circumstances, can have no other effect than to lessen the degree

of evidence required to establish the fact of his domicile in Mississippi. But if it were admitted that Hairston, when he came to Mississippi in 1842, did not intend to make it his permanent place of residence, but designed to retain his domicile in Virginia, we can not doubt that he changed such intention, and became in fact and intention domiciled in this state. His declaration that he expected to live and die at his residence in Lowndes county, his continued residence for ten years at a place where a large part of his property was situated, and finally, the exercise of the rights of a citizen, are without doubt conclusive on the subject.

It was said in argument that when Hairston sought a residence in Mississippi he abandoned his duty as a husband, and thereby violated a sacred obligation imposed by the laws of society; and hence, upon a principle of public policy, he should be denied the rights of domicile in this state. However reprehensible the motive of the alleged act may have been, in a moral point of view, it is evident that it was not his intention, by his change of residence, to affect injuriously the pecuniary rights of the appellee, as her interest in his estate has thereby been materially enhanced. Hence, if the foundation of the argument were better sustained than it is, by the proofs in the cause, the objection comes from the wrong quarter.

The next question is, whether the appellee is entitled to her widow's portion out of the slaves which were owned by the deceased, in the matrimonial domicile, before he removed to and permanently settled in Mississippi, under the law of that domicile, or under that of Mississippi. As we have stated, if the distribution is to be made according to the statute of this state, the appellee will succeed to one half of the slave property, and will hold it by an absolute title in fee simple; whereas, if the law of Virginia is to give the rule of succession, she will have only a life estate in one half of the slaves. This question will admit of very little debate. We have decided that Hairston's domicile, at the time of his death, was in Mississippi. Hence, although the appellee did not follow him there, but remained in Virginia, her legal domicile was that of her husband at the time of his death: Story's Conf. Laws, p. 43, sec. 46. The case, therefore, presented by the petition of the appellee, is not one in which the citizen of a foreign jurisdiction solicits the aid of our courts to enforce rights arising under a contract made elsewhere; but it is one in which the widow of a citizen, having his proper domicile within this state, invokes an application of our

municipal regulations for the ascertainment of her rights in regard to his estate. But the rights claimed against her are alleged to arise out of a marriage celebrated in another state. Therefore, upon a well-settled principle of comity, it becomes our duty to enforce those rights, if they shall be found to exist. This brings us to the question of what were the respective rights, in reference to the property in controversy, of the appellee and her husband, arising out of the contract of marriage, as regulated by the laws of Virginia.

In the ingenious and very learned argument of counsel, it was assumed that the widow under the law of Virginia does not take her share of the deceased husband's estate by virtue of the general statute of distributions; but is entitled to it under a separate and independent provision of the law.

This may be conceded. It may also be admitted that the wife, not being of the next of kin to the husband, does not succeed to her share of his estate as a distributee, in the proper sense of the term; but that the right to her portion of the deceased husband's estate is an incident ingrafted by law upon the contract of marriage. But the concession will avail nothing unless it can be shown that the right of the *feme covert* in the personal estate of the husband, during the subsistence of the marriage, are of a superior character and different nature to those of the next of kin; or, in other words, unless it can be proved that by the consummation of the marriage, the wife acquires a vested interest in the personal estate of the husband, possessed at the time of the marriage, or acquired subsequently and before there has been a change of domicile. It is evident to us that this position is not maintainable.

By the law of Virginia regulating the rights of husband and wife, the husband becomes the absolute owner of the personal property of the wife which is in her possession at the time of the marriage, or which he shall reduce into his possession during its continuance. The marriage is held to operate an absolute gift to the husband of all the personal property of the wife. During the subsistence of the marriage, the wife has no right whatever to the personal estate of the husband, or to any portion of its proceeds or profits. This is conclusively shown by the unlimited right of the husband to dispose of it for any purpose whatever. Such an unrestricted right of disposition is manifestly inconsistent with the idea of a fixed and vested right on the part of the wife to his personal property. It is true that the husband is incapable, by a testamentary disposi-

tion which can only take effect after his death, to deprive the wife of her statutory portion of his effects of which he may die possessed. In this respect only does the wife stand on a different or better foundation than those persons who, as next of kin, would be entitled to the succession, as heirs or distributees, in the event the husband should die intestate.

It matters not, therefore, whether the right of the wife to her share of the deceased husband's personal effects arises under the general statute of distributions of the state of Virginia, or whether it is based upon a distinct and independent act of legislation. The question is, Does the wife by the contract of marriage, under the operation of the law of Virginia regulating the institution of marriage, acquire a vested interest in the personal estate of the husband, then possessed by him or subsequently acquired? It seems too evident to admit of debate that she acquires no immediate fixed right of present or future enjoyment, which are the conditions of a vested estate: 4 Kent's Com. 202. The most that can be said of it is, not that it is a vested interest in or right to the personal estate of the husband, but a privilege to have her portion of the personal effects of which the husband may die possessed, and of which he can not deprive her by a testamentary disposition, which can only take effect after he is dead.

Where, by the operation of the law regulating the institution of marriage, the husband is the absolute and exclusive owner of the personal property brought into the marriage, it is clear that the doctrine of a tacit contract can not apply. If the wife has no vested interest of any character to the personal property possessed at the time of the marriage, or to any future acquist and gains which may accrue during its continuance, there is evidently nothing to which it can attach, or upon which it could operate. Personal property has no *silus*. In contemplation of law, it follows the owner and is subject to the law which governs his person, both with respect to the disposition of it, and its transmission either by succession or the act of the party. It is the law of Virginia, as well as the law of Mississippi, that personal property shall be distributed according to the law of the domicile. Hence, if any tacit contract can be imagined to attach to the fact of marriage as regulated by the law of Virginia, it is that the wife shall be entitled to distribution according to the law of the place in which the husband may have his domicile at the time when he shall die.

Let the decree be affirmed.

FACT AND INTENTION MUST CONCUR TO CONSTITUTE DOMICILE: *Ringgold v. Barley*, 59 Am. Dec. 106; *Hart v. Lindsey*, 43 Id. 597, note 603, where other cases are referred to.

DOMICILE OF HUSBAND DETERMINES DOMICILE OF WIFE, WHEN: See *Harrison v. Harrison*, 56 Am. Dec. 227, note 235, where other cases are collected.

CHANGE OF DOMICILE: See *Lowry v. Bradley*, 39 Am. Dec. 142, note 148, where other cases are collected.

SITUS OF PERSONALTY FOLLOWS OWNER'S DOMICILE: See *Smith v. Eaton*, 58 Am. Dec. 746, note 750; *Speed v. May*, 55 Id. 540, note 542; *Succession of Alice Packwood*, 41 Id. 341, note 348, where other cases are collected.

ALEXANDER v. BERESFORD.

[27 MISSISSIPPI, 747.]

COURT OF EQUITY WILL RESCIND CONTRACT FOR SALE OF LAND on the ground of fraud practiced on the vendee, where at the time of the sale the vendor represented to the vendee that the land was good for agricultural purposes, above the influence of the waters of the river, and not subject to overflow, except from the backwater of a certain bayou, although he knew at the time that the land was subject to general overflow, which diminished its value, the purchaser being at the time unable to ascertain from appearances whether the land was subject to overflow or not.

STATEMENTS MADE TO WITNESS IN PRESENCE OF PURCHASER by vendor, in reference to land he is about to sell, are equivalent to statements made to the purchaser himself.

APPEAL from the superior court of chancery. The opinion states the case.

George S. Yerger, for the appellant.

D. W. Adams, for the appellees.

By Court, FISHER, J. The appellees filed this bill in the superior court of chancery for the purpose of obtaining a decree rescinding a contract made by them with the appellant for the purchase of a certain tract of land in Rankin county, on the ground of fraud alleged to have been practiced by the appellant in making said sale. The land is situated near the bank of Pearl river, and is, according to the allegations of the bill, the admissions of the answer, and the proof in the cause, subject to overflow from the waters of said river during ordinary or annual freshets. The bill alleges that the purchasers in making said trade trusted to the truth of the statements made by the appellant respecting said overflow; that when interrogated on this

subject, he stated that the land was above the influence of the waters of said river, and had never been inundated within his knowledge; that the purchase was made in the month of November, when the river was very low, and when the purchasers could ascertain nothing from appearances as to the lands being subject to overflow. The answer admits that the land is liable to overflow as charged in the bill; but denies that the complainants made any inquiries on the subject, or that the appellant made any false or fraudulent statements relative to the same.

The first witness examined on behalf of the complainants proves that he was present with W. F. Beresford when the cleared land was partially examined by the purchaser; that the witness himself, in the presence of Beresford, asked the appellant the question whether the land which they were then examining was subject to overflow; when the appellant replied, only from the backwater coming into a certain bayou; the appellant on this occasion represented the land to be good and valuable for agricultural purposes; the answer and the proof show very clearly that the appellant was not, at the time of the sale, ignorant of the true condition of the land. But it is said that he concealed nothing, because he was not requested by the purchaser to make any disclosures. The statement to the witness in the presence of the purchaser was equivalent to a statement to the purchaser himself. That was, to say the least, in effect a clear declaration that the tract of land was only liable to overflow from the backwater, which he averred at the time produced no injury to the land, and remained on it only a few days at a time. The whole testimony when properly considered, in our opinion, fully establishes the fraud.

No objection is made to the interlocutory or final decree; and we have nothing to do, therefore, but to affirm the decree of the chancellor.

FRAUD OF VENDOR, VENDEE RELIEVED ON GROUND OF, IN EQUITY, WHEN: See *Anderson v. Hill*, 51 Am. Dec. 130, note 132, where other cases are collected; *McCorkle v. Doby*, 47 Id. 560, note 563; *Masson v. Bovet*, 43 Id. 651, note 654.

WINSTON v. PRESIDENT AND TRUSTEES OF FRANKLIN ACADEMY.

[28 MISSISSIPPI, 118.]

TENANT CAN NEVER DISPUTE HIS LANDLORD'S TITLE except in a few special cases.

PARTY WHO TAKES POSSESSION UNDER LESSEE IS BOUND BY COVENANTS contained in the latter's lease of the premises; and after the death of such party, his executor is bound by everything that bound his testator.

WHERE LANDLORD HAS, BY TERMS OF LEASE, RIGHT TO RE-ENTER and become reinvested with his former estate in the premises demised, he is entitled to recover damages according to the injury which the property had sustained at the time when this right accrued. And if the tenant has removed buildings from the premises, the injury sustained is measured by the landlord's loss of rent arising from such removal.

ERROR from the circuit court of Lowndes county. The opinion states the case.

R. Evans, for the appellant.

C. R. Crusoe, for the appellees.

By Court, FISHER, J. The plaintiffs below brought this suit in the circuit court of Lowndes county, to recover damages for injuries done to a lot of ground situated in the town of Columbus, of which it is alleged they are the owners. The defendant below demurred to the complaint, assigning various causes of demurrer, all of which were overruled by the court below. The facts, as shown by the complaint and the exhibit filed therewith, are as follows: The lot is part of the sixteenth section donated for the use of schools, which, it appears from the pleadings, is under the control and management of the plaintiffs. Indeed, it is alleged that the title and reversionary interest are in them. On the sixth of April, 1841, the plaintiffs leased the lot to one Abraham Wolf, and his lease covenants, among other things, that he will pay in advance annually the sum of twenty-five dollars on the first day of August in every year, for the unexpired term of ninety-nine years from the first day of August, 1821; that on failure so to pay, the lessors were to have the right to re-enter and to become reinvested with their former title, and to hold the lot "discharged from all claim of the said Wolf, his executors, administrators, or assigns." Wolf leased the lot to one Walter C. Winston, who died, having first made his will and appointed the defendant below executor thereof. He, as executor, took possession of the lot, and while thus in possession removed therefrom the buildings situated thereon, alleged to be

of the value of five hundred dollars. In the mean time there was a failure to pay the rent according to the stipulations of the lease; and it is further alleged that Wolf has left the state, leaving behind no property or other means out of which the rent can be made. It is also alleged that Winston refuses to pay the rent as covenanted by Wolf.

The rules of law applicable to this state of case are too well settled to require argument or even the citation of authority. The tenant, except in a few special cases, can never dispute the title of his landlord. Wolf, by taking the lease, admitted the plaintiffs' title to the lot. Walter C. Winston, coming in possession under Wolf, was bound by the covenants contained in the lease of the latter, and the defendant is bound by everything which bound his testator. The failure to pay the rent gave the plaintiffs the right to re-enter and to become reinvested with their former estate; and they were therefore entitled to recover damages according to the injury which the property had sustained at the time this right accrued. The removal or destruction of the buildings on the lot was an injury which must be estimated with reference to the time when the plaintiffs would become or had become entitled to the possession and enjoyment of the property. The injury at the expiration of the term of ninety-nine years might have been a very trivial one, as the buildings during that time might have been destroyed by the laws of decay. As a compensation for such loss, however, would have been the annual rent of the property. The complaint alleges that in consequence of the removal of the buildings the plaintiffs are prevented from again leasing the lot, except at a reduced price. This is of course the result of the defendant's trespass, which operated to the immediate injury of the plaintiffs in rendering their property less valuable or less productive than it otherwise would have been.

We are therefore of opinion that the court below committed no error in overruling the demurrer. All the other questions were proper for the consideration of the jury; and they, to say the most, not having abused their discretion in the matter, we are of opinion that the judgment of the court below ought to be affirmed.

Judgment affirmed.

ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE: See *Niles v. Ransford*, 51 Am. Dec. 95, note 101, where other cases are collected: *George v. Putney*, 50 Id. 788, note 791.

LIABILITY OF ADMINISTRATOR ON COVENANTS IN DEEDS OF INTESTATE: See *Matter of Galloway*, 34 Am. Dec. 209, note 210, where other cases are collected.

ONE ENTERING DIRECTLY UNDER TENANT and by his permission stands in the same relation as the original tenant: *Jackson v. Miller*, 21 Am. Dec. 316, note 323. The relation of landlord and tenant once established attaches to all who succeed to the possession through or under the tenant, immediately or remotely: *Jackson v. Davis*, 15 Id. 451.

REMEDIES BY LESSOR AGAINST ASSIGNEES AND SUBLESSEES: See note to *Fulton v. Stuart*, 15 Am. Dec. 543, where this subject is considered.

ROBERTS v. ROGERS.

[28 MISSISSIPPI, 152.]

ADMINISTRATOR IS NOT BOUND TO INTERPOSE STATUTE OF LIMITATIONS to defeat a recovery, unless, under the facts known to exist, it can avail as a successful defense.

ADMINISTRATOR WHO HAS MADE VOLUNTARY PAYMENTS must, in a future contest with the distributees, show that the debts, though paid under no legal compulsion, were, nevertheless, such as could have been enforced against the estate. He is not to be regarded as in any worse position than the creditor was at the time of the payment.

EXPENSE OF BRINGING PROPERTY OF DECEASED PERSON FROM ANOTHER STATE to the jurisdiction in which the administrator who incurred such expense is acting is not a legal claim against the estate. The probate court can not allow a claim for services rendered or expenses incurred on account of property while it was subject to another jurisdiction.

ERROR from the probate court of Wayne county. The opinion states the case.

Glenn and S. A. D. Steele, for the appellants.

No counsel for the appellee.

By Court, FISHER, J. This was a bill of review filed by the appellants in the probate court of Wayne county, to open the final settlement made by the appellee as administrator of the estate of Henry F. Rogers, deceased. Among other things, it is alleged that the administrator paid sundry claims against the estate, which were barred by the statute of limitations. This allegation is met by the answer and proof introduced on the part of the administrator, showing that the intestate left the state about the year 1839 or 1840, and never returned to it again. The counsel of the appellants, however, contend that while this might have operated to stop the running of the statute if pleaded against the creditor, it can not avail the administrator, as he voluntarily paid the debts. An administrator is

only bound to interpose the statute of limitations to defeat a recovery when, under the facts which are known to exist, it can avail as a successful defense. In making voluntary payment, he only assumes upon himself the responsibility of showing, in any future contest with the distributees, that the debts, though paid under no legal compulsion, were nevertheless such as could have been legally enforced against the estate. He is to be regarded as in no worse position than the creditor was at the time of payment.

It is next alleged that the administrator was allowed the sum of one thousand six hundred and eighty-eight dollars, for expenses incurred and services rendered in bringing the property of the estate, amounting to about four thousand dollars, from the state of Texas to Wayne county, prior to the grant of letters of administration on the estate; and that such charge is not only unreasonable, but is wholly unsustained by any legal principle. We deem it unnecessary to make any comment upon the evidence introduced to sustain this charge, as it is clear that under no rule of law can it be sustained against the estate. While there was no evidence introduced with a view of showing the domicile of the intestate at the time of his death, yet it is manifest from all the proof that his domicile was not in Wayne county, but most probably in the state of Texas where he died. Administration should therefore have been granted in that state, by the proper court, and the property administered there, and finally distributed or otherwise disposed of according to the law of the intestate's domicile. The probate court of Wayne county certainly acquired no jurisdiction over the property until it was brought into that county; and having no jurisdiction over the property, or power to grant letters of administration, until it was brought within the limits of the county, the court could not for the same reason allow a claim for services rendered, or expenses incurred on account of the property, while it was subject to another jurisdiction.

It may be true that in ordinary cases the probate court could and ought to allow a claim for taking care of property, or rendering essential services for its preservation, before letters of administration could be granted, or a collector could be appointed. But whatever the rule may be in such cases, it is clear that it can have no application to the present case. The probate court of Wayne county, if it acquired any jurisdiction at all over the subject-matter, did not acquire it from the fact of the domicile or property of the deceased being situate in that county, or

other cause mentioned in the statute, but from the act of the administrator himself. Until he brought the property into Wayne county, there was nothing to administer on or to give the court jurisdiction in appointing an administrator.

It is not our intention to decide anything as to the proper exercise of the jurisdiction of the probate court in this case. The appellee appears to have been appointed on his own motion, and to have made and returned an inventory and undertaken to account for the property through the action of the probate court. He ought not, therefore, to be permitted to go out of the record, which he himself has caused to be made, to show the invalidity of his appointment. The record not showing his appointment void, it will be treated as conclusive, so far as he is concerned, and estop him from denying or controverting the jurisdiction of the court.

The item of one thousand six hundred and eighty-eight dollars ought to be disallowed. If, as is contended, the administrator made a contract with the heirs before his appointment to bring the property from Texas, he must rely on his contract for compensation, and enforce it in the court having jurisdiction of such matters. It is not a claim either against the deceased, or growing out of the administration of the property, and can not, therefore, be entertained by the probate court.

Decree reversed, and cause remanded.

AUTHORITY OF ADMINISTRATOR OVER ASSETS IN ANOTHER JURISDICTION: See *Smith's Ex'rs v. Wiley*, 58 Am. Dec. 262, note 268, where other cases are collected.

ADMINISTRATOR CAN NOT RETAIN DEBT DUE HIM from the estate which he represents, where such debt was barred by the statute of limitations before he administered: *Batson v. Murrell*, 51 Am. Dec. 707, note 709.

ADMINISTRATOR SUED FOR DECEDENT'S DEBT MUST PLEAD so as to protect all creditors: See *Davis v. Smith*, 48 Am. Dec. 279, note 298.

THE PRINCIPAL CASE IS EXPLAINED in *Byrd v. Wells*, 40 Miss. 715; and is cited in *Woods v. Elliott*, 49 Id. 180, to the point that although an administrator is not bound to plead the statute of limitations specially, he is bound to rely on it as a defense, which he may do under the general issue.

SARAH v. STATE.

[28 MISSISSIPPI, 267.]

DISTINCT AND SEPARATE OFFENSES ARE CREATED BY STATUTE which provides that "if any slave, free negro, or mulatto shall prepare, exhibit, or administer to any person or persons in this state any medicine what-

soever, with intent to kill such person or persons, he or she so offending shall be judged guilty of a felony, and shall suffer death." But there is no objection to the insertion of several distinct felonies of the same degree in the same indictment against the same offender.

JOINDER IN ONE INDICTMENT OF TWO FELONIES WHICH DO NOT DIFFER either in their character or in the punishments attached to their commission is not good ground for quashing the indictment.

WORDS "IN THIS STATE," USED IN STATUTE OF 1822, SECTION 53, are intended to designate the jurisdiction in which the offenses are prohibited, and not as descriptive of the persons against whom they may be perpetrated.

COUNT IN INDICTMENT AVERRING THAT PRISONER MIXED MEDICINE with coffee which had been prepared for the use of the person intended to be killed does not charge two distinct felonies. The alleged act of mixing the medicine with the coffee is not charged as an act of felony, but is merely stated as a part of the means or manner in which the administration of the medicine was effected.

WORD "ADMINISTER," IN SECTION 53 OF ACT OF 1822, DOES NOT MEAN that the article given in order to effect the felonious intent must be given or administered under pretense that it is a medicine. The intention of the legislature was to punish any preparation, giving, or administration of any substance known as a medicine with intent to kill.

IT IS MATTER IN DISCRETION OF COURT WHETHER IT WILL COMPEL PROSECUTION TO ELECT upon which one of two separate counts of an indictment charging two distinct felonies it will proceed to try the prisoner.

RULE THAT IT IS SUFFICIENT TO DESCRIBE OFFENSE IN WORDS OF STATUTE applies only in cases where there is a sufficient description of the offense intended to be created by the legislature.

INDICTMENTS UPON HIGHLY PENAL STATUTES MUST STATE ALL CIRCUMSTANCES which constitute the definition of the offense in the act, so as bring the defendant precisely within it.

INDICTMENT IS INVALID UNLESS IT CONTAINS AVERMENT OF MALICIOUS INTENT, wherever such intent is an essential ingredient in the constitution of an offense created by statute, although it is not so made by the express words of the act.

WORDS "WITH INTENT TO KILL" ARE CONSTRUED TO MEAN "with intent to commit murder."

ERROR from the circuit court of Warren county. The opinion states the case.

C. L. Buck, for the appellant.

D. C. Glenn, attorney general, for the state.

By Court, SMITH, C. J. The prisoner was convicted in the circuit court of Warren county, under the provisions of the fifty-third section of the statute of 1822: Hutch. Dig. 521. The indictment contains two counts: the first count charges the willful, malicious, unlawful, and felonious preparation of a certain medicine, namely, arsenic, alleging the said arsenic to be a deadly

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poison, and that the prisoner well knew that arsenic was such deadly poison, "with intent then and there to kill" the persons named in the indictment, "contrary to the form of the statute," etc.; the second count charges the "willful, malicious, unlawful, and felonious" administration to certain persons named in the indictment of "a certain medicine commonly called arsenic, the said arsenic being then and there a deadly poison, by then and there mixing and mingling the said arsenic in certain coffee which had been prepared for the use of the said" persons, "with the intent then and there that the said coffee should be administered to them for their drinking the same, and the said coffee with which the said arsenic was so mixed and mingled as aforesaid, afterward, namely, etc., in the county aforesaid, was delivered to the said" persons, "then and there to be drunk; and said persons, not knowing said arsenic to have been mixed and mingled with said coffee, did afterwards, namely, etc., in the county aforesaid, take, drink, and swallow, etc., a large quantity of said arsenic, so mixed and mingled with said coffee" by the prisoner, "with the intent then and there to kill the said" persons, "contrary to the form of the statute," etc.

In the court below, before trial, a motion was made to quash the indictment, and after verdict, the prisoner's counsel moved in arrest of judgment. There was also a motion made for a new trial, which was overruled. Hence the cause is brought before us by writ of error. The grounds relied on in support of these motions are now urged as reasons for reversing the judgment.

1. It is insisted that the indictment should have been quashed, because the prisoner was charged with two distinct, separate, and independent felonies. The statute under which the conviction was had provides that "if any slave, free negro, or mulatto shall prepare, exhibit, or administer to any person or persons in this state any medicine whatsoever, with intent to kill such person or persons, he or she so offending shall be judged guilty of a felony, and shall suffer death." It is manifest that distinct and separate offenses have been created by this act. To prepare any medicine, with intent to kill any person, is a separate and distinct offense from the crime of administering such medicine for a like purpose. This is clear, for the evidence which would sustain an indictment for the preparation by a slave, free negro, or mulatto, of medicine with the intent to murder any person, would not be sufficient to convict where the party is charged with the administration of any medicine for the same purpose. It must there-

fore be conceded that the indictment charges the prisoner with two distinct felonies.

But does it follow, hence, that the refusal of the court to quash the indictment is ground for reversing the judgment? The rule is well settled that, in point of law, there is no objection to the insertion of several distinct felonies of the same degree in the same indictment against the same offender: 1 Oh. Crim. L. 253; *Kane v. People*, 8 Wend. 203; *People v. Rynders*, 12 Id. 425; *Wash v. State*, 14 Smed. & M. 120. But while this is the acknowledged doctrine both in this country and England, it is held in the courts of the latter country to be irregular, in cases of felony, to charge upon the prisoner more than one distinct offense at one time in the same indictment. And if the joinder of more than one distinct felony in the same indictment be objected to before plea, the court will quash the indictment, lest it should embarrass the prisoner in his defense, or prejudice him in his challenge to the jury. But this appears not to be regarded as a right, strictly speaking, of the accused, but as a matter submitted to the discretion of the court, which it might exercise as a measure of prudence for the safety of the accused: 1 Oh. Crim. L. 253; *Res v. Strange*, 34 Eng. Com. L. 341. In the case last cited, which was an indictment under the statute of 7 Wm. IV. and 1 Victoria, the offenses of stabbing and cutting with intent to murder, with intent to maim, and with intent to do grievous bodily harm, were all included in the same indictment; and notwithstanding the judgment is by the statute different, being for the offenses charged in the first count capital, and for the others transportation, the court even refused to compel the prosecutor to elect on which count he would proceed.

The courts in many of the states of this confederacy have gone a step further, and hold that distinct felonies of the same character, though differing in the degree of punishments attached by law to their perpetration, may be charged in the same indictment against the same person: Whart. Crim. L. 149. In the case at bar the felonies charged in the indictment differ neither in character nor in the punishments attached to their commission. They manifestly refer to the same transaction, and depend necessarily to some extent on the same evidence. I am therefore of opinion that the joinder of the two felonies charged in the indictment was not good ground for quashing it.

2. It is contended that the indictment should have been quashed, because there is no averment in either of the counts

that the persons for whom the medicine was prepared and to whom it was administered were "persons in this state."

In my opinion, this exception is based upon a misconstruction of the statute. That construction assumes that it was the intention of the legislature, by the words "in this state," to designate the persons for whom or to whom to prepare or administer medicine with intent to kill the statute declared to be a felony. That is, that the medicine must be prepared for or administered to a person within the state at the time of the alleged offense. Hence, that these words constitute an essential part of the description of the offenses created by the act.

It can not be imagined that the legislature deemed it necessary to declare that it was their intention to confine the operation of the law to acts performed within her jurisdiction; as it will certainly not be contended that it was not known to it that the statutes of this state could not extend to offenses committed without her jurisdiction. A medicine or a poison might be prepared for a person not at the time of the preparation within the state; but neither could it be administered to any one in such a way as to violate any law of the state, unless the person who might be the subject of the felony were, at the time of the administration of the medicine or poison, within the jurisdiction of the state. If, therefore, the words "in this state," employed in the statute, are understood as characterizing the persons against whom the offense must be committed, they are useless and unmeaning. But if these words are held to refer, not to the persons against whom the offense may be committed, but to the felonious act itself, they are intelligible and proper, and the intention of the legislature becomes manifest. It appears to me too evident to admit of question that, by the proper and legal construction of the statute, these words were intended to designate the jurisdiction in which the offenses are prohibited, and not as descriptive of the persons against whom they might be perpetrated. Upon this interpretation of the act, the counts in the indictment, in reference to this exception, are unobjectionable.

3. It is insisted that the second count in the indictment charges the prisoner with two distinct felonies; and for that reason, the court below erred in overruling the motion to quash. This objection is untenable. In the count under consideration it is averred that the prisoner mixed and mingled the medicine with coffee which had been prepared for the use of the persons intended to be killed; but the alleged act of mixing the medicine

with the coffee is not charged as an act of felony. It is stated as a part of the means or manner in which the administration of the medicine was effected. This was not only proper, but essential, in order to show that the alleged act of administering the medicine came within the meaning of the statute.

4. It is contended that a new trial should be awarded upon the ground that the proof did not show that "the poison or medicine was administered under pretense that it was a medicine." The statute affords no pretense for this exception. It declares that "if any slave, free negro, or mulatto shall prepare, or administer to any person or persons, any medicine whatever, with intent to kill," etc. According to the evidence, arsenic was administered, which is not only a medicine, but a poison. And such is the case with many articles used as medicines, depending upon the quantity in which they are given. The word "administer," as used in the statute, does not mean that the article given, in order to effect the felonious intent, must be given or administered under pretense that it is a medicine. The manifest intention of the legislature was to punish any preparation, giving, or administration of any substance known as a medicine with intent to kill.

5. It is insisted that the court below erred in refusing to compel the prosecution, upon the application of the prisoner's counsel, to elect upon which count of the indictment he would proceed. We have seen that it was no objection to the indictment that it charged the prisoner with two distinct felonies in separate counts; although it rests with the court as a matter of prudence and discretion to order the indictment to be quashed for that reason, when the objection is made before plea. The same answer may be given to this objection; it was a matter of discretion with the circuit court, and is therefore no ground upon which the judgment should be reversed: *Rex v. Strange*, 34 Eng. Com. L. 341; *People v. Rynders*, 12 Wend. 425; *Cone v. Hope*, 22 Pick. 1.

6. It is contended that the court below erred in overruling the motion in arrest of judgment. Neither count of the indictment charges the alleged felony to have been committed with malice aforethought. This, it is insisted, is a fatal defect. The words used in the statute are, "with intent to kill." In *Bradley v. State*, 10 Smed. & M. 618, it was held that an indictment for an assault with intent to kill means an indictment for an assault to commit murder, according to the understanding of this court; therefore the words above quoted from the

statute mean, "with intent to commit murder." Hence the gist of the offense charged in the indictment is willful malice.

It is unquestionably true, as a general rule, that in an indictment for an offense created by statute it is sufficient to describe the offense in the words of the statute. But it is manifest that this rule can only apply in cases in which there is a sufficient description of the offense intended to be created by the legislature. It is a mistake, says Justice Earl, *Blease v. State*, 1 McMull. 479, to suppose that it is always sufficient to allege the offense in the mere words of the statute; for while it consists of several acts, they should be averred with the same particularity as at common law. The rule adopted in this court is that indictments, especially upon highly penal statutes, must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it: *Anthony v. State*, 18 Smed. & M. 262.

It follows necessarily from this doctrine, in all cases of felony in which malice is the gist of the offense, that the malice must be averred in the indictment; otherwise it will be defective, and the judgment arrested on motion. We believe there is not a recognized exception to this rule, either in England or this country; and this is the case whether the offense exist at common law or be one of statutory creation. Thus, in murder, where the death has been caused by the administration of poison, or by any other means, however indicative of a malicious intent, it is essential to charge the act to have been done with malice aforethought; and no other words will suffice. So in an indictment under the statute of 9 Geo. I., which made it felony for any person to burn any dwelling-house, outhouse, barn, stable, etc., it was held necessary that there should be an averment of willful malice, although the statute did not contain the words "willful and malicious;" for the reason that malice was of the essence of the offense: 2 East P. C. 1033.

The statutes of 7 Wm. IV. and 7 Victoria provide that whoever shall administer, or cause to be administered, any poison or other destructive thing, "with intent to commit murder," shall be guilty of a capital felony. The only material difference between this statute and the one under consideration consists in the use of the words "with intent to commit murder," instead of the words "with intent to kill," employed in the latter. But according to the construction of this court, the words "with intent to kill" mean "with intent to commit murder." The precedents of indictments under the English statutes all show

that it was deemed essential to charge the offense to have been committed with malice aforethought. And we apprehend that it is not to be doubted that an indictment framed under those statutes would be held in an English court to be fatally defective without such an averment.

The statute, chapter 64, section 33, Hutch. Dig. 960, declares it to be an offense punishable by imprisonment in the penitentiary for any person to shoot at another, "with intent to kill such other person;" and the statute of 1822, chapter 37, section 55, Hutch. Dig. 521, makes it a capital offense for any slave "to burn any dwelling-house, store, cotton-house, gin or outhouse, barn or stable." But in neither of the offenses created by these statutes is willful malice made an ingredient by express words. It will not, however, be denied that malice is the very gist of each of these offenses. For it is not to be doubted that the legislature did not intend to punish a person for shooting at another in just self-defense, although such person intended to kill the assailant; or to punish a slave for setting fire to and burning his master's stable or outhouse at his master's command. These statutes furnish examples which show conclusively that wherever a malicious intent is an essential ingredient in the constitution of an offense created by statute, although it is not so made by the express words of the act, the indictment will be invalid unless it contain an averment of the malicious intent. For if indictments framed under these statutes would be valid because they contain a description of the offense in the language of the statute, the consequence would be that the jury would be compelled to convict and the court to pronounce judgment, however innocent the accused might be of any intent or act held criminal by the law.

We are unable to perceive a distinction, in reference to the question under consideration, between the statute under which the prisoner is charged and the statute above referred to. For in neither is malice by express words made an ingredient in the offenses therein defined. Hence, if it be necessary, in order to warrant the conviction of a slave for setting fire to and burning a stable, to charge the act to have been done with malice, it must, upon principle, be equally essential to charge the administration of poison, with intent to kill, to have been done with malice aforethought, before the accused can be legally convicted of a capital offense.

The indictment in the case of *Anthony v. State*, *supra*, was framed under the statute of 1822, chapter 64, section 36, Hutch.

Dig. 521, as amended by the act of 1825: Id. 532, art. 8, sec. 1. By the original act it was made a capital felony for any slave to commit an assault and battery upon any white person, "with intent to kill." The amendatory act provides that the foregoing act, "when the killing does not actually occur, shall be so construed as to render the proof of malice aforethought expressly necessary to subject the person or persons therein named to capital punishment." The indictment charged the offense to have been committed "feloniously, willfully, and of his malice aforethought." The jury, upon the evidence submitted to them, found the accused guilty, and that the act was committed with express malice, and sentence of death was pronounced. Upon the removal of the cause into this court, the judgment was reversed, upon the ground of the insufficiency of the indictment to authorize the punishment of death. The court say the indictment contains no averment of that species of malice (that is, express) which alone authorizes capital punishment. This is a direct decision upon the question under consideration. According to these views, both counts in the indictment were defective. The court, therefore, erred in overruling the motion in arrest of judgment.

Let the judgment be reversed, and the prisoner remanded to be proceeded against in the court below.

HANDY, J., dissented.

WHERE SEVERAL DISTINCT OFFENSES OF SAME NATURE ARE JOINED in the same indictment, it rests in the discretion of the court to say whether the prosecutor must elect on which count he will proceed: *State v. Jackson*, 59 Am. Dec. 281, note 284, where other cases are collected; and see note to *Ben v. State*, 58 Id. 238, where this subject is discussed at length; *Teat v. State*, 53 Miss. 458, citing the principal case.

INDICTMENT MUST ALLEGE EVERY MATERIAL FACT going to constitute the offense charged, with precision and certainty: *State v. Thurston*, 58 Am. Dec. 695, note 696, where other cases are collected. It is generally necessary in an indictment to describe the offense in the substantial language of the statute: *Riley v. State*, 43 Miss. 405, citing the principal case.

INDICTMENT CHARGING OFFENSE IN LANGUAGE OF STATUTE CREATING IT, or so plainly that the jury can clearly understand it, is sufficient: *Cook v. State*, 56 Am. Dec. 410, note 418, where other cases are collected. But it is not sufficient to charge a statutory offense in the words of the statute, when in the language of the statute there are no sufficient words to define any offense; *Harrington v. State*, 54 Miss. 494, citing the principal case.

BRISCOE v. ANKETELL.

[28 MISSISSIPPI, 361.]

PROMISE OR ACKNOWLEDGMENT IS NOT SUFFICIENT, under the Mississippi act of 1844, to prevent the running of the statute of limitations, unless it is made in writing, or on presentation of the claim sued on.

PROMISE OR ACKNOWLEDGMENT OF ONE OF SEVERAL MAKERS of a promissory note does not charge the co-makers.

STATUTES OF LIMITATIONS PERTAIN TO REMEDY, and not to the essence of the contract; and the legislature has power to regulate the remedy and modes of proceeding in relation to past as well as future contracts, provided it does not take away all remedy upon the contract, or impose upon its enforcement new burdens and restrictions which materially impair the value and benefit of the contract.

NEW PROMISE, MADE BEFORE NOTE IS BARRED BY STATUTE OF LIMITATIONS, does not create a new and substantive contract, but is merely evidence of an existing liability.

MISSISSIPPI ACT OF 1844 APPLIES TO ALL CAUSES OF ACTION existing at the time of its passage, except in cases where its application would deprive the party of all remedy, by shortening the period of limitation so as to cut off all right of action, or by destroying the validity of the evidence upon which the establishment of his demand depends.

ERROR from the circuit court of Claiborne county. The opinion states the case.

John B. Coleman, for the appellants.

W. S. Wilson, for the appellee.

By Court, **HANDY, J.** On the thirtieth day of September, 1846, the defendant in error brought this action in the circuit court of Claiborne county against Andrew B. Logan, William Briscoe, and Parmenas Briscoe, upon three joint and several promissory notes executed by them; the first of which had become due on February 7-10, 1839, the second on February 7-10, 1839, and the third on February 7-10, 1840. The defense was founded on the statute of limitations of six years. On the trial, at April term, 1853, the plaintiff read in evidence the notes sued on, and introduced as a witness John Murdock, who testified that a few days or weeks after the first of February, 1842, he furnished the defendant Logan with a statement of the amount due on the notes, which he admitted to be just; that afterwards, in the winter of 1842 and 1843, witness applied to Logan for the balance due on the notes, and Logan promised to pay it in about two weeks from that time, and admitted a balance to be due. The defendants objected to this evidence: 1. Because the admissions and promises of Logan were not evidence against

the other makers of the notes; and 2. Because the alleged promises and admissions were not made upon presentation of the notes to Logan at the time; which objection was overruled and the evidence permitted to go to the jury, and the defendants excepted. Logan died pending the suit, and it abated as to him. At the instance of the plaintiff, the court gave the following instruction to the jury: "If the jury believe from the evidence that within six years before the institution of this suit, Logan, one of the makers of the notes, made payment thereon to John Murdock, as agent of the plaintiff, and admitted that a balance was due upon the notes, which he promised to pay, such promise is sufficient to take the case out of the statute of limitations as to the defendants" (William and Parmenas Briscoe). And the following instruction asked by the defendants was refused: "That unless the jury believe from the evidence that the notes sued on were presented to Logan at the times testified to by Mr. Murdock, then Logan's admissions, made at said times, are not sufficient to take the case out of the statute of limitations."

The verdict and judgment being for the plaintiff, the defendants have prosecuted this writ of error. The points made in the court below present the question here, whether the promises and acknowledgments made by Logan are sufficient to charge the co-makers of the notes: 1. In reference to the necessity of presentation at the time of the promise; and 2. In reference to the binding force of the promise of Logan upon his co-makers of the note. Both of these points were presented in the case of *Foute v. Bacon*, 24 Miss. 156; and it was there held: 1. That under the provisions of section 16 of the act of 1844 a promise or acknowledgment was not sufficient to prevent the running of the statute, unless made in writing or on presentation of the claim sued on; and 2. That the promise or acknowledgment of one of several makers would not charge the co-makers. That case is conclusive both against the admissibility and sufficiency of the evidence in this case. But it may not be improper to consider some objections that are presented to the soundness of this view of the subject, under the facts of this case.

1. It is said that as the new promise in this case was made before the passage of the act of 1844, that act can not be interpreted to have a retrospective effect, and apply to defeat rights which were vested before its enactment. It is too well settled to admit of question at the present day, that statutes of limitation pertain to the remedy, and not to the essence of the con-

tract; and that it is within the power of the state legislatures to regulate the remedy of modes of proceeding in relation to past as well as future contracts. This power is subject only to the restriction that it can not be exercised so as to take away all remedy upon the contract, or to impose upon its enforcement new burdens and restrictions which materially impair the value and benefit of the contract: *Bronson v. Kinsie*, 1 How. 315; *McCracken v. Hayward*, 2 Id. 612. And accordingly it has been held to be within the undoubted competency of the state legislatures to shorten the periods of limitation of actions, to change existing rules of evidence, and to prescribe new rules of evidence and judicial procedure, all to affect both past and future rights of action: *Sturges v. Crowninshield*, 4 Wheat. 122; *Jackson v. Lamphire*, 3 Pet. 290; *Bronson v. Kinsie*, *supra*. Such acts are held to be invalid when they deprive the party of all remedy, by changing the period of limitation, or destroying the validity of the proof on which his claim rested, and rendering it impossible to establish his right.

In England, it has been held that the statute of limitations, known as Lord Tenterden's act, which contains provisions analogous to the statute under consideration, applies to a parol acknowledgment made before the passage of the act: *Towler v. Chatterton*, 6 Bing. 258; S. C., 19 Eng. Com. L. 76; *Ansell v. Ansell*, 8 Car. & P. 568; S. C., 14 Eng. Com. L. 451. And it has also been held that the statute did not make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely required a different mode of proof, substituting the certain evidence of a writing signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses: *Haydon v. Williams*, 7 Bing. 163; S. C., 20 Eng. Com. L. 86. Applying these principles to the facts of this case, it appears that two of the notes sued upon were not barred until February, 1845, and the third was not barred until February, 1846, so that without the right of action being interfered with by the act of 1844, the plaintiff had nearly twelve months as to two of the notes, and nearly two years as to the third, to bring suit. He had, therefore, ample time to bring his suit, as his right of action stood upon his notes, before they could come under the operation of the act of 1844, and it can not be said that he was deprived of all remedy by the provisions of that act.

It can not be said that the new promise constituted a new and valid contract which was available to the plaintiff under the

law as it then stood, and that the act of 1844 impaired the obligation of that contract. For in the first place it is settled that, as the law was understood to be prior to that act, the new promise, being made before the notes were barred by the statute then existing, did not create a new and substantive contract, but was evidence merely of an existing liability: *Parham v. Raynal*, 2 Bing. 306; S. C., 9 Eng. Com. L. 413; *Bell v. Morrison*, 1 Pet. 360; *Ilseley v. Jewett*, 3 Met. 444. And the action should be brought on the original contract: *Leaper v. Tatton*, 16 East, 420; *Upton v. Else*, 12 Moo. 303; S. C., 22 Eng. Com. L. 451. Secondly, it was competent, under the rules above stated, for the legislature to introduce a new rule of evidence, affecting contracts then existing, provided it did not debar the plaintiff of all remedy upon his contract; and it is above shown that he had ample time to pursue his remedy before the notes were affected by the new rule of evidence established by the act of 1844.

But it may be urged that, as the new promise in this case was made before the notes were barred by the statute, it was not a promise to revive a cause of action already barred, but to continue and give new vigor to one then in force, and therefore is not within the statute. The language of the statute is: "No promise or acknowledgment, either express or implied, shall operate to revive at law any action or cause of action from the bar and limitations contained in the provisions of this act, unless such promise or acknowledgment be in writing and signed by the party to be charged thereby; provided, however, that the promise or acknowledgment, to save the bar, may be made without writing, if it be proved that the very claim sued on was presented and acknowledged to be due and unpaid:" Hutch. Code, 832, sec. 16. It is manifest that the language here employed is not very precise or even accurate. The term "revive," in its strict import, would apply to demands already barred. But the language, "no promise shall operate to revive any action from the bar and limitations," etc., is too loose to justify the application of critical rules in interpreting it. The last clause of the same section provides that "the promise or acknowledgment to save the bar," etc., "may be made without writing," etc., which language could properly apply only to claims not already barred. Yet it has reference to the same character of demands embraced in the previous part of the section. In view of the entire section, we think it was the manifest intention of the legislature to establish a new rule of evidence, whether to revive a cause of action already barred or to continue one not barred.

2. It is insisted that the new promise was sufficient to take the case out of the statute, because the act of 1844 extended only to "the bar and limitations contained in the provisions of that act," and the new promise was relied upon to remove the bar created by the act of 1822. The period of limitation as to actions on promissory notes is the same in both acts. It was doubtless the intention of the legislature that the new rules established in the act should apply, so far as could be, to causes of action which had already commenced to run; and it is expressly provided in section 18 that the act should not stop the running of the limitations contained in any other act, when the same had commenced before its passage. It is therefore manifest that the limitation upon the notes in this suit did not commence running anew under the provisions of the act of 1844, but that it continued to run from the maturity of the notes for the period of six years, and that, during that time and afterwards, they became subject to the provisions of that statute. And this rule would apply to all causes of action existing at the time of the passage of the act, except in cases where its application would deprive the plaintiff of all remedy, by shortening the period of limitation so as to cut off all right of action, or by destroying the validity of the evidence upon which the establishment of his demand depended.

Under these views of the subject, the court below erred in admitting the evidence of Murdock, in refusing the instruction asked by the defendants, and in granting that asked by the plaintiff.

The judgment is therefore reversed, and the case remanded for a new trial.

ACKNOWLEDGMENT WHEN SUFFICIENT TO REMOVE BAR OF STATUTE OF LIMITATIONS: See *Burton v. Stevens*, 58 Am. Dec. 153, note 155, where other cases are collected.

CLAIM BARRED BY STATUTE OF LIMITATIONS CEASES TO BE LEGAL RIGHT, and becomes a mere moral one, but the legal right is restored by a new promise: *Kyle v. Wells*, 55 Am. Dec. 555.

REVIVAL OF DEBT BY ACKNOWLEDGMENT OF JOINT DEBTORS: See *Cox v. Bailey*, 54 Am. Dec. 358, note 360, where other cases are collected; *Van Keuren v. Parmelee*, 51 Id. 322, note 330.

RECOVERY MUST BE ON NEW PROMISE, and not on the old debt, where there has been an acknowledgment of a debt barred by the statute of limitations: *Martin v. Broach*, 50 Am. Dec. 306, note 317.

STATUTES OF LIMITATIONS WHEN CONSTITUTIONAL: For a discussion of this subject, see the note to *Griſſin v. McKenzie*, 50 Am. Dec. 391. The power of the legislature to regulate the remedy on a contract is subject only to the

restriction that it can not be exercised so, as to take away all remedy on the contract, or impose upon its enforcement new burdens and restrictions which materially impair the value of the contract: *Coffman v. Bank*, 40 Miss. 35; *Price v. Crone*, 44 Id. 578; *Price v. Hopkins*, 13 Mich. 325, all citing the principal case. The legislature may change a rule of evidence, and establish a new rule as to what shall be regarded as sufficient proof of a new promise or acknowledgment to take a case out of the operation of the statute of limitations, and may apply such new rule to cases arising before its adoption: *Carothers v. Hurley*, 41 Miss. 73; *Dismukes v. Stokes*, Id. 434; *Cowan v. McOutchen*, 43 Id. 211, all citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Fisher v. Fisher*, 43 Miss. 217, to the point that the courts of Mississippi hold to a strict construction of statutes of limitations.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

LONG v. CONSTANT.

[19 MISSOURI, 320.]

DEBT EVIDENCED BY LOST NOTE MAY BE ASSIGNED, and the assignee may sue for it in his own name.

APPEAL from Buchanan circuit court. The facts are stated in the opinion.

Vories, for the appellant.

Willard P. Hall, for the respondent.

By Court, **GAMBLE, J.** Long's petition states that Constant made his promissory note for one thousand three hundred dollars, dated February 10, 1851, payable sixty days after date, to Henry Russell, or bearer, for value received; that Russell lost the note; that a copy of the note was made, and Russell, upon that copy, on the twenty-fifth of August, 1851, assigned the note, and the debt of one thousand three hundred dollars thereby secured, to the plaintiff, and that the defendant was notified of the assignment. The defendant demurred to the petition, and the demurrer was sustained.

In *Walker v. Mauro*, 18 Mo. 564, it was held that, since the adoption of our code of practice, a debt may be assigned, so as to authorize the assignee to maintain an action in his own name. The assignment of the debt in that case consisted of an order drawn by the creditor on his debtor, in favor of the person who brought the suit. In other cases, it has been held that where the debt is evidenced by a bond or note, and it is trans-

ferred without assignment on it, the action is to be brought in the name of the obligee or payee, because he is a person recognized by the code as a trustee of an express trust. In the present case, by the loss of the note payable to Russell or bearer, a court of equity would have had jurisdiction to decree payment by the maker to the payee, and would have required an indemnity from the payee. It is true that a distinction has been taken between a lost bond and a lost note, upon the ground that, in an action on a bond, oyer could be prayed, and until it was given, the plaintiff could not proceed with his action, and therefore he might commence his suit in equity; but as oyer was not demandable of a note or other unsealed instrument, the plaintiff might proceed at law, and show the contents of the lost instrument: *Walmsley v. Child*, 1 Ves. sen. 344; 1 Story's Eq. Jur., sec. 85. But such distinction does not exist here, where the same proceeding is had, in an action on a note, as in an action on a bond; and indeed, all our civil actions are now suits in equity as much as actions at law. In this case, then, we have a suit upon a note payable to bearer, which has been lost or destroyed, and the payee has assigned the debt to the present plaintiff. By the loss or destruction of the instrument, while in the hands of the payee, he could not assign the evidence of the debt so as to comply with our statute regulating the assignment of bonds and notes, and as he sold and assigned the debt to the plaintiff, the plaintiff may maintain the action in his own name. The demurrer, therefore, should have been overruled.

The judgment is reversed and the cause remanded, with the concurrence of the other judges.

KEETON v. AUDSLEY.

[19 MISSOURI, 362.]

ENTRY OF PUBLIC LAND GIVES NO TITLE TO TIMBER cut and lying upon it at the time such entry is made.

APPEAL from Saline circuit court. The facts are stated in the opinion.

Hayden, for the appellant.

Napton, for the respondent.

By Court, SCOTT, J. This was an action for wrongfully entering upon the plaintiff's land, and for cutting timber and carrying it away. The answer consisted of a denial of the matters

stated in the petition. The facts were, that Audsley, the defendant, had a set of house-logs cut upon the public land, and afterwards Keeton, the plaintiff, entered the land, and Audsley, after Keeton's entry, hauled the logs away. There was no evidence in the cause on which any instruction could be based, relative to the right of the plaintiff to any portion of the land by accretion. The court gave the following instruction, asked by the plaintiff: "If the jury believe from the evidence that the defendant entered upon fractional section, south of the Missouri river, numbered 21, in township 53, range 20, and carried away timber or house-logs, cut and lying on said land, they will find for the plaintiff; provided they are satisfied from the evidence that said fractional section has been and was, at the time of said entry and carrying off said logs, the property of plaintiff; and notwithstanding they may also believe said logs were cut upon said land prior to the entry thereof by the plaintiff." And refused the following instructions asked by defendant: "That, to enable the plaintiff to recover in this action, it devolves upon him to show to the jury that the defendant cut and carried away the timber of the plaintiff, as stated in his petition. That if they find from the evidence that the defendant procured Ira Tilman to cut and hew the house-logs mentioned by the witnesses, before the plaintiff entered or purchased the land of the United States, and that the defendant, after the purchase by plaintiff, hauled the logs from and off of the land, then the plaintiff can not recover of the defendant any damages for the timber or the logs so hauled off of the land by the defendant. That in this case, the plaintiff has not claimed of the defendant any damages for an injury to his, plaintiff's, land, by reason of the mere entry upon and return of his wagon and team upon his land, and therefore the plaintiff can not recover of defendant any damages therefor."

The action is for entering on land and cutting timber and carrying it away. The word "timber," in common parlance, is applied to standing trees, and to wood proper for buildings, utensils, furniture, ships, etc. Yet, in law, timber means certain trees useful for building, or the like. Taking the word in its popular sense, when it is used in connection with the word "cut," it is understood usually to apply to standing trees. When we say one cut timber on another's land, the ordinary understanding of the language is that trees were cut down. These observations are made, because the instruction given for the plaintiff would seem to substitute a matter in aggravation of

damages different from that stated in the petition. We are not aware of any principle which would give damages to the plaintiff for house-logs cut upon the land before he entered it. He may maintain trespass *quare clausum fregit* for entering his close, and recover damages for the injury sustained by such entry, but that those damages can be increased by proof that house-logs were taken from the land, which had been cut before the land was purchased from the United States, is a proposition unsustained by any principle of which we are aware. In the case of *James v. Snelson*, 3 Mo. 393, it was held that, where cord-wood was cut upon public land by one, and the land was afterwards entered by another, the person who cut the wood might maintain trover for it against the purchaser of the land who refused to deliver it up. It has been supposed that this case was overruled by the subsequent one of *Turley v. Tucker*, 6 Id. 583 [35 Am. Dec. 449], where it was decided that one who had cut saw-logs on the public land could not maintain an action for the logs against another who went upon the land and took them away. The property in the logs remained in the United States, and the trespasser gained no title by cutting down the trees.

Gale v. Davis, 7 Mo. 544, was an action of trespass *quare clausum fregit* for entering a close and removing a worm-fence. After the entry of the land by Davis, Gale went on it and removed a rail fence which he had built upon it. The question in that case was, whether Davis, before actual entry and possession, could maintain an action of trespass *quare clausum fregit*. It was held that the action could be maintained; and the worm-fence being a part of the freehold, and annexed to it, no question was made about his right to damages for removing it, if the action could be maintained at all, before an actual entry and possession. In the case of *Bower v. Higbee*, 9 Id. 259, it was held that one claiming a right of pre-emption under the act of congress of the first of June, 1840, could not maintain an action of replevin for timber cut upon the land before his right of pre-emption was proved up. None of these cases maintain the principle assumed by the instruction given by the court for the plaintiff, that house-logs cut upon land, before it was entered, belong to the purchaser of the land. They were severed from the freehold, and formed no part of the land. They do not pass with the land as a part of it when a conveyance is made: *Wincher v. Shrewsbury*, 2 Scam. 284 [35 Am. Dec. 108]; *Johnson v. Barber*, 5 Gilm. 431; *Basset v. Maynard*, 1 Cro. 819; *Leford's Case*, 11 Co. 50 b; *Farrant v. Thompson*, 7 Eng. Com. L. 272;

Movers v. Waite, 3 Wend. 104; *Buck v. Aikin*, 1 Id. 468 [19 Am. Dec. 535]. From what has been said, it follows that the second instruction asked by the defendant should have been given.

The other judges concurring, the judgment will be reversed and the cause remanded.

TITLE TO TIMBER CUT ON PUBLIC LANDS: *Wincher v. Shrewsbury*, 35 Am. Dec. 108, and note 110; and as to what is acquired by purchase of land from the United States, see *Floyd v. Ricks*, 58 Id. 374.

RIGHTS OF PARTIES CUTTING TIMBER ON PUBLIC DOMAIN: See *Turley Tucker*, 35 Am. Dec. 449, and note commenting upon the subject 456.

THE PRINCIPAL CASE WAS CITED in *Wilson v. Petty*, 21 Mo. 419, and the opinion there expressed that it did not overturn *Turley v. Tucker*, 6 Id. 583; S. C., 35 Am. Dec. 449.

STATE v. MOORE.

[19 MISSOURI, 309.]

SUIT UPON SHERIFF'S BOND IS PROPERLY BROUGHT in name of state.

SHERIFF IS LIABLE FOR ALL ACTS DONE BY HIS DEPUTY as such.

SHERIFF'S BONDSMEN ARE LIABLE FOR HIS TRESPASS committed in seizing property exempt from execution.

ERROR to Chariton circuit court. This was an action brought under the code, in the name of the state of Missouri, to the use of William Russell and Sarah J., his wife, against sheriff Moore, the defendant, and his bondsmen. The substance of the material allegations of the petition was that a suit was commenced in Chariton county, on the twenty-fifth of November, 1848, by George W. Temple against Sarah J. Cochran, who had since married plaintiff, William Russell, and a writ of attachment issued, which was levied upon the goods and effects of said Sarah J., to the value of nine thousand four hundred and fifty-four dollars and forty-nine cents. The sheriff, by his deputy, seized the goods, but allowed them to be lost, stolen, destroyed, or injured, except the amount in value of one thousand one hundred and forty-nine dollars and seventy-two cents. The wearing apparel of the said Sarah J. was also seized and taken into possession, by which she was damaged to the amount of two thousand dollars. At a subsequent term the sheriff was directed and ordered by the court to deliver to the said Sarah J., the goods, etc., seized by him, the suit having terminated in her favor. The damages were laid at eight thousand dollars. A demurrer to the petition was sustained, and plaintiffs appealed.

Davis, for the plaintiff in error.

Clark, for the defendants in error.

By Court, SCOTT, J. The first ground of demurrer to the plaintiff's petition is that the proper parties are not made plaintiffs. It is maintained that the suit should have been brought in the name of William Russell and his wife, they being the real parties in interest, and not in the name of the state of Missouri. The action is on a sheriff's bond, which is by law made payable to the state of Missouri, and is against the sheriff and his sureties. In the construction of the present practice act, it has been held that the obligee of a bond and the payee of a note are the proper persons in whose names suits should be instituted on such instruments. They are the trustees of an express trust within the exception of the act: *Harney v. Dutcher*, 15 Mo. 89 [55 Am. Dec. 131]. Another objection to the petition is that a cause of action which lies against the sheriff alone is joined with one against both him and his sureties. It is alleged in the petition, as a breach of the condition of the bond, that the sheriff levied an attachment on property belonging to the plaintiff's wife, which was not liable to that process under the statute regulating attachments. Other breaches of the condition of the bond are likewise averred in the petition, for which it is conceded the sheriff and sureties would be jointly liable. It is argued for the defendant that, for such wrongful acts of the sheriff, the sureties in his official bond are not responsible—that the act constituted a trespass for which the sheriff alone is liable.

It is an undoubted principle that the master is not liable for the wanton acts of those whom he may employ. If an agent, transcending the limits of his authority, wantonly commits a trespass, his principal is not liable to an action for such wrong; but the sheriff is liable for all acts done by his deputy as such; for all abuses, for every perversion of the authority with which he is intrusted, he is liable, though they may be committed by his deputies. He is responsible for all trespasses done by a deputy by color of his office. This is a well-established principle: 6 Bac. Abr., tit. Sheriff, 156.

The law of attachments relieves from that process all property exempt from execution by law, in favor of those who are residents of this state. Trespass lies against an officer for seizing under process property exempt from execution. Are, then, the sureties of a sheriff liable for trespass committed in the execution of process in his hands? The sheriff's bond is conditioned for

the faithful discharge of the duties of his office. Is it a faithful discharge of his duty to pervert process placed in his hands to the injury or oppression of another? The office of sheriff is a very important one. He is intrusted with very great powers, and for the safety of individuals, the law in its wisdom has seen proper to require of him surety for his good conduct. It would be hard if a sheriff, by virtue of the process placed in his hands, should oppress or ruin individuals, and they should have no other security than his own resources. He may be insolvent, and unable to respond in damages out of his own estate. Such a condition of things would drive men to a resistance of the execution of the process of the law. We are not without authority on this question. In the case of *Commonwealth v. Stockton*, 5 T. B. Mon. 193, it was held that a person on whose property a sheriff levies an execution against another may have an action for his use on the sheriff's official bond against the sheriff and his sureties. So in the case of *Carmack v. Commonwealth*, 5 Binn. 184, it was decided that the sureties of a sheriff are liable in damages for the sheriff's trespass in seizing and selling goods of one under execution against another. The condition of the bond sued on in that case was substantially the same as that required by our law.

The objection that there was no order of the court requiring the sheriff to restore the attached property, and that there was no demand of the property before the institution of the suit, can not be sustained, as the action is founded on the allegation of injuries sustained by the loss and destruction of property whilst in the custody of the sheriff. Under such a state of facts, no order for the demand or delivery of the goods was necessary, as such steps would have been nugatory.

The other judges concurring, the judgment will be reversed and the cause remanded.

SHERIFF'S LIABILITY FOR ACTS OF HIS DEPUTY: *Hazard v. Israel*, 2 Am. Dec. 438; *Forsythe v. Ellis*, 20 Id. 218; *Governor v. Vanmeter*, 33 Id. 221; *Harrington v. Fuller*, 36 Id. 719; *Pascal v. Ducros*, 41 Id. 294; *King v. Chase*, Id. 675.

LIABILITY OF SHERIFF FOR HIS OWN ACTS: *Forsythe v. Ellis*, 20 Am. Dec. 218; *Pascal v. Ducros*, 41 Id. 294; *Weston v. Dorr*, 43 Id. 259, and notes thereto; *City of Lowell v. Parker*, 43 Id. 436; and note to *Commonwealth v. Cole*, 46 Id. 509, containing an extended discussion of what constitutes a breach of the official bonds of sheriffs and constables; *Abbott v. Kimball*, 47 Id. 708.

AS TO WHAT PROPERTY CAN BE ATTACHED, see *Roby v. Labuzan*, 56 Am. Dec. 237.

SURETIES ON OFFICIAL BOND OF TAX COLLECTOR ARE NOT LIABLE FOR HIS TORTS committed as sheriff: *Moss v. State*, 47 Am. Dec. 116.

THE PRINCIPAL CASE WAS CITED in *State v. Powell*, 44 Mo. 438, to the point that the sheriff is liable upon his official bond, for his acts as collector of taxes; and its doctrines showing his liability for seizing property exempt from execution were affirmed in *State v. Farmer*, 21 Id. 160; *State v. Dulle*, 48 Id. 288, both citing it. That suits upon official bonds given to the state must be brought in the name of the state was affirmed in *Meier v. Lester*, 21 Id. 112; *Sickles v. McManus*, 26 Id. 28, both citing the principal case. It was also cited in *State v. Shacklett*, 37 Id. 285.

VALLE v. FLEMING.

[19 MISSOURI, 454.]

ADMINISTRATOR'S SALE IS SHOWN TO BE VOID when it affirmatively appears that the publication of notice required by statute, previous to the order, could not have been given; or when the record shows that it has not been approved by the court, although the approval need not be in express terms.

ADMINISTRATOR'S SALE VOID FOR WANT OF NOTICE in not complying with certain sections of an act can not be sustained on the ground that it might have been made under other sections of the same act requiring no notice.

VOID ADMINISTRATION SALE IS NOT RENDERED VALID AGAINST HEIRS because they receive the benefit of the proceeds, particularly when they are minors.

ADMINISTRATION SALE CAN NOT BE AVOIDED because the last administrators made it, where, after the death of one of two administrators, letters of administration were granted to the survivor and another without any express revocation of the former letters.

APPEAL from Madison circuit court. This was an action by six of the seven heirs of C. C. Valle, to recover an undivided interest in the Mine la Motte tract of land. The following facts were disclosed by the record: C. C. Valle died in 1838, owning an undivided one third of said tract; the other two thirds being owned by Lewis F. Linn and E. F. Pratte. Letters of administration on Valle's estate were granted on the nineteenth of December, 1838, to B. St. Gemme and E. F. Pratte. At a special term on the twenty-first of the same month, the administrators presented a petition to the county court, alleging the insufficiency of the personal estate of decedent to pay his debts, and that his interest in the realty mentioned was incumbered by a mortgage due in the following February. The petition also stated that there was filed with it a statement of the real and personal property of the deceased, and of his in-

debtedness; but the only lists disclosed by the record were those of debts due to and from the estate. The haste of the administrators was justified in their petition, by the statement that they had consulted with and had been advised by the friends and relatives of decedent to make the application. On the same day the court made an order, reciting that a petition had been presented, accompanied by a true account of the administration, of the debts due to and by the deceased, and of the real and personal estate and other assets; and in conformity with the administrator's prayer for such an order, authorizing the administrators to sell, at private sale, the whole or so much of the realty as should be necessary to pay the debts, provided the same be not sold for less than three fourths of its appraised value, which was one hundred thousand dollars for the entire tract. One half of the interest of C. C. Valle, or one sixth of the whole tract, was sold by the administrators, to Fleming, Lamb, and Chauncey of Philadelphia, for the sum of sixteen thousand six hundred and sixty-six dollars and sixty-six and two thirds cents. Pratte and Linn, the other owners, sold one half of their respective interests at the same time to the parties. The record of the proceedings showed no report of this sale of Valle's half-interest; neither was there any entry to show that the sale had been approved by the county court. On the twenty-fourth of April, 1839, Pratte and St. Gemme as administrators, and Pratte and Linn as owners, joined in ordinary warranty deeds conveying to each of the three purchasers one undivided sixth of the entire tract. This deed recited the order of sale of Valle's interest, dated the twenty-first day of December, 1838, but contained no recitals of the proceedings under the order. Pratte and Linn warranted title for themselves, and Pratte and St. Gemme warranted it as administrators of C. C. Valle. Subsequently to the sale, two decrees were rendered in suits commenced by Robert T. Brown and Francis Valle respectively, against C. C. Valle's widow, administrators, and minor heirs, whereby title to three fifty-sixths of the tract in controversy was vested in said Brown and Francis Valle. It was further decreed that the administrators should account to Brown and Francis Valle for the one half of their respective interests, which were sold by the administrators, with their assent, under the order of the twenty-first of December, 1838. The administrators presented another petition to the county court in May, 1843, and recited therein that, pursuant to the order of the twenty-first of December, 1838, they had sold at private sale the one

equal undivided half of C. C. Valle's interest in said tract of land, for the sum of sixteen thousand six hundred and sixty-six dollars and sixty-six and two thirds cents, upon a credit of — months, to some gentlemen in Philadelphia. They stated the necessity for a sale of his remaining interest, and prayed for an order; but this petition did not appear to have ever been acted upon. On the nineteenth of January, 1844, St. Gemme having died, new letters of administration on the estate of C. C. Valle were granted to Melanie Valle and E. F. Pratte, the latter being one of the former administrators. There was, however, no express revocation of Pratte's former letters. The administrator and administratrix presented another petition on the eighteenth of September, 1847, reciting that they had formerly sold an equal undivided one sixth of the Mine la Motte tract, which sale had been reported to the court, and that the proceeds had been insufficient to pay the debts of the estate. They prayed for an order for the sale of their intestate's remaining interest in the tract, being one sixth less three fifty-sixths. An order of sale was made at the November term, 1847, after publication of notice, in accordance with the prayer of the petition. Under this order a sale was made to Thomas Fleming, and it was approved. The administrators executed a deed to Thomas Fleming on the tenth day of February, 1848, by which, after reciting the order of sale and proceedings thereunder, and that Valle's interest was one sixth less three fifty-sixths, they conveyed to him "all the interest which the said C. C. Valle had in the Mine la Motte tract at the time of his death, less three fifty-sixths." Under these two administration sales defendants claimed, and the law was declared to be in their favor by the court below. Plaintiffs appealed.

Noell and Frissell, for the appellants.

T. T. Gantt and R. M. Field, for the respondents.

By Court, SCOTT, J. The validity of the proceedings which resulted in the sale of the land in controversy has been placed on two grounds: the first of which is that the sale was valid under the eighth and the following sections of the third article of the act, respecting executors and administrators, of the revised code of 1835, which authorized a sale of the lands of a deceased person to pay his debts, when there was an insufficiency of personal estate; the second ground was put on the second and third sections of the same article, which prescribed that, when any person should die, after having purchased any real estate,

and should not have completed the payment, should it be believed that, after the payment of debts, there would not be sufficient assets to pay for such real estate, the executor or administrator should, by order of the county court, sell all the right, title, and interest of the deceased therein.

An objection to the sale, when its legality is based on the first ground stated, is, that the requisite notice was not given to those interested to come in and show cause why the sale should not be made. The law required that the application should be made at one term for the sale, and that six weeks' notice of it should be given by publication in a newspaper. At the next term after such notice, upon proof of the publication of it, the court was required to hear the testimony, and dispose of the application. It is contended that this notice is not necessary to give validity to the proceedings; that the court having jurisdiction of the subject, the failure to give notice does not render its order of sale void; that the presumption of notice arises from the fact of the order having been made, and at most, an omission to give it would only affect the proceedings with error, which would not avoid a sale under them. It is certainly true that the county courts have no other jurisdiction than that which is specially conferred on them by statute. They have no common-law jurisdiction, nor can they be said to be courts of general jurisdiction, in whose favor, by the common law, the liberal intendments are indulged which are extended to courts of that character. But the great mischief which, experience has shown, arises from avoiding sales made under the authority of tribunals having jurisdiction of the subject has induced courts to extend an enlarged liberality of construction to proceedings instituted for such purpose, with a view to uphold them. As to these proceedings, the presumption extended to courts of general jurisdiction is indulged. No case is more frequently cited, in connection with this subject, than that of *Grignon v. Astor*, 2 How. 319. There the supreme court of the United States went a great way to uphold judicial sales of real estate. Those proceedings were under a statute resembling ours. Notice of the application for the sale of the real estate by an administrator was required by law. It did not appear that the notice had been given. The opinion says, after the court has passed on the representation of the administrator, the law presumes it was accompanied by the certificate of the judge of probate, as that was requisite to the action of the court. The order of sale is evidence of that or any fact which was necessary

to give the power to make it, and the same remark applies to the order to give notice to the parties.

In the case before the court, the record shows that it was impossible that the notice required by law could have been given. The order of sale was made but two days after the letters of administration were granted. The court, at the term at which the sale was ordered, could not by law act on the matter; a sale could only have been directed at a term subsequent to the application for it. How, then, can a notice be presumed, when the record shows on its face that it was impossible, in the nature of things, that it could have been given? There is great difficulty in maintaining that a party is bound by an irregular proceeding, because he did not appeal from it, when the very objection is that he had no notice which would have enabled him to be present to take his appeal, and the appeal by law could have been only taken at the term during which the order of sale was made. There is no writ of error allowed in such cases. The case of *Snyder v. Markel*, 8 Watts, 416, which is relied on by the defendants, and was also used as an authority in the case of *Grignon v. Astor*, *supra*, maintains that the regularity of the proceedings for an administrator's sale of land of his intestate can not be impeached collaterally; that the remedy is an appeal for the correction of errors in them. How could there have been an appeal in such a case as the present? *Smith v. Rice*, 11 Mass. 507. This is an infirmity attached to these proceedings which is apparent upon the face of the record, and no length of time can cure it. If the antiquity of the proceedings were such (and it is not) as to warrant the application of the maxim, *Ex diuturnitate temporis omnia præsumuntur rite et solenniter esse acta*, yet it could have no place here, as the defect in the proceedings is apparent on the record. In the case of *Grignon v. Astor*, *supra*, it did not appear but that the notice was given, and as the proceedings had transpired a great length of time before they were assailed, the maxim above cited might have exerted an influence in its determination. But unfortunately, this case is so circumstanced as to be beyond its operation. If we admit that the purchaser is not bound to look behind the order of sale under which he derives his title, yet the order here shows that it was made at a term at which no possible state of circumstances would authorize it, in the absence of those interested. The order of sale immediately follows the presentation of the application, when the statute required that it should be made at the next succeeding term of the court, after proof of the

publication of six weeks' notice of the application in a newspaper.

Another objection to the validity of the proceedings is that they want the approval of the court. The statute required that, at the next term of the county court after a sale, the administrator should make a full report of his proceedings, and enacted that if such report of the administrator be not approved by the court, his proceedings should be void, and the court should order a new sale; if the report be approved by the court, such sale should be valid, and the administrator, upon the payment of the purchase money, should make to the purchaser a deed conveying all the right, title, and interest which the deceased had in the real estate sold. This objection is not affected by the principle that a fair purchaser at a sale shall not be affected by any subsequent irregularity of the officer conducting it, as there could be no valid sale until there was a report and confirmation of it. In looking over the cases on administration sales of real estate, a provision like that above cited has not been found. It must have been intended to have some effect. So far as the court was concerned, the approval would seem to be the crowning act of the sale. That approval could only appear by the record, as it is an act of the court. It is not maintained that it should be *in totidem verbis*, but the sanction of the court to the proceedings should in some way appear; otherwise the sole condition on which the law imparts any validity to them is not complied with. An order directing the administrator to make to the purchaser a deed would be an implied sanction of his proceedings. The recital of the facts in a subsequent application for the sale of the real estate, which was never acted upon, that the land was sold for sixteen thousand six hundred and sixty-six dollars and sixty-six and two thirds cents, on a credit, whose duration is not mentioned, to persons not named, whose notes for the purchase money were disposed of at a discount not disclosed, and promises a full report thereafter, on no rule or principle can be regarded as any evidence of an approval by the court of the first sale. This application was, moreover, not made until 1843, upwards of four years from the date of the deed. If an approval after the sale will avail anything, and one four years thereafter is effectual, no reason is perceived why the sale might not be ratified by an approval at this time. The law evidently contemplates that the deed should not be given until there is an approval of the report of the proceedings of the administrator. A failure to enter the order of approval might be remedied by an

amendment of the record or by *mandamus*. Nor does the application for the sale of land on the eighteenth of September, 1847, furnish any evidence that the first sale was approved. That application states that a report of the first sale had been made, but it nowhere appears but as stated in the application made in 1843. The deed itself furnishes no evidence of the approval of the proceedings of the administrators by the county court. That deed is not in conformity to the statute, such as the court was required by law to direct the administrators to make. It did not convey to the purchaser all the right, title, and interest which the deceased had in the real estate, but the administrators, as such, convey the land itself, just as the other joint owners conveyed it, joining in a deed with them, and as administrators, they warrant the title. The case requires no expression of opinion as to this deed, otherwise than as affording no evidence that the court approved the sale, as the deed is not such a one as the court was directed to order to be made to the purchaser. We do not say that, if there had been a report and a deed in conformity to law following it, the approval of the court might have been presumed on the maxim, *Probatis extremis præsumuntur media*. The approval of the court should have been a matter of record, and it should have been shown by the record.

It is impossible, from an examination of this transcript, to say that the sale is valid, on the second ground on which its validity is attempted to be upheld, stated in a preceding part of this opinion. If an order of sale, under the sections referred to, had been contemplated, it would have been for the sale of all the right, title, and interest of the deceased in the tract of land purchased; whereas, the order was for the sale of the whole or so much of the real estate as shall be necessary to pay the debts of the deceased. Had the sale been under these sections, no appraisalment would have been required, nor would there have been any necessity for a petition; yet we find both of these among the papers in the cause. It is not pretended that, had the sale taken place under these sections, the appraisalment or petition would have affected its validity. The petition was not so worded as to accomplish any such result as was designed by these sections, nor does the deed itself show that such a purpose was intended. The act that was done by the court could only have been performed under the eighth and following sections of the third article of the act, and the order made shows that the court never intended to act under the second and third sections. If a proceeding is had under one provision of law.

and it turns out to be invalid, can it be upheld on the ground that it might have taken place under provisions which would avoid the objections taken to its validity? The argument can not be that the second and third sections upheld the proceeding, but that it might have taken place under them; for it is obvious that the end contemplated by these sections was not accomplished by the proceeding which did occur.

It is a matter of regret that purchasers should lose their estates by reason of irregularities in the proceedings of those intrusted with the execution of the law. This sale bears intrinsic evidence of its fairness. Not the least blame can be imputed to the purchaser. He has been deceived by relying on the opinion of those who, though incompetent to advise, yet were no doubt conscientious in the views they expressed. These considerations can not affect the law of the case. To uphold this sale would repeal every restriction which the law has imposed with a view to prevent unnecessary sales of the real estate of deceased persons. It is obvious that no validity can be imparted to this sale, by reason of any of the proceedings in the suits by R. T. Brown and others against the plaintiffs; the fact that they were minors, even if anything was therein contained to affect them, would prevent such a consequence.

There was no irregularity affecting the last sale sufficient to invalidate it. The first administration either continued or it was replaced by the second. If it continued, the association of the name of Melanie Valle with that of the real administrator, who, it is assumed, was alone competent to act, would not prejudice the proceedings. If the second grant of letters was valid, the sale was equally good.

RYLAND, J., concurring, the judgment is reversed and the cause remanded.

GAMBLE, J., not sitting.

ADMINISTRATOR OF INTESTATE APPLYING FOR LEAVE TO SELL REALTY must give notice of such application; otherwise the sale under the license conveys no title: *French v. Hoyt*, 25 Am. Dec. 464.

POWER OF SALE IS ATTACHED TO OFFICE OF EXECUTOR, AND NOT TO PERSON NAMED AS SUCH: *Zebach v. Smith*, 5 Am. Dec. 352; *Marr v. Peay*, Id. 521.

THE RULE IN PRINCIPAL CASE as to administration sales was affirmed in *Strouse v. Drennan*, 41 Mo. 239. It was also cited in *Farrar v. Dean*, 24 Id. 16; *Knowlton v. Smith*, 36 Id. 513; see *Valle's Heirs v. Fleming's Heirs*, 29 Id. 152.

RANKIN v. CHARLESS.

[19 MISSOURI, 490.]

WHERE JURISDICTION OF COURTS OF LAW AND EQUITY ARE BLENDED, plaintiff is entitled to all the relief that would formerly have been afforded by a court of law and equity.

TO OBTAIN INJUNCTION, SOME STRONG AND SPECIAL FACTS must be shown which entitle the petitioner to this extraordinary remedy. It will not issue to compel a builder to remove his joists inserted without license in the wall of an adjoining proprietor; yet the injured party may recover damages.

APPEAL from St. Louis court of common pleas. Civil action under the code. The nature of the petition, answer, and verdict is shown by the opinion. In addition, however, to the judgment entered up against defendant, a further judgment was entered that the ends of the joists inserted in the plaintiff's building be removed, and the holes filled with brick and mortar. Execution was ordered to issue to plaintiff accordingly.

B. B. Dayton and Barton Bates, for the appellant.

C. D. Drake, for the respondent.

By Court, SCOTT, J. There is no evidence preserved in the record in support of the defense set up by the defendant. Consequently no question can arise as to the right to continue the use of the wall of the plaintiff as a support for the joists of his building. The verdict establishes the fact that the defendant has unlawfully made use of the building of the plaintiff as a support to the joists of his house, and the only question that arises is, What remedy or judgment is warranted in law by the verdict of the jury? The present practice act having blended the jurisdiction of courts of law and equity, it would seem that the plaintiff is entitled, in this proceeding, to all the relief that would formerly have been afforded both by a court of law and equity.

According to the definition of a nuisance, which is said to be a wrongful act or neglect of one man, in the use or management of his land, which occasions damage to the possession or easement of his neighbor, or to a public easement, it may be questioned whether the injury complained of is a nuisance or not: *Gibbons on Dilapidations and Nuisances*, 360. A purpresture is a species of nuisance, but that term is only applied to an encroachment on land belonging to the public: 2 Co. Lit. 277. But although the act complained of may not be a tech-

nical nuisance, to be redressed by the remedies appropriated by law for that species of wrong, yet it is clearly an injury, entitling the party affected by it to an action for its redress. The record in this case only presents the petition of the plaintiff, the answer of the defendant, and the verdict and judgment. The petition substantially alleges that the defendant, in building his house, used the wall of the plaintiff's house (who was building simultaneously) for a support to the joists of his building. The defense was, a license to use the wall. The verdict of the jury awarded damages to the plaintiff for the act complained of.

It seems that, in the opinion of the court below, an erroneous judgment was entered on this verdict, and so much of it as decreed that the joists be removed from the wall, that the holes made by the insertion of the joists be filled with brick and mortar as strongly as it may be done, and that the plaintiff have execution against the defendant, in conformity to this judgment and decree, was stricken out, and it was thus left a judgment for the damages assessed.

Even if the injury complained of was a nuisance, yet it is well known that, in an action on the case for such a wrong, no judgment for the abatement of it is given. That judgment was only proper in the old writ of assize of nuisance, and in a *quod permittat prosternere*: 3 Bla. Com. 219. But these ancient remedies have fallen into disuse if they have not been abolished, and the action on the case and the writ of injunction are now the usual remedies for a nuisance. But courts of equity do not, as a matter of course, interfere in all cases of this kind. That interposition can only be demanded to restrain irreparable mischief, or to suppress oppressive or interminable litigation, or to prevent a multiplicity of suits.

No injunction will be granted unless the act done or contemplated is or will clearly be a nuisance. If a party sees a nuisance in progress, and does not interfere to prevent it, he will forfeit his right to assistance from a court of equity: *Jones v. Royal Canal Co.*, 2 Mol. 319; *Williams v. Earl of Jersey*, 1 Cr. & Ph. 91; *Gibbon on Nuisances*, 403. As the record is barren of all the circumstances attending this transaction, no reason is perceived why, if the extraordinary powers of a court of chancery are exerted in this case, they may not be in every complaint of a nuisance. It is allowable for a party to take the redress of wrongs of this character into his own hands. This was a case eminently proper for the exercise of such a right.

Had the injury been redressed by the party at the moment it was done, the consequences would have been by no means so serious as they must be at this time by granting the relief prayed. The injury has been done. It can not now be prevented. It may be redressed. Whether it would be more equitable to let it remain, and leave the plaintiff to his remedy at law, we can not say, as the facts necessary to a determination of that question are not before us. To tear down the house of the defendant now might look more like revenge than the legal reparation of an injury. It is no part of the business of tribunals of justice to minister to the angry passions of men. If the defendant will wantonly persist in his encroachments on the rights of the plaintiff, it is in the power of the courts of law to award such damages as will arouse him to a sense of his continued injustice.

The other judges concurring, the judgment is affirmed.

DISTINCTION BETWEEN LAW AND EQUITY AS TO ACTIONS IS NOT ABOLISHED IN CALIFORNIA.—The innovation that there shall be but one form of civil action extends only to the form of the action and the pleadings: *De Witt v. Hays*, 56 Am. Dec. 352. As to equity powers of supreme court of Maine, see *Soutter v. Atwood*, Id. 647.

INJUNCTIONS ISSUE ONLY TO PROTECT CLEAR RIGHTS, OR AT LEAST THOSE FREE FROM REASONABLE DOUBT: *Snowden v. Noah*, 14 Am. Dec. 547; *Commonwealth v. F. & M. Bank*, 32 Id. 290; *Robeson v. Pittenger*, Id. 412; *Roath v. Driscoll*, 52 Id. 352, and note to same containing collected cases 357; *White v. Flannigan*, 54 Id. 668; *Whitfield v. Rogers*, 59 Id. 244.

THE PRINCIPAL CASE WAS CITED AND ITS DOCTRINE APPROVED IN *Abraham v. Krentler*, 24 Mo. 69.

MOONEY v. KENNETT.

[19 MISSOURI, 551.]

MANY CAUSES OF ACTION, UNDER CODE PRACTICE, MAY BE JOINED IN ONE PETITION; but each must be set out separately from the others, with its appropriate prayer for relief.

IF SEVERAL CAUSES OF ACTION ARE JOINED IN ONE PETITION, there should be a separate assessment of damages or verdict in each cause; but a general finding for defendant on such petition may be sustained.

IMPROPER BLENDING OF SEVERAL CAUSES OF ACTION MAY BE CURED BY motion to compel an election.

INSTRUCTION TO JURY, IN TRIAL FOR ASSAULT AND BATTERY, IS ERRONEOUS WHICH RUNS THUS: "Although you may believe from the evidence that the defendant had probable cause for giving information of the violation of the law by the plaintiff, still this does not authorize or justify the defendant in committing an assault and battery upon the person of the plaintiff; and if the jury also believe he did so commit an assault and

battery, the law presumes it to have been done maliciously, and the jury are at liberty, in such case, to render a larger amount than the amount actually paid by the plaintiff, by way of smart-money."

PETITION IN ACTION FOR WRONGFUL PROSECUTION IS FATALLY DEFECTIVE, unless it states that the prosecution was malicious, and that plaintiff was acquitted of it.

CITY ORDINANCES ARE NOT SUBJECT OF JUDICIAL NOTICE; when relied on they must be pleaded.

APPEAL from St. Louis commissioner's court. The petition in this action combined a suit for an assault and battery with one for a wrongful arrest and prosecution. In the former, plaintiff alleged that defendant, a police officer of the city of St. Louis, assaulted him, laid violent hands upon him, and had him arrested for the violation of a city ordinance. In the latter, plaintiff set out that defendant had caused two separate charges to be made and prosecuted against him for violating city ordinances. Plaintiff, however, alleged no malice, or acquittal of the charges. He claimed damages to the amount of one hundred dollars. Evidence adduced at the trial tended to show that plaintiff was driver of an express wagon, which he left standing in a street, obstructing a crossing. Defendant went to him in a store near by where he was delivering a parcel, and requested him to remove his wagon. Plaintiff replied that he would in a moment. Defendant told him to do it immediately, and laid hands upon his coat collar. After some words plaintiff drove off and was afterwards arrested. Defendant then offered two city ordinances in evidence, but which he had not pleaded: one prohibiting the obstruction of streets by vehicles, under a penalty; the other, imposing a penalty for resisting officers in the discharge of their official duties. These the court excluded, on the ground that they were private statutes, and had not been properly pleaded or referred to as such. Plaintiff obtained a general verdict for fifty dollars, and defendant appealed.

Glover and Richardson, and C. G. Mauro, for the appellant.

A. M. Gardner, for the respondent.

By Court, Scott, J. It would seem from the petition that this is a suit for a wrongful arrest and prosecution and an assault and battery. There are two causes of action joined, or rather mingled together, in violation of the rules of pleading, as determined by this court in the case of *Childs v. Bank of Missouri*, 17 Mo. 213, and of the forms of pleading, as prescribed in the precedents appended to the present practice act. Those precedents show that while many causes of action may be

joined in one petition, yet each is to be set out separately and apart from the others, with its appropriate prayer for relief—a course indispensably necessary, it would seem, to avoid inextricable confusion. No effort was made by the defendant to relieve the pleadings of this embarrassment, but the parties went to trial, trying both causes of action at one and the same time, as appears by the record, and taking but a single assessment of damages. If the parties will not properly prepare their pleadings in the courts in which their causes are first tried, they can not expect a reformation of them in this court. Its powers are not competent to such an undertaking. No such authority is intrusted to it. It must take the record as it is, and affirm or reverse the judgment, as is warranted by the principles of law. The presumption is in favor of the correctness of the judgment of the inferior court, and if there is enough in the record to sustain it, it must be affirmed.

It was a provision of the late code of procedure that where there are several counts in a declaration, and entire damages were given, the verdict should be good, notwithstanding one or more of the counts should be defective. If the present practice act is properly administered, such a state of things can not arise under it. If, however, under the present act, two distinct causes of action are blended and tried together, and a single assessment of damages is made, and one of the causes of action is insufficient to sustain a judgment, or there has been error in the trial of it, and the other is sufficient and the trial of it has been regular, what is to be done? Will the legal cause of action, with its regular trial, support the verdict, without regard to the defective cause of action or the error in the trial, notwithstanding it is obvious that the defective cause of action, or that in the trial of which there may be error, was considered by the jury in assessing the damages? Where several causes of action are joined in one petition, there should be a separate assessment of damages or verdict in each cause; otherwise, when a new trial is had in one cause of action, there must necessarily be a new trial as to all, where it is apparent that the verdict as to some of them is correct. This course, too, will enable the plaintiff to enter a *nolle prosequi* as to one cause of action and take a judgment for the rest. A general finding for the defendant, on a petition containing several causes of action, may be sustained; but where the finding is for the plaintiff, every consideration of propriety requires that there should be a verdict in each cause of action, and these will all be blended in one judg-

ment. This course of pleading and practice is also recommended by the considerations that a motion in arrest of judgment will thereby be confined in its effect to the cause of action defectively stated, and plaintiffs will be enabled to see the glaring impropriety of misjoining different parties, between whom there is no privity in the same action. It is now become a common practice to unite an action of ejectment with a petition for partition, thus making the tenant in possession wait the event of a litigation in which he has no interest, before his part of the suit can be tried.

As the present practice act does not prescribe a mode by which this irregularity in pleading can be corrected, and as this is not one of the enumerated causes of a demurrer, the most suitable mode of redress, in such cases, would seem to be a motion to the court to compel the plaintiff to elect for which cause of action he will proceed. An election of one of the causes will not have the effect to prevent a future action for the other causes. In all cases of election, the costs would be at the discretion of the court, to be governed by the circumstances, so that justice may be done.

In the case under consideration, there was an instruction given in relation to the assault and battery which can not be sustained. The jury was told that although they may believe from the evidence that the defendant had probable cause for giving information of the violation of the law by the plaintiff, still this does not authorize or justify the defendant in committing an assault and battery upon the person of the plaintiff; and if the jury also believe he did so commit an assault and battery, the law presumes it to have been done maliciously, and the jury are at liberty, in such case, to render a larger amount than the amount actually paid by the plaintiff, by way of smart-money. We know of no principle which justifies such an instruction in a trial for an assault and battery. The cause of action, as to the wrongful prosecution, as stated, does not aver that the injury was done maliciously, whereas, malice is of the essence of the action; but even if this was not fatal, surely the omission to show that the plaintiff was acquitted of the prosecution is a fatal objection to this portion of the petition.

The court did not err in refusing, as evidence, the ordinances of the city. The courts of the state do not take judicial notice of the ordinances of any town or city. The defendant must set forth his justification in his answer. If he relies on the ordinances of the city, he should set out so much of them as may be necessary for his defense, that the plaintiff may know on what

he relies. It is obvious that section 8 of article 7 of the practice act does not affect this matter, as it relates only to the private acts of the general assembly. It is only necessary to read the defense set up by the defendant, in his answer, as to the wrongful prosecution, to be satisfied of its insufficiency. The facts are pleaded in such a way as not to constitute any justification for the act complained of.

The other judges concurring, the judgment will be reversed and the cause remanded.

AS TO SEPARATE SUITS FOR SEVERAL CAUSES OF ACTION, see notes to *Rossiter v. Rossiter*, 24 Am. Dec. 65; *Badger v. Titcomb*, 26 Id. 615.

MALICE AND WANT OF PROBABLE CAUSE MUST BE SHOWN in an action for malicious prosecution, or a malicious arrest: *Kellon v. Bevins*, 5 Am. Dec. 670; *Bell v. Graham*, 9 Id. 687; *Turner v. Walker*, 22 Id. 329, and note to same 336; *Mowry v. Miller*, 24 Id. 680; note to *Whipple v. Fuller*, 29 Id. 335; *Leidig v. Rawson*, Id. 354; note to *Merriam v. Mitchell*, Id. 516; note to *Savage v. Brewer*, 28 Id. 257; *Maloney v. Doane*, 35 Id. 204; *Grant v. Dewel*, 38 Id. 228; and this, notwithstanding plaintiff's trial and acquittal upon such prosecution: *Stone v. Stevens*, 30 Id. 611, and notes thereto.

CITATIONS OF PRINCIPAL CASE.—Rule as to separate verdict and assessment on each count was affirmed in *Johnson v. Dicken*, 25 Mo. 594. As to improper joinder, it was cited in *Meyers v. Field*, 37 Id. 434; *Peyton v. Rose*, 41 Id. 261, containing reference to other cases; *Stevenson v. Judy*, 49 Id. 223. The principle of compelling to elect was affirmed in *Bobb v. Woodward*, 42 Id. 488; *Otis v. Mechanics' Bank*, 35 Id. 132; *Myers v. Field*, 37 Id. 434. It was discussed in *House v. Lowell*, 45 Id. 382. As to judicial notice of city ordinances, it was affirmed in *State v. Oddle*, 42 Id. 214; and as to general verdict, it was cited in *Boyce v. Christy*, 47 Id. 72; *Brownell v. Pacific R. R. Co.*, Id. 243. The principal case was also cited in *Clark v. Hann. & St. Jo. R. R. Co.*, 38 Id. 215; *State v. Dulle*, 45 Id. 271; *Bigelow v. North Missouri R. R. Co.*, 48 Id. 512.

STATE, USE OF ROE, v. THOMAS.

[19 MISSOURI, 613.]

MEASURE OF DAMAGES IN ACTION UPON ATTACHMENT BOND is only the natural and proximate damages resulting from the attachment; but in an action on the case for maliciously suing out an attachment, damages for injury to credit and business can be recovered.

ERROR to the St. Louis court of common pleas. Samuel Gunn, on the twelfth day of September, 1849, sued out of the St. Louis circuit court an attachment against Bernard F. Roe, a resident of Iowa, for three hundred and nineteen dollars, and executed the usual attachment bond with Jacob P. Thomas as security. Roe then had on board a steamboat at the levee in St. Louis.

lot of merchandise, worth from one thousand to two thousand dollars, purchased by him of merchants in that city, and to be forwarded to his store in Iowa, where he then was. Upon this the writ was levied. Friends of Roe executed a forthcoming bond, and the goods went on the same boat without losing the trip. Defendant obtained a verdict for seventy dollars on an offset in the attachment suit, which was tried on its merits before a jury on March 5, 1852. Judgment upon this verdict remained unreversed. On the tenth of August, 1852, suit was commenced on the attachment bond, in the St. Louis court of common pleas, against Gunn and Thomas. The case was tried at the September term of said court, 1853. There being no service on Gunn, the suit as to him was dismissed. On the trial before a jury, plaintiff proved Roe's direct damages and costs to be three hundred and fifty-eight dollars and fourteen cents. Plaintiff further offered to prove great damage to Roe's credit and standing in business, which was that of a retail merchant in the state of Iowa; but the court sustained defendant's objection to this testimony, which was excluded. Plaintiff excepted. The jury were instructed that plaintiff was not entitled to recover for any loss of credit to Roe in consequence of said attachment proceedings, and a verdict in plaintiff's favor for the sum above named was rendered. Plaintiff's motion for a new trial was refused. Proper exceptions were taken at the various stages of the proceedings, a bill of exceptions was signed, and plaintiff prosecuted his writ of error.

Hill, Grover, and Hill, for the plaintiff in error.

F. A. Dick, for the defendant in error.

By Court, SCOTT, J. This is an action against the surety in the attachment bond. The condition of the bond is, that Samuel Gunn, the principal, should prosecute his action without delay and with effect, refund all sums of money that might be adjudged to be refunded to the defendant, or found to have been received by the plaintiff and not justly due to him, and pay all damages that might accrue to any defendant or garnishoe by reason of the attachment or any process or proceeding in the suit, or by reason of any judgment or process thereon. The only question presented by the record is, whether the plaintiff can show that his character and reputation as a merchant were injured by reason of the attachment, and that he was compelled to suspend his business in consequence of it.

Nothing can be clearer, both on principle and authority, than

the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract: *Blair v. Perpetual Ins. Co.*, 10 Mo. 566 [47 Am. Dec. 129]. If the design of the legislature, in prescribing the condition of the bond for an attachment, was to cover such damages as are claimed by the plaintiff, there would have been no necessity for the various specifications which are found in the condition. If all possible damages, proximate and remote, were designed to be covered by the clause giving damages that might accrue by reason of the attachment, why afterwards insert a clause allowing damages sustained by reason of any judgment or process thereon? This distribution, or rather specification of the results of an attachment, and the giving damages accruing by reason thereof, shows what damages were in the contemplation of the general assembly when they allowed for all that might accrue to any defendant by reason of the attachment. It is worthy of observation, that the defendant and garnishee are mentioned together, as equally likely to suffer from the effects of the writ. If it was the intent to give the defendant damages for the loss, he would not thus have been connected with the garnishee, who could sustain no such damage. The law says the clerk shall judge of the sufficiency of the penalty. If injuries to the credit were designed to be covered by the penalty, how could the clerk estimate the sum necessary to compensate them? By what means would he be enabled to ascertain the amount that would cover such damages? In this very case, it is said that the damages are greater than the penalty of the bond, and so they would be in every case. The clerk does not know that any such damages will accrue, and can not inform himself thereof. Even if he was assured that damages would accrue, he could not possibly ascertain their extent. In requiring the clerk to judge of the sufficiency of the bond, the law must have designed that he should require a penalty that would cover the natural and proximate consequences arising from attaching property equal in value to the debt sued for, which would be known to the clerk. He would have no other *data* in fixing the penalty.

The question here is, not whether the plaintiff is entitled to damages for a malicious attachment against his goods, whereby his credit was injured and his business suspended, but whether the terms of the bond were designed to cover such damages. For a wrongful attachment, a plaintiff may bring his action on the case, and recover damages for the injury sought to be compensated in this action. For a malicious arrest, for a malicious

suing out execution, or any other malicious abuse of process, the injured party has his remedy in a special action on the case. The same resort is open to the plaintiff in this suit. The case of *Donnell v. Jones*, 17 Ala. 689 [52 Am. Dec. 194], in which the court held that, in an action for a wrongful attachment, injuries done to the credit of the plaintiff by reason thereof might be compensated in damages, was not on an attachment bond as was supposed, but was an action on the case.

The statute was not designed to give damages beyond the natural and proximate damages resulting from the suing out of an attachment. For injuries to his credit and business, the plaintiff is only entitled to damages where the motives of the defendant have been vicious; where his proceedings have been malicious and vexatious. To allow damages for loss of credit to business, in an action on the bond, would be to make the plaintiff responsible in one form of action, when, if it had been brought in another form, he might have interposed a defense which would have protected him. In a suit on the bond, the defense of a probable cause would be unavailing. However upright and innocent his motives, he would be mulcted in the same manner and to the same extent as though his conduct had been swayed by the blackest malice: *Offut v. Edwards*, 9 Rob. (La.) 92.

In the case of *Pettit v. Mercer*, 8 B. Mon. 51, the action was on a bond for an attachment, the condition of which was to pay all damages and costs that might be sustained by the defendant in the suit, by reason of the order for the attachment. There the court held that the plaintiff was confined in his recovery to the costs and expenses incurred by him, and such damages as he may have sustained by a deprivation of the use of his property or any injury thereto, or loss or destruction thereof, consequent upon the suing out of the attachment; that he had no right to recover for injuries to his credit, or for the derangement of his business; that, for such injuries, he had his redress in an action on the case for the wrongful process.

The court which tried this cause seems to have adopted the foregoing rule as the measure of the damages to be recovered in an action on an attachment bond. We see no reason to depart from it.

The other judges concurring, the judgment will be affirmed.

ACTION FOR WRONGFUL AND VEXATIOUS ATTACHMENT: *Donnell v. Jones*, 48 Am. Dec. 59; *Forrest v. Collier*, 56 Id. 190; *Benedict v. Bray*, Id. 332.

THE PRINCIPAL CASE WAS CITED AND APPROVED in *Alexander v. Harrison*, 28 Mo. 264, and cited in *Brady v. Erwin*, 48 Id. 535.

WADE v. JONES.

[20 MISSOURI, 75.]

PHRASE "HEAD OF FAMILY" INCLUDES MAN who has neither wife nor children, within the meaning of the execution exemption act.

PROCESS MAY BE SERVED UPON MEMBER OF MAN'S FAMILY, by leaving a copy thereof with his widowed sister keeping house for him.

ACTION by Wade against Jones to recover property levied upon and sold under regular execution directed to defendant. Plaintiff, who had no wife or child, was, at the time of the levy, living on and cultivating a rented piece of ground; but his widowed sister, with four small children, having no other home, lived with him and kept house for him, and he supported them. Besides the property levied upon, not exceeding the value of eighty-seven dollars, plaintiff had no other property to exceed the value of ten dollars. Judgment for defendant, and plaintiff appealed.

J. O. Broadhead, for the appellant.

E. Hunt and W. Porter, for the respondent.

By Court, RYLAND, J. We have no doubt, from the above agreed statement of facts, that the plaintiff comes within the meaning of the phrase "head of a family," and that he should have been so considered by the court below. The supreme court of Tennessee, in 1842, in the case of *Bachman v. Crawford*, 3 Humph. 216 [39 Am. Dec. 163], held the following language: "When a man controls, supervises, and manages the affairs about a house, he is, in the largest sense, the head of the family, and all who reside in the house are members of the family. But it may be a large boarding establishment, in which half a dozen distinct families reside. We do not suppose that these families lose their character as such because they reside under another man's roof and feed at a common table. So two families, with equal rights and claims, may reside together, and although thus associated, they all constitute, in a large sense, one family; still the father or mother, as the case may be, exercising a distinct control over the children and servants belonging to them, constitutes each a distinct family, and the manager of each a 'head of a family.'"

In the case of *Bachman v. Crawford*, *supra*, the court below charged the jury, "that if the plaintiff had children who were living with her at the time the levy was made, although she resided in the same house with her father, and although he

might claim and exercise absolute dominion and control over the house and farm, still the plaintiff, being the mother of children residing with her, would within the meaning of the statute be considered as the head of her own family, and within the exemption of the statute, and that there might be two families residing together in the same house, and occupying the same apartments." This charge was held correct by the supreme court.

In the case of *Sallee v. Waters*, 17 Ala. 486, the jury found "that Curtis had one child dependent on him for a support; but that he had no wife, nor did he keep house; but he and his child boarded at different houses in the town of Greenville." The court said upon this question, as to Curtis being the head of a family, from these facts found by the jury, "We think it clear that he was." But in the same case the court said: "To constitute a family within the meaning of the act [exempting property from execution], the relation of parent and child, or that of husband and wife, must exist; there must be a condition of dependence on one or the other of these relations; but it is not necessary that all the defendants should live under the same roof, or that the family should live together; it is the relation, and the dependence on that relation, and not the aggregation of the individuals, that constitutes a family."

In our opinion, it is not necessary that the relation of husband and wife, or father and child, or mother and child, should exist in every case to constitute a family. The man who controls, supervises, and manages the affairs about the house is the head of a family, and such a man need not necessarily be a husband or a father. Much more does such a man assume the station and rank and responsibilities of the head of a family than a father only, who has but one child, no wife, keeps no house, but boards out himself with one family, his child boarding with another family in the same village. Here the brother, the plaintiff, had his widowed sister and her children living with him; he was keeping house and cultivating a small piece of ground, and provided for and supported his sister and her four small children; the sister kept house for him. He must be considered as the controller, manager, and supervisor about the house, and the head of the family.

Our law prescribes the mode in which defendants shall be served with the process issuing on petitions. The third and last method prescribed is as follows: "Or 3. By leaving such copy at the usual place of abode of the defendant, with some

white person of his family, above the age of fifteen years." Suppose this plaintiff had been sued himself, and the sheriff had served the process by leaving a copy thereof with the defendant's sister, Mrs. Carter, at his usual place of abode, and stating she was a member of his family, and a white person over the age of fifteen years, could there be a doubt about the legality of such service? Could the defendant have convinced the court, from the facts agreed to in this record, that he had no family, and consequently the service was not sufficient? Clearly not. Then, if he has a family sufficient for this purpose, the same must serve him for other purposes.

We have no doubt the facts agreed to constitute this plaintiff "the head of a family," in the meaning and contemplation of the act, and therefore that the court below erred in declaring the law for the defendant.

The judgment is, with the concurrence of the other judges, reversed, and the case remanded for further proceedings in accordance with the views expressed herein.

WHO IS HEAD OF FAMILY?—1. *What Constitutes a Family* is a question which courts have sometimes to answer in cases of trust, and those relating to the construction of devises and policies of insurance. So, too, in many of the states, homestead and other exemptions are allowed to the "heads of families;" and the courts have frequently been required to discuss and decide the question, Who is entitled to the benefit of this exemption? This question was considered with reference to the provisions of the Texas constitutions of 1845 and 1866, and the following language used by the court: "Lexicographers, from whom in our literary education we derive all our knowledge of the correct import of words, tell us that the word 'family,' in its origin, meant servants; that this was the signification of the primitive word. It now, however, has a more comprehensive meaning, and embraces a collective body of persons living together in one house, or within the curtilage, in legal phrase. This may be assumed as the generic description of a family. It may, and no doubt does, have many specific senses in which it is often used, arising from the paucity of our own as well as of all other languages. Examining and criticising the word in all its specific uses and appropriations, it will be most obvious that it was in none of these specific senses the term 'family' was used in the constitution. Its use in such a sense would have been objectless and nugatory, because it would be wholly impracticable in its application to the civil affairs of mankind. It was most certainly used in its generic sense, embracing a household composed of parents and children or other relatives, or domestics and servants; in short, every collective body of servants living together within the same curtilage, subsisting in common, directing their attention to a common object, the promotion of their mutual interests and social happiness. These must have been the characteristics of the 'family' contemplated by the framers of the constitution in ingrafting this provision upon it. It is, besides, the most popular acceptance of the word, and is more fully in unison with the beneficent conception of the political power of the state, in making so humane and so wise a concession as that

of the inviolability of a homestead from all invasion by legal process:" *Wilson v. Cochran*, 31 Tex. 680. Having a wife is having a family: *Kitchell v. Burgwin*, 21 Ill. 45; and see *Greenwood v. Maddox*, 27 Ark. 657. And the wife is a part of the family: *Nixon v. Nanney*, 1 Q. B. 747. In *Arnold v. Waltz*, 53 Iowa, 707, and *Poor v. Hudson Ins. Co.*, 2 Fed. Rep. 438, a family is also defined to be a collective body of persons who live in one house and under one head or manager. In the case last cited it was said that "there is no specific number required to constitute a family; but they must live together in one house and under one head. Nor is it necessary they should eat in the house where they live. There are many families, it is well known, who live in one place and eat outside of it. Nor was it necessary that they should be employed in the house or about it; nor was it material that they were hired. The precise question is, Were they living there together under one head or management? This is one of fact and not of law." But while "family" includes children, or persons who have a legal or moral right to expect to be fed and clothed by another, those persons who have neither a legal nor moral claim to the bounty of another can not be placed in that category: *Whaley v. Whaley*, 50 Mo. 581. An indigent sister and her children, though mainly dependent on the applicant for support, do not constitute a family for whose benefit he can take a homestead in Georgia. There must, it is said, be some legal obligation on him to support its members to constitute him the head of a family: *Dendy v. Gamble*, 64 Ga. 528. In Alabama, it has been said that, to constitute a family within the meaning of the exemption act of that state, the relation of parent and child, or that of husband and wife must exist; there must be a condition of dependence on the one or other of these relations; but it is not necessary that all the dependents should live under the same roof, or that the family should live together; it is the relation, and the dependence on that relation, not the aggregation of the individuals, that constitutes a family: *Sallee v. Waters*, 17 Ala. 488; see also *Abercrombie v. Alderson*, 9 Id. 984. So it has been said in Texas that the mere temporary and indefinite union of persons in one household, "directing their attention to a common object, the promotion of their mutual interest and social happiness," or the hiring of servants, or contributing to the support of persons permissively residing with a party, do not constitute a family within the meaning of the constitution of that state: *Whithead v. Nickelson*, 48 Tex. 530. In the state just mentioned, the relation of a family is determined to exist from the following rules deduced from the authorities: 1. It is one of social status, not of mere contract; 2. Legal or moral obligation on the head to support the other members; 3. Corresponding state of dependence on the part of the other members for support: *Roco v. Green*, 50 Id. 490. It will be seen that this question is determined by two rules: 1. Test of legal duty to support; 2. Test of condition of dependence. And the latter one prevails in the decisions. Thus it is said, in a case involving the exemption of household goods, that the term "family" is not confined to the mother and daughter alone; but if the mother is keeping boarders, it may properly include a servant, and in any case would include a visitor, or a dependent relative who was living in the family: *Weed v. Dayton*, 40 Conn. 293; and in a case of trust, that the "family of James Taylor" meant his wife and such children as lived with him as part of his household and were legally dependent upon him for support; but did not include grown up children who were married and not living with him: *Smith v. Wildman*, 37 Id. 384.

In *Town of Cheshire v. Town of Burlington*, 31 Conn. 326, the term "family" was held to embrace all persons whom it is the right of the head of the family to control, and his duty to support; see also *Hill v. Franklin*, 54 Miss.

636. The widow is a part of the family: *Weber v. Short*, 55 Ala. 318; and see *Turner v. Whitten*, 40 Id. 530. But the term does not include alone the widow and minor children of the deceased, but includes such persons as constituted the family of the deceased at the time of his death, whether servants or children who had attained their majority. This, however, is said not to include boarders, but only the persons constituting the private household of the deceased: *Strawn v. Strawn*, 53 Ill. 263. It is not essential that "family" should include children. A man and his wife who live together alone, and have no children, are a family: *Cox v. Stafford*, 14 How. Pr. 519. So his surviving widow, without a child, would constitute that relation: *Bradley v. Rodelsperger*, 3 Rich. 226. And the father and daughter who live together, the wife and mother being dead, would come within the same definition: *Cox v. Stafford*, 14 How. Pr. 519. The words "to marry and have a family" have been construed to mean to get married and have issue of such marriage, and not merely to get married and have a family by becoming a housekeeper: *Spencer v. Spencer*, 11 Paige, 159; and where one dies leaving a widow, mother, brother, and children of a deceased brother, he leaves a family: *Kain v. Fisher*, 6 N. Y. 597. What persons constitute the members of a family is sometimes an important question. Thus, if an applicant for a homestead is *bona fide* the head of a family consisting of his widowed daughter and her minor children, physically unable to support themselves and dependent upon him, he is entitled to it; but if he fraudulently made them members of his family to avoid the payment of his debts, he is not: *Blackwell v. Broughton*, 56 Ga. 390. A married daughter with her children, residing with her mother, has been held to form no such constituent member of the family as to entitle her to succeed to the homestead upon the death of her mother: *Roco v. Green*, 50 Tex. 483. So an adult person residing with and transacting his step-mother's business is not, within the meaning of statutes exempting personal property from execution, either a householder or member of her family: *Bowme v. Will*, 19 Wend. 475. But exemptions in Texas, it seems, in favor of "every citizen or head of a family" extends to all inhabitants of the state, married or single: *Cobbs v. Coleman*, 14 Tex. 594. More latitude, it seems, is indulged in the interpretation of the term "family" as used in acts regulating the service of process; and it is not confined in Missouri to persons under the control or in the employ of defendant. Thus if a son take his widowed mother to reside with him, and his house is her home, she is within the terms of the statute a member of his family: *Ellington v. Moore*, 17 Mo. 424. But in Wisconsin it is said that service of summons and complaint, by leaving a copy thereof at the workshop of defendant with his hired man, is not a service by leaving it with a member of defendant's family: *Mayer v. Griffin*, 7 Wis. 82. And in criminal proceedings, a disturbance of the "neighborhood" is a disturbance of the family: *Noe v. People*, 39 Ill. 96. The word "family," taken in its ordinary and popular sense, is no ground for holding that two workmen who slept in a building destroyed by fire constitute a family within the meaning of the policy of insurance; their acts in looking after the building made them watchmen, not a family: *Poor v. Humboldt Ins. Co.*, 125 Mass. 274; see *Poor v. Hudson Ins. Co.*, 2 Fed. Rep. 432.

In England it is held that the word "family," in a will, primarily means "children," and that under the word "family" children alone can take: *Pigg v. Clarke*, L. R., 3 Ch. Div., 672. The expression can not include either husband or wife: *In re Jeffreys*, L. R., 14 Eq. Cas., 136; *In re Hutchinson*, L. R., 8 Ch. Div., 540. For construction of the expression "her own family or next of kin," see *Snow v. Tweed*, L. R., 9 Eq. Cas., 622. So in this country, in de

termining the objects of a trust, it has been held that by the "family" of the testator, his children only are meant: *Dominick v. Sayre*, 3 Sandf. 555. But a broader rule is sustained by the preponderance of authorities in the United States, and the doctrine of the master of the rolls in *Blackwell v. Bull*, 1 Keen, 181, has been approved and applied. The master there said that "the word 'family' is capable of so many applications that if any one particular construction were attributed to it in wills, the intention of testators would be more frequently defeated than carried into effect. Under different circumstances, it may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children, excluding the wife; or in the absence of wife and children, it may mean his brothers and sisters, or his next of kin, or it may mean the genealogical stock from which he may have sprung. All these applications of the word and some others are found in common parlance; and in the case of a will, we must endeavor to ascertain the meaning in which the testator employed the word, by considering the circumstances and situation in which he was placed, the object he had in view, and the context of the will:" *Wallace v. Ex'rs of McMicken*, 2 Disney, 569, and authorities there cited. See, to same effect, *Hall v. Stevens*, 65 Mo. 670; *Bowditch v. Andrew*, 8 Allen, 339; *Bates v. Dewson*, 125 Mass. 334.

2. *General Definition of Head of Family*.—"When one man controls, super-vises, and manages the affairs about a house, he is, in the largest sense, the head of the family, and all who reside in the house are members of the family. But it may be a large boarding establishment, in which half a dozen distinct families reside. We do not suppose that these families lose their character as such because they reside under another man's roof and feed at a common table. So two families, with equal rights and claims, may reside together, and although thus associated, they all constitute in a large sense one family; still the father, or mother, as the case may be, exercising a distinct control over the children and servants belonging to them, constitutes each a distinct family, and the manager of each a 'head of a family:' " *Bachman v. Crauford*, 3 Humph. 216. The head of a family primarily is the husband or father, but one may be such head without being either, as we shall show further on: *Whalen v. Cadman*, 11 Iowa, 226; *Parsons v. Livingston*, Id. 104. Yet he must be the master in law of the family: *Whalen v. Cadman*, 11 Iowa, 226. The following examples will illustrate the meaning of the general rule:

3. *Husband*.—Any man who has a wife is the head of a family: *Brown v. Brown*, 68 Mo. 388; *Whitehead v. Tapp*, 69 Id. 415; *Küchell v. Burgwin*, 21 Ill. 45; *Cox v. Stafford*, 14 How. Pr. 521; and he will occupy this relation though he have children who are temporarily absent to be educated, but for whom he provides: *Robinson's Case*, 3 Abb. Pr. 466. But a husband in one state with a family in another can not be considered as the head of a family in the former, though he shows that during his residence in the former state he was accompanied by his son. He must show his son to be dependent upon him for support: *Allen v. Manasse*, 4 Ala. 554. And a person can not claim the benefit of exemptions afforded by law to men of family, without evidence that he has a family: *Abercrombie v. Alderson*, 9 Id. 981; *Boykin v. Edwards*, 21 Id. 261; *Estate of Walley*, 11 Nev. 260; *Kidd v. Lester*, 46 Ga. 231.

4. *Deserted Husband*.—Whilst a marriage *de jure* exists, the husband is the head of the family, though composed only of his wife who has left him: *Brown v. Brown*, 68 Mo. 391; and the case is not affected by the fugitive wife's residence in another state, or the husband's illicit relations with

another woman living with him: *Whitehead v. Tapp*, 69 Id. 415. While the *status*, however, of the husband as head of the family is not necessarily lost by the death or absence of his wife and children: *Doyle v. Coburn*, 6 Allen, 71; *Webb v. Cowley*, 5 Lea, 722; *Revalk v. Kraemer*, 8 Cal. 66; it may cease to exist under certain circumstances: *Revalk v. Kraemer*, *supra*. Thus, in Ohio, it is said to cease where the husband was living alone, whose youngest child was in the custody of his divorced wife, and whose eldest children, nearly grown, were entirely supporting themselves in other localities, with the father's consent, and without any control or assistance from him: *Cooper v. Cooper*, 24 Ohio St. 488; compare with *Blackwell v. Broughton*, 56 Ga. 390.

5. *Widower*.—It can not be maintained that a man is no longer the head of the family because his wife is dead, leaving with him minor children. He then would seem to be more the head than ever, when the responsibility and care of the remnant of the family are thus cast solely upon him. If the husband is the head of the wife, *Ephesians v. 23*, and therefore the head of the family, so, also, is the widower the head of his motherless children, and thus the head of a family: *Barney v. Leeds*, 51 N. H. 268. And while a man's family may be broken up, after his wife's death, by his grown children's voluntary departure, it is not so just as soon as his wife dies, and his children become of age; for if a dependent daughter and her three minor children remain with him, and are supported by him, he is still the head of a family: *Blackwell v. Broughton*, 56 Ga. 390. Even if a widower's children leave him, after the years of majority, and he still continues to occupy the premises used as a home at the time of his wife's death, as his own dwelling-place and home, he is yet the head of a family: *Barney v. Leeds*, *supra*; compare with *Cooper v. Cooper*, *supra*. And the occupation of premises by a widower without children, where he and his mother are living thereon, and making it his and her home, gives him the same *status*: *Parsons v. Livingston*, 11 Iowa, 104.

6. *Surviving Widow*.—While the husband lives he is considered the head of the family, and upon his death the widow takes that capacity, and all the incidents, privileges, and responsibilities attached to it. Husband and wife are co-equals in life, and at death the survivor, whether husband or wife, remains the head of the family. But it will be observed that when the wife dies, the surviving husband takes upon himself no new capacity, but continues as he was before, the head of the family: *Wood v. Wheeler*, 7 Tex. 20; *Revalk v. Kraemer*, 8 Cal. 73; *Floyd v. Mosier*, 1 Iowa, 512; *Whalen v. Cadman*, 11 Id. 226. If the wife and her children continue to reside together in the house of her deceased husband, and constitute a family, she is entitled to exemptions offered by law to her as the head of a family: *Becker v. Becker*, 47 Barb. 497. And if a widow with her children reside in the house, and on the land of her aged father, being permitted to cultivate such portion of the land as she chose, she is the head of a family: *Backman v. Crawford*, 3 Humph. 214; approved in *Ex parte Brien*, 2 Tenn. Ch. 33. But the wife, a childless widow, is embraced within the meaning of the words "family of the deceased:" *Estate of Walley*, 11 Nev. 260; and there is no ground for holding that she can not occupy the position of head of a family: *Bradley v. Rodelsperger*, 3 Rich. 226. So a widow, keeping house upon land allotted to her in dower, without any children of her own, but with five orphan children of a deceased sister who had been members of the family during her husband's life, and with two other orphan children of her late husband's sister, is the head of a family: *Ex parte Brien*, 2 Tenn. Ch. 33. In Georgia, however, it is said that a widow who has no children living with her, dependent on her for support, is not entitled, as the head of a family, to carve a homestead out of her

deceased husband's property: *Kidd v. Lester*, 46 Ga. 231. The husband's children of a former marriage, as well as her own offspring, constitute a part of the widow's family, and if the minor children of deceased live with her, and are supported by her, she is to be regarded as their head: *Sanderlin v. Sanderlin*, 1 Swan, 442; *Brigham v. Bush*, 33 Barb. 596. So is a woman having an infant son who lives with her, and is dependent upon her for support: *Cautrell v. Connor*, 6 Daly, 224; S. C., 51 How. Pr. 45. But it is held in Georgia that the wife, having no children of her own, is not the "head of a family" of the minor children of her husband by a former marriage: *Lathrop v. Soldier's Loan and Building Association*, 45 Ga. 483.

7. *Abandoned Wife*.—A married woman, abandoned by her husband, but living with and supporting her child, is the head of a family within the meaning of the execution law: *Nash v. Norment*, 5 Mo. App. 545; and in criminal prosecutions she will be so considered: *Stute v. Slater*, 22 Mo. 464. And in homestead exemptions she will thus be protected, though the separation was the result of agreement on the part of husband and wife, arising out of their unhappy relations and his failure to provide her with a home: *Kenley v. Hudelson*, 99 Ill. 500; S. C., 39 Am. Rep. 31. In fact, it matters not what his motives were for leaving, whether it was dissatisfaction with his family or fear of criminal prosecution, the effect is the same on his family. They need a homestead as much in the one case as in the other: *People v. Stitt*, 7 Brad. App. 298.

8. *Married Woman Living Apart from her Husband*.—It is held in Alabama that a married woman residing there, who has no children, and whose husband is a non-resident, is not entitled to claim the benefit of the exemption law, because she has no family: *Keiffer v. Barney*, 31 Ala. 192. But a married woman, the owner of separate property, and residing upon it as a domicile, with her family, is entitled to claim her homestead exemption: *Partee v. Stewart*, 50 Miss. 717. And while the deserted husband is, in Missouri, still held to be the head of a family within the meaning of the homestead law, after his wife left him, she is still, in the absence of minor children, entitled to the homestead, upon her husband's death, though she be living apart from him at that time: *Brown v. Brown*, 68 Mo. 388.

9. *Unmarried Persons*.—Any individual of either sex may be the head of a family. It is not necessary that the head of a family should be a married person: *Revalk v. Kraemer*, 8 Cal. 72. There must, however, be some dependence upon such head. Thus where evidence showed the debtor to be a *bona fide* housekeeper, with an unmarried sister and two brothers, all under twenty-one years of age, living with him, that the parents were both dead, that the children were without means, and that he had assumed their education and support, exempted articles were set apart to the family as thus constituted: *McMurray v. Shuck*, 6 Bush, 111. So is a son in legal contemplation the head of a family, if he is of full age and assumes the obligation of providing for a widowed mother and her children, with whom he lives, and who are dependent upon him: *Connaughton v. Sands*, 32 Wis. 387; *Whalen v. Cadman*, 11 Iowa, 228. An unmarried man whose indigent mother and sisters live with him and are supported by him occupies this status: *Marsh v. Lasenby*, 41 Ga. 153; and so does an unmarried woman, in charge of her deceased sister's two children and keeping them in her own house, where they were taken upon the sister's death, and at her request: *Arnold v. Waltz*, 53 Iowa, 706. Where a man of the years of majority and his sister live together, both owning some personal property and contributing toward their household expenses, the brother appearing to direct and control affairs, he is a house-

holder: *Graham v. Crockett*, 18 Ind. 119. The same rule prevails as to an unmarried woman having the care and maintenance of her illegitimate minor child: *Ellis v. White*, 47 Cal. 73. But where the facts show the person assuming to be the head of a family to be a bachelor, having no person depending on him for support and maintenance, he is not the head of a family: *Calhoun v. McLendon*, 42 Ga. 405; and having servants and employees residing with him will not make him so: *Id.*; *Garaty v. Du Bose*, 5 S. C. 493; *Calhoun v. Williams*, 32 Gratt. 18. An unmarried woman having no children is not the head of a family: *Woodworth v. Comstock*, 10 Allen, 425; neither is an unmarried man who furnishes necessities for housekeeping and living to his brother and brother's wife who live with him and for whom they keep house: *Whalen v. Cadman*, 11 Iowa, 226. So with a single man who had sometimes occupied a house and lot as a sleeping-place, but had no family in any sense of the word: *Wilson v. Cochran*, 31 Tex. 677. And in South Carolina an unmarried person can not constitute himself the head of a family by the adoption of another's child, and the maintenance of servants and a household; for the law will make no "distinction among unmarried persons, favoring those who have servants from those who have none; or those who choose to exercise a charity towards others by giving them food and shelter from those who have not the ability to do so:" *In re Lamson*, 2 Hughes, 233.

10. *Guardian of Minor Child* may become the head of the family, in case there should be no father or mother. The child can not be deprived of the homestead because it has no parents living: *Rountree v. Drenard*, 59 Ga. 629; S. C., 27 Am. Rep. 401.

11. *Tenant*, by renting and occupying the premises of the owner, can not deprive the owner of such control over the property as to forfeit his right of homestead, where the owner boarded and lodged in the house. The tenant can not thus be made the head of the family: *Brown v. Brown*, 68 Mo. 388. Nor does the fact that the owner is a widower, his children all being married and away from home, affect the case: *Myers v. Ford*, 22 Wis. 139.

12. *Partnership* can not be the head of a family. The members of the firm can not severally or jointly claim an exemption as to partnership property: *Kingsley v. Kingsley*, 39 Cal. 665; *State v. Spencer*, 64 Mo. 355; *Guptil v. McFer*, 9 Kan. 30; *In re Handlin*, 3 Dill. 290; *Pond v. Kimball*, 101 Mass. 105; *Bonsall v. Comly*, 44 Pa. St. 442; *In re Hafer*, 1 Nat. Bank. Reg. 547 (Pa.); *In re Price*, 6 Id. 400 (Md.); *In re Blodgett*, 10 Id. 145 (Mich.). The weight of authority and argument seem to sustain this conclusion, but the courts of New York, Wisconsin, and North Carolina have held otherwise: *Radcliff v. Wood*, 25 Barb. 52; *Stewart v. Brown*, 37 N. Y. 350; *Wright v. Pratt*, 31 Wis. 99; *Burns v. Harris*, 67 N. C. 140. This contrary doctrine is further supported in *In re Young*, 3 Nat. Bank. Reg. 440 (Mo.); *In re Rupp*, 4 Id. 95 (Ohio); *In re McKercher*, 8 Id. 409 (Dak. Ter.). So a widow can not lawfully claim a homestead out of the partnership property of her deceased husband: *Kingsley v. Kingsley*, 39 Cal. 665.

13. *Indian Families*.—The term "family" is used in treaties between the United States and Indian nations. Thus, within the meaning of the treaties of 1817 and 1819, a white man, recognized as a member of the Cherokee nation by being treated with as a commissioner of the nation, and married to an Indian woman, although he exercised the privileges of a citizen of the state of Tennessee and of the United States, was held to be the head of an Indian family: *Morgan v. Fowler*, 2 Yerg. 450; and the fact that a person's name was registered with the Cherokee agent for a reservation, etc., has been held conclusive evidence that he was the head of an Indian family, and

resided within the ceded territory: *Jones v. Evans*, 5 Id. 324. In *Turner v. Fish*, 28 Miss. 306, it is held that the treaty of 1830 has reference to the heads of families living under the dominion of the Choctaw nation; but it does not say that a white man may not, according to the usages and customs of that nation, be the head of a family. A grandmother and her grandchildren were held to compose a "family" in the meaning of that word in the treaty of 1832, and the grandmother to be the head of a Creek family: *Ladiga v. Roland*, 2 How. 581.

14. *Householder*.—Thus far in this note the term "householder" has several times been used; but it is very nearly synonymous with the phrase "head of a family." In fact, the terms "householder" and "head of a family" are held in Virginia to have the same meaning in the provisions of the constitution and statute relating to homesteads: *Calhoun v. Williams*, 32 Gratt. 18. In New York the word "householder" is defined to be the head, master, or person who has charge of and provides for a family, and does not apply to the subordinate members or inmates of the household: *Bowne v. Will*, 19 Wend. 475; *Woodward v. Murray*, 18 Johns. 400; *Griffin v. Sutherland*, 14 Barb. 456. See also *Greenwood v. Maddox*, 27 Ark. 648. The terms are used interchangeably in an Illinois case, in which it was held that, where a widower and resident of Missouri went with his children to the first-named state, and there occupied a room merely at the sufferance of the owner, under circumstances which made him a mere visitor or guest, and soon afterwards died there, the children could not receive the same amount of property that would have been by law allowed to the widow of deceased. The facts showed deceased to be neither a resident nor the head of a family. He was in declining health, and his eldest daughter cared for him until his death: *Veile v. Koch*, 27 Ill. 129. Evidence that a housekeeper with a family absented himself from home for a time on account of some domestic difficulty, and staid with his sister, is insufficient to show that he has forfeited his right of exemption under execution laws: *Carrington v. Herrin*, 4 Bush, 824. Again, one does not lose his character of householder by temporarily ceasing to keep house, and storing his property, with a view to return to it again and renew housekeeping: *Griffin v. Sutherland*, 14 Barb. 456. Furthermore the protection of property exempt from execution in favor of *bona fide* housekeepers with a family continues while the housekeeper is *in transitu*; as where a debtor avowed his intention to leave the state, and packed up and started for that purpose: *Anthony v. Wade*, 1 Bush, 110. The subject of this note is somewhat discussed in the note to *Rockwell v. Hubbell's Adm'rs*, 45 Am. Dec. 254; and fully in Freeman on Executions, secs. 222, 223, 240; and Thompson on Homesteads and Exemptions, secs. 44 68.

CARMAN v. JOHNSON.

[20 MISSOURI, 108.]

FEE IN LAND DISPOSED OF BY UNITED STATES remains in the government until patent issues.

PATENT IS BETTER LEGAL TITLE THAN PRIOR ENTRY, as giving the right to possession.

EQUITY WILL COMPEL CONVEYANCE OF PATENTEE'S TITLE obtained under circumstances sufficient to make him trustee for party making prior entry.

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FACTS SUFFICIENT TO COMPEL CONVEYANCE OF PATENTEE'S TITLE HELD IN TRUST FOR ANOTHER, and relied upon as a defense in ejectment, must be set up in answer with the same particularity required of a bill in chancery.

MERE STATEMENT IN ANSWER TO EJECTMENT THAT DEFENDANT'S ENTRY WAS PRIOR to that upon which plaintiff's patent issued shows no ground for equitable relief.

APPEAL from Clark circuit court. Ejectment. Plaintiff relied on a patent from the United States, dated April 19, 1850. Defendant relied upon an entry with the register and receiver of the land-office at Palmyra, dated June 21, 1847. Plaintiff, under instructions appearing in the opinion, submitted to a nonsuit, and failing to have it set aside on motion, appealed.

Dryden, for the appellant.

Anderson and Richmond, for the respondent.

By Court, GAMBLE, J. The plaintiff claims the land in controversy in this ejectment under a patent. The defendant sets up an entry older than the patent, and denies that after his entry the United States had a right to sell the land to the plaintiff, or to issue a patent, and alleges that the plaintiff obtained the patent by fraud, and that therefore it is void. Evidence was given for the purpose of showing that the plaintiff, having entered by mistake a different tract of land, had applied to have the entry canceled, and to have the money applied to the entry of the land now in dispute; such applications could only be acted upon and decided by the commissioner of the general land-office; and that, pending the plaintiff's application before that officer, the defendant had been permitted to enter the land, upon condition that the entry was to be vacated if the application of plaintiff was sustained; that the plaintiff's application was sustained, and the officers of the land-office vacated the entry of defendant and issued a patent to the plaintiff. The circuit court, in the two instructions given at the request of the defendant, and which are the only instructions given, required that the plaintiff, in order to recover in this ejectment, should show facts anterior to his patent and prior to the entry of defendant. The first of these instructions required that he should show an application to the register, made in a particular manner, and prior in time to the defendant's entry, or he could not recover. The second lays down the law broadly that he could not recover without showing an application and entry older than the defendant's entry.

The supreme court of the United States has repeatedly declared that the fee in land disposed of by the United States remains in the government until the patent issues, and this court has followed those decisions, acknowledging their obligation. In the present case two parties claim the right of entering a particular portion of public land, and a controversy is carried on before the officers of the land department. The decision is in favor of the plaintiff, and his entry is recognized and the patent issues to him. The fee in the land is thus vested in him, and if there is any equity in favor of defendant, which would make the plaintiff a trustee of the fee for his benefit, that equity is to be enforced, not by declaring the patent void, but by a proceeding by which the fee would be transferred from the plaintiff to the defendant. If the defendant had a patent junior to that of the plaintiff, it might answer his purpose to have the elder patent declared void. The present action is simply an action of ejectment, and the parties rely on a patent on one side and an entry on the other. Between two such titles, as giving the right to possession, the law gives effect to the patent in such action: *Griffith v. Deerfelt*, 17 Mo. 31. Nor does the effect of the patent depend upon the mere fact of priority of entry, for if the patent issues on the junior entry, it still transfers the fee which remained in the government after the first entry. If the patent was obtained under such circumstances as would make the grantee in it a trustee for another, the mode of enforcing such equity, under our former practice, was to file a bill in a court of equity to compel a conveyance of the title held under the patent. If the same facts that would be sufficient to compel such conveyance can be available under our present practice, in the defense of an ejectment for the possession, they must be set up in the answer with the same particularity that would be necessary in a bill in chancery.

The answer in the present case merely sets up the entry of defendant as prior to the date of the plaintiff's patent, and alleges that the patent was illegally and fraudulently obtained, and was therefore void. If the present defendant had sought, in a court of equity, to divest the plaintiff of the fee acquired by the patent, he would have stated the time when the plaintiff entered the land in the land-office, and the circumstances under which the entry was permitted by the officers; whether under a mistake, or upon false representations made by the plaintiff, setting forth the facts in relation to the mistake or the representations made. In like manner, any other ground of equitable

claim to the land, as against the grantee in a patent, would have been stated in a bill with precision. The only fact alleged in the answer in this case is the fact that the defendant entered the land prior to the issuing of the plaintiff's patent. It is true that it is in parts of the answer assumed that the entry by the plaintiff was after that by the defendant, but it is not anywhere stated distinctly as a fact that the entry by plaintiff was the junior entry. The date of it is not stated in the answer. Now, the fact that the defendant's entry is older than the plaintiff's patent is consistent with the fact that the entry upon which that patent issued may have been older than that of the defendant. But if it be assumed that the patent issued to plaintiff upon a junior entry, still, if in any case under the laws of the United States and practice of the government a patent could rightfully issue upon such junior entry, the mere statement that the defendant's entry was the elder is not of itself the statement of a ground for equitable relief, for in favor of the patent the presumption will be made that the facts warranted the officer in issuing it. The record in this case shows that evidence was given upon the trial for the purpose of establishing the facts that Carman, the plaintiff, had, by mistake, made an erroneous entry upon other land, and that he had made an application to have the error corrected and the money applied to the purchase of the land in question, and that this application was pending in the general land-office when the defendant's entry was made. This proceeding was under the act of March 3, 1819: 3 U. S. Stat. 526.

Without expressing any opinion upon the question whether the evidence given established the fact of such application having been made before the defendant was permitted to enter the land, it is sufficient to say that it was a proper execution of that act, upon an application being made to correct the error in the previous entry, and apply the money to the payment for another specified tract, to hold the tract thus applied for as exempt from entry by others. At least, the officers of the government, in giving such construction and effect to the act, would not be regarded as attempting to exercise a power injurious to others. In such case, if the defendant succeeded in obtaining permission from the register to enter the land, it would be but the just exercise of the powers of the land department to refuse to recognize the entry of the defendant, provided the application of the plaintiff to correct the error in his previous entry was sustained, and his right to purchase the land entered by defendant was

recognized. In such case it is not believed that a court of equity would interfere to divest the title held under the patent. This, then, would be one case in which the mere priority of entry would create no equity against the person holding the patent under the junior entry, and this is only given as an instance. Other cases might be stated in which a court of equity would not disturb the title held under the patent, although another person had made the first entry.

The answer, then, in this case, if it be understood to allege that the defendant's entry was the elder, does not, by that statement alone, make a case for equitable relief, and the instructions of the court, which required the plaintiff to go beyond his patent and prove an entry prior to that of defendant, were erroneous. The defendant, if he has a claim upon the courts to interpose for his relief, must show it more specifically.

The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

PATENT IS BETTER LEGAL TITLE THAN PRIOR ENTRY AS GIVING RIGHT TO POSSESSION: *Gingrich v. Foltz*, 57 Am. Dec. 631.

FRAUDULENT PATENTEE IS TRUSTEE FOR BENEFIT OF THOSE INJURED BY HIS CONDUCT: *Lewis v. Lewis*, 43 Am. Dec. 540, and note; *Groves' Heirs v. Fulsome*, 57 Id. 247.

PRIOR ENTRY WILL PREVAIL OVER PATENT IN EQUITY, BUT AT LAW PATENT WILL PREVAIL OVER PRIOR ENTRY: Note to *McAfee v. Keirn*, 45 Am Dec. 335.

RIGHT ACQUIRED BY ENTRY IS NOT LEGAL BUT EQUITABLE RIGHT: *Reed v. Bullock*, 12 Am. Dec. 345; and no equitable title can be opposed to the patent where a recovery is sought in ejectment: *Parkinson v. Bracken*, 39 Id. 296; *contra: Hit-tuk-ho-mi v. Watts*, 45 Id. 308.

IN ACTION OF EJECTMENT PATENT CAN NOT BE IMPEACHED BY SHOWING THAT IT WAS OBTAINED BY FRAUD: *Witherington v. McDonald*, 3 Am. Dec. 603; *Smith v. Winton*, Id. 755; *Overton v. Campbell*, 9 Id. 780; note to *Stark v. Mather*, 12 Id. 565; *Parkinson v. Bracken*, 39 Id. 296; *contra: Hit-tuk-ho-mi v. Watts*, 45 Id. 308.

FOR GENERAL RULE AS TO WHEN CESTUI QUE TRUST CAN MAINTAIN EJECTMENT, see note to *Doggett v. Hart*, 58 Am. Dec. 472.

PATENT REGULAR ON ITS FACE CAN NOT BE COLLATERALLY IMPEACHED.—The regular proceeding is by a direct suit for that purpose in chancery: Note to *Stark v. Mather*, 12 Am. Dec. 566; note to *Boatner v. Ventress*, 20 Id. 276; *Cartier v. Spencer*, 39 Id. 106; but a patent is not always conclusive evidence of title, and an equitable right originating before date of patent will be examined into: *Kitttridge v. Breand*, Id. 512; *Aulick v. Colvin*, 43 Id. 164; and it is said in Mississippi that patent may be impeached for illegality or fraud at law as well as in equity: *Hit-tuk-ho-mi v. Watts*, 45 Id. 308.

THE PRINCIPAL CASE WAS CITED in *Gray v. Givens*, 26 Mo. 302; and *Holmes v. Stroutman*, 35 Id. 308, to the doctrine that a patent obtained by fraud

inures to the benefit of the defrauded person. This is also laid down to be the rule in the same case, 29 Id. 84. See also *Stephenson v. Smith*, 7 Id. 610. The principle that legal title remains in the United States until patent issues was reasserted in *Gibson v. Chouteau's Heirs*, 39 Id. 536; and the principal case cited to this point in *Le Beau v. Armitage*, 47 Id. 138.

CHRISTY'S ADMINISTRATOR v. ST. LOUIS.

[20 MISSOURI, 143.]

MUNICIPAL CORPORATION, AS INCIDENT, HAS POWER TO TAKE AND HOLD PROPERTY, REAL AND PERSONAL, unless restrained by express words of its charter.

ACTION AGAINST MUNICIPAL CORPORATION TO RECOVER ILLEGAL TAXES, assessed under color of law, can not be maintained by one who has voluntarily paid them, on the ground that the city has no capacity to take and retain the money where no restraint to take and hold personal property is imposed by the words of its charter. This principle is not affected by the fact that the money was paid by an administrator.

APPEAL from St. Louis court of common pleas. Action by administrator of William Christy to recover taxes paid by him and his predecessor to the city of St. Louis, beyond one sixteenth of one per cent per annum, upon real estate of their intestate, situate in what was known as the new limits, brought into the city by the charter of 1841. Judgment for defendant, from which plaintiff appealed.

Reynolds, for the appellant.

Dayton and Gantt, for the respondent.

By Court, SCOTT, J. This action is founded on the state of facts that existed in the case of *Walker v. St. Louis*, 15 Mo. 563, and grows out of the acts of the city therein detailed. The argument addressed to the court, founded on the incapacity of the city as a corporation to take and retain the money, the subject of this suit, is unsupported by authority; as by the common law, corporations, as an incident, possess the power to take and hold property, real and personal. The mortmain acts, if they are in force here, will not affect this question, as they do not extend to personalty. Restraints on this incident of corporations may be imposed by the express words of their charters, or by implication, but there is nothing in the charter of the city of St. Louis that can affect this question. Nor is the point in the case affected by the consideration that the money was paid by an administrator. No reason can be perceived why the case

of an administrator should be different from that of any other individual. Under the circumstances, it would hardly be maintained that he committed a *devastavit* in paying the taxes demanded by the city.

It can not be disguised that the question involved in this controversy has received different determinations in the courts of the states of the Union. The view entertained by this court, when the point was presented in the case of *Walker v. St. Louis*, *supra*, derives confirmation from the cases of *Hemmingway v. Machias*, 83 Me. 445; and *Smith v. Readfield*, 27 Id. 145.

The other judges concurring, the judgment is affirmed.

CORPORATION MAY HOLD BOTH REAL AND PERSONAL PROPERTY UNLESS RESTRICTED BY TERMS OF ITS CHARTER: *Lathrop v. Commercial Bank*, 33 Am. Dec. 481; *State v. Commissioners of Mansfield*, 57 Id. 409, and note thereto.

FOR INCIDENTAL POWERS POSSESSED BY CORPORATIONS, see extended citation of authorities in note to *State v. Commissioners of Mansfield*, 57 Am. Dec. 414.

MUNICIPAL CORPORATION CAN ONLY EXERCISE POWERS EXPRESSLY GRANTED, and such others as may be necessary to carry the powers expressly granted into execution: *Bank of Chillicothe v. Swayne*, 32 Am. Dec. 707, and note thereto; *Collins v. Hatch*, 51 Id. 465; *Ohio L. I. & T. Co. v. Merchants' etc. Co.*, 53 Id. 742; *Town of Petersburg v. Mappin*, 56 Id. 501.

AS TO RECOVERY OF ILLEGAL TAXES PAID UNDER COMPELSION, see extensive note to *Mayor of Baltimore v. Lefferman*, 45 Am. Dec. 164. The note to this case also contains an elaborate discussion of what constitutes compulsory payment, so as to enable the payor to recover the money paid.

THE PRINCIPAL CASE WAS CITED in *State v. Powell*, 44 Mo. 440, to the point that illegal taxes voluntarily paid can not be recovered back. See also, to the same point, *County of Lewis v. Tate*, 10 Id. 650.

THOMPSON v. LYON.

[20 MISSOURI, 155.]

INFANT CAN NOT EXECUTE POWER OF APPOINTMENT coupled with an interest.

INFANT'S DISABILITY CAN NOT BE DISPENSED WITH by instrument creating power of appointment.

MERE LAPSE OF TIME WILL NOT PREVENT COURT OF EQUITY FROM DIVESTING LEGAL TITLE, conveyed by trustee under direction of infant beneficiary exercising power of appointment, at any period short of that constituting a bar by the statute of limitations.

PURCHASER'S TITLE TO INFANT'S ESTATE, OBTAINED FOR VALUABLE CONSIDERATION, AND WITHOUT NOTICE OF ANY CLAIM AGAINST ESTATE, will not be disturbed in equity.

APPEAL from St. Louis court of common pleas. The opinion states the facts.

Glover and Richardson, and B. Bates, for the appellants

Shepley, for the respondents.

By Court, SCOTT, J. This was an action to set aside a deed, and to recover possession of two lots on Collins street, in the city of St. Louis, brought in May, 1851. The respondents, who are the defendants, claim title to the premises in controversy, under a deed from William P. Foster and his daughter, Virginia Wetherell, who afterwards intermarried with William F. Thompson, one of the plaintiffs. In July, 1829, Charles Collins and wife conveyed the premises in dispute to William P. Foster, for the consideration of seven hundred dollars, in trust for his daughter, Virginia Wetherell, who was then a minor, and to no other. This deed was subject to the following proviso, viz.: "That it shall and may be lawful to and for the said William P. Foster, the trustee aforesaid, at any time hereafter, upon the request of her the said Virginia Wetherell, to release, assign, and convey the whole or any part of the premises herein described to such person or persons as she shall designate or appoint, and to such use or uses as she shall or may think fit or expedient. John W. Wetherell, the husband of Virginia Wetherell, died during the year 1831. On the seventh day of June, 1831, William P. Foster and his daughter, Virginia Wetherell, who was still a minor, joined in a deed and conveyed the lots in dispute to Russell Hubbard for one hundred and thirty-two dollars and fifty-three cents, which lots by subsequent conveyances passed to the respondents. In the year 1834 Virginia Wetherell intermarried with William F. Thompson, who, in conjunction with his wife, brings this suit, on the ground of her infancy when she executed the deed to Russell Hubbard. On these facts there was a judgment for the defendants. Nothing is said in relation to the title derived from the execution on Neville's judgment against John W. Wetherell, because there is no fact found which shows that the consideration of the deed from Collins and wife to Foster, in trust for Virginia Wetherell, proceeded from her husband.

The defendants seek a support to the conveyance made by Virginia Wetherell during her infancy in the words of the proviso, which empowered the trustee, at any time thereafter, upon her request, to convey the premises. The *dicta* in some of the books, which maintain that an infant may make an appointment to uses

of trust estates, where such authority is conferred by express terms in the deed creating the trust, do not seem to be supported by any decided case. The case of *Hollingshead v. Hollingshead*, Gilb. Eq. 137, where an infant, having covenanted to settle his estate on marriage, according to a power vested in him, but having died before full age, the remainderman was compelled to perform the covenant, has been called an idle one, and not law: Bingham on Infancy and Coverture, 81. Sir Edward Sugden has remarked, in reference to the opinion that an infant might exercise a power not simply collateral, given by express words during infancy, that it would be a bold decision that an infant may have a power of disposition over an estate through the medium of the statute of uses. Before the statute, it is clear that an infant could not alien a use limited to him, that is, could not direct his trustees to convey the estate to a third person. In that respect equity followed the law. Now the statute only operates on what were uses at the time it passed. A power not simply collateral is a beneficial right to direct the trustee to convey the estate to whom you shall appoint. This direction an infant can not give by reason of his nonage: Sugden on Powers, 216; Macpherson on Infancy, 302; 4 Kent's Com. 324. A beneficial power being in the nature of property which an infant can not by law alienate, it would be strange that an incapacity which the law imposed should be evaded by means of a power conferred by an individual. A right to bestow on infants property, with an absolute power of disposal, would enable third persons to destroy that control with which the law has wisely intrusted parents over their minor children. Minors would become adults, as there would be no danger of loss in contracting with them.

The statute of limitations is no bar to the plaintiffs' right of recovery. Although the disabilities enumerated in the statute are not cumulative, yet as Virginia Wetherell was under age when she executed the conveyance in 1831, her right of action accrued immediately thereon; consequently she had twenty years from her majority within which to bring her action, as a provision of the act of limitations of 1835, still in force, expressly declared that actions theretofore accruing should be governed by the statute in force at the time they accrued. The act of 1825 was in force in 1831, and allowed infants twenty years within which to bring their actions after their disabilities were removed.

As this judgment will be reversed and the cause remanded, with leave to amend the answer, we will state that, had it appeared from the facts in the case that the defendants were pur-

chasers for a valuable consideration without notice, they would have been protected in their possession against the claim of the plaintiffs. Virginia Wetherell had nothing but an equity in the disputed premises, and if by her conduct she has been the means of that equity passing to a purchaser for a valuable consideration without notice, her infancy can not avail her. We are here dealing with equitable rights. It is an inflexible rule of equity jurisprudence to grant no relief against a purchaser for a valuable consideration without notice. Virginia Wetherell is seeking equity through the medium of a procedure in the nature of a bill in equity, and she must submit to the rules of equity courts. Could she sue at law, or in other words, was her title a legal one, her claim could not be resisted. Her incapacity to make the conveyance would be fatal to the defendants' cause. There is a similar incapacity to dispose of her rights in equity; but having disposed of them, and adopting a proceeding in the nature of a bill in equity, she must submit to the rules of a court of equity. The modification of our rules of pleading, and the blending of law and equity, does not destroy the equitable rights of parties.

The same learned lawyer whose authority has settled the first question which was made in this cause says that a court of equity acts upon the conscience; and as it is impossible to attach any demand upon the conscience of a man who has purchased for a valuable consideration, *bona fide* and without notice of any claim on the estate, such a man is entitled to the peculiar favor and protection of a court of equity. Precedents are numerous and ancient where the court has refused to give any assistance against a purchaser, either to an heir or to a vendor, or to the fatherless, or to creditors, or even to one purchaser against another: 2 Sugden on Vendors, 295. So he says if a person, having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert or under age: *Id.* 300. The judgment will be reversed and the cause remanded, with leave to the defendants to amend.

RYLAND J., concurred.

GAMBLE, J., did not sit.

RIGHTS OF INNOCENT PURCHASER FOR VALUABLE CONSIDERATION WITHOUT NOTICE: *Patrick v. Marshall*, 4 Am. Dec. 670; *Jones v. Zollicoffer*, 7 *Id.* 703.

FOR FURTHER PROCEEDINGS IN PRINCIPAL CASE, see *Thompson v. Lyon*, 33 Mo. 219.

STATE v. DAVIDSON.

[20 MISSOURI, 212.]

"EACH" MAKES SEVERAL AND NOT JOINT LIABILITY, where principal and surety in a recognizance to answer an indictment acknowledge themselves each to be bound in a specified sum.

REMISSION BY GOVERNOR IN FAVOR OF ONE PARTY TO SEVERAL OBLIGATION or forfeited recognizance does not discharge the other.

REMISSION BY GOVERNOR FROM LIABILITY UPON RECOGNIZANCE TO APPEAR IN ONE COUNTY is not applicable to a recognizance to appear in another.

APPEAL from Jefferson circuit court. *Scire facias* upon forfeited recognizance. The opinion states the facts.

Noell, for the appellant.

Jones, for the respondent.

By Court, GAMBLE, J. Davidson became bound as the security of one Wright, in a recognizance for the appearance of Wright in the circuit court of Jefferson county, to answer an indictment. The recognizance was regularly forfeited, and this *scire facias* is brought to have execution for the amount. Davidson alone was served, and relies upon a remission of the forfeiture by the governor as his defense. The circuit court held it to be a defense. By the recognizance, Wright as principal and Davidson as security acknowledged themselves each to be bound to the state of Missouri in the sum of one thousand dollars, for the appearance of Wright in the Jefferson circuit court, to which the indictment had been removed on a change of venue from the Franklin circuit court. The remission by the governor remits and discharges Wright from liability upon a recognizance for the sum of one thousand dollars, entered into by Wright for his appearance before the circuit court of Franklin county. The circuit court held that the remission in favor of Wright discharged Davidson. As we read the recognizance, each person was bound in a sum of one thousand dollars for himself, and not that both were bound for the same one thousand dollars. To make them bound only for the same single sum, it is necessary to strike the word "each" out of the recognizance. The remission, then, of one of the sums is not the remission of the other. If the remission had been of the sum of one thousand dollars in favor of Davidson, the security, it is not supposed that it would be insisted that Wright, the principal, was discharged. Yet the construction of the instrument ought to be the same in each case. The obligation was several,

not joint; neither was liable for the sum acknowledged by the other.

The remission, moreover, was not applicable to this recognizance. There was in the record a recognizance for Wright's appearance at the circuit court of Franklin county. The one on which this *scire facias* was issued was for his appearance at Jefferson county.

The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

OBLIGATION IN SOLIDO WILL NEVER BE PRESUMED: *Mayor of New Orleans v. Ripley*, 25 Am. Dec. 175.

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

WALKER v. LOVELL.

[20 NEW HAMPSHIRE, 138.]

WHERE GOODS ARE SOLD, SALE OF PART OF WHICH IS PROHIBITED by law, the illegality of the sale of that part can have no effect upon the sale of the other articles made at the same time for a separate, agreed, and ascertainable price, wholly distinct from the price of the prohibited articles.

WHERE OFFICER WHO HAS ATTACHED PROPERTY IS SUED BY ALLEGED VENDER of the debtor, and sets up defense that the sale was fraudulent as to creditors, it is sufficient if he can show that he acted for a creditor, whether such creditor be for a small or a large amount. He is not obliged to show that the whole debt claimed in the action was due at the time when the attachment was made by him.

OFFICER DOES NOT RENDER HIMSELF LIABLE AS TRESPASSER *ab initio* by selling property attached by him and applying to the satisfaction of the execution a larger amount than is legally due thereon. Notwithstanding this application, the excess is, in point of law, still in the hands of the officer for the use of the party entitled to it.

TRESPASS for taking and carrying away a quantity of brandy and rum alleged to be the property of the plaintiff. Plea, the general issue, with a brief statement that the liquors belonged to Calvin W. Walker, were attached by the defendant, a deputy sheriff, on a writ of attachment in favor of Martin L. Hall & Co. against said Calvin W. Walker, and were sold under the writ pursuant to the statute, and the proceeds applied by the defendant upon an execution in his hands against said Walker in that suit. The plaintiff claimed the property in question under a sale from said Calvin W. Walker, which sale the defendant claimed was fraudulent and void as to creditors. And the evi-

dence tended to show that it was made for the purpose of defeating and delaying the creditors of said Walker. The facts relating to the sale by Hall & Co. to Calvin W. Walker are stated in the opinion. Counsel for the plaintiff requested the court to instruct the jury: 1. That if a part of the debt on which the judgment was founded accrued from the sale in Massachusetts of spirituous liquors, in violation of the laws of that state, the defense wholly failed, and the defendant was a trespasser *ab initio*; 2. That the portion of the debt which accrued from the sale of the articles other than the spirituous liquors could be considered by the jury only in mitigation of the damages; 3. That if the sales of the liquors and other articles took place at the same time and were one transaction, the whole was void, and Hall & Co. would not be creditors of said Calvin W. Walker so as to entitle them to impeach the sale from him to the plaintiff. The court declined to give these instructions, but it did instruct the jury that if said Hall & Co. sold goods to Calvin W. Walker, some of which were liquors, the sale of which was prohibited by law, and the remainder other articles not prohibited, and the sales were not made for a gross sum, but at a stipulated price for the liquors, and stipulated prices for the other articles, so that the quantity of each kind of article, and the amount stipulated to be paid for it, could be ascertained, and at the time of the sale from said Calvin to the plaintiff said Calvin was indebted to Hall & Co. for such other articles, this would make them creditors of said Calvin so as to authorize them to impeach the sale from Calvin to the plaintiff; that it was of no consequence whether the whole amount claimed by Hall & Co. in their suit was justly due or not; and that if they were satisfied from the evidence that Hall & Co. were creditors for any amount for which they would have been entitled to judgment, this was sufficient to entitle the defendant to introduce evidence to the jury impeaching the sale from Calvin to the plaintiff, as fraudulent upon the creditors of said Calvin. The plaintiff excepted to these instructions, and the jury having found for the defendant, moved that the verdict be set aside and a new trial granted.

Cushing, for the plaintiff.

Stoughton and Baxter, and Lovell, Wait, and Wheeler, for the defendants.

By Court, Woods, J. Were the instructions that were requested to be given to the jury improperly withheld? and were

the instructions that were given legal and proper, or otherwise? The whole question necessary to be decided arises upon the instructions given to the jury, and the exception stated in the case is to those instructions alone. And well enough it may extend thus far only; for a proper decision of the questions arising thereon will also form a proper decision of the question arising upon the refusal of the instructions asked for and withheld. Upon the instructions given, and the finding of the jury thereon, it appears that the liquors and other goods, sold by Hall & Co. to Calvin W. Walker, were sold at one and the same time, but were not sold for one gross sum or price. The liquors and the other goods were, in fact, separately valued, and the price of the liquors was not a just and legal debt for which a recovery could be had. Upon that state of facts, the question is, Were Hall & Co. creditors of Calvin W. Walker, or not? That Hall & Co. were entitled to recover the price of the goods sold other than the liquors, under the circumstances, we entertain no doubt. That precise question, as we understand it, came before this court in the case of *Carleton v. Woods*, 28 N. H. 290, in the county of Hillsborough. That action contained a count for goods sold and delivered. It appeared that, in 1850, the plaintiff agreed to sell the defendant his stock of goods and groceries. The price to be paid was the cost and freight of the articles. In order to ascertain the cost, a schedule of the articles was made, and the cost of each article was separately carried out. The defendant contended that the contract was an entire one; that a part of the consideration was illegal, and the plaintiff could not recover any part of the price of the articles. The plaintiff contended that the price of the spirituous liquors was distinct and independent of the price of the other articles, and would be readily ascertained, and that the consideration was divisible, and that he was entitled to recover the sum due for the articles, excepting the price of the spirituous liquors.

The court held that the contract was not to be regarded as one entire and indivisible contract, but as divisible, and the consideration divisible, and that the sale and delivery of each article formed the consideration for the promise to pay the agreed price of it. It was said that the case did not differ from that of a sale of various articles sold by a merchant, at one and the same time, to his customer, for separate values agreed upon for each article, and charged to the customer in account, and the plaintiff had judgment for the price of the articles other than the liquors. And we discover no reason to doubt the cor-

rectness of that decision. And accordingly we are of the opinion that Hall & Co. were entitled to have judgment, in their action against said Calvin, for at least the price stipulated for the articles sold him other than the liquors, and had a just and valid claim to that extent. The mere fact that the liquors were sold at the same time, they being sold for an agreed separate value, would not defeat the recovery of the price of the other goods, although the sale of the liquors was an act prohibited and forbidden by the statutes of Massachusetts when the sale was made, which would render the sale of the liquors wholly illegal and void. The illegality of the sale of the liquors could have no effect upon the sale of other articles, made at the same time for a separate, agreed, and ascertainable price, and wholly distinct from the price of the prohibited articles. And we are further of the opinion that, this point being decided, it distinctly appears that Hall & Co. are shown to have been creditors at the time of the attachment, and that, so far as that fact was necessary to be made to appear by the defendant, the officer who made the attachment, it is well made out. Although it is incumbent upon an officer who has made an attachment of property, in a case like the present, in justification of the act, and to enable him to interpose in his defense evidence of the fact that the claimant has acquired the title, in virtue of which he claims of the debtor in fraud of his creditors, or to delay and defeat their just efforts to collect their dues; yet it has never been held, that we are aware of, that the entire debt claimed in the action should be made to appear to be due, and a recovery be had for that sum, or that the defense must fail. On the other hand, if the officer shows a debt due and recoverable in the action, and a judgment therefor actually recovered, it is a sufficient justification for taking and holding possession of the goods for the satisfaction of the proper debt due to the creditor.

In *Damon v. Bryant*, 2 Pick. 411, Parker, C. J., says: "The distinction which seems not to have occurred to the judge at the trial is, that where the execution or writ upon, which goods are taken is against the plaintiff himself, the officer is justified by the precept itself, for that commands him to take the goods of the plaintiff, and is a sufficient authority. But where the goods taken are claimed by a person who was not a party to the suit, and he brings trespass, and his title is contested on the ground of fraud, under the statute of 13 Eliz., c. 5, a judgment must be shown if the officer justifies under an execution, or a debt if under a writ of an attachment, because it is only by

showing that he acted for a creditor that he can question the title of the vendee." The officer must show, then, that he acted for a creditor only, and it matters not whether he be a creditor for a small or a large amount; and the authorities to this point are numerous, and we believe are entirely agreed: *Lake v. Billers*, 1 Ld. Raym. 733; Bac. Abr., tit. Trespass, G, 1; *Savage v. Smith*, 2 W. Black. 1104; *High v. Wilson*, 2 Johns. 9; *Jemra v. Jolippe*, 6 Id. 9; *Parker v. Miller*, 6 Id. 195; *Blackley v. Sheldon*, 7 Id. 32; *Holmes v. Nuncaster*, 12 Id. 395; *Doe v. Smith*, 2 Stark. 199. But it is contended on the part of the plaintiff that inasmuch as it appears that the avails of the goods attached and sold upon the writ amounted to a greater sum than the amount of the debt justly and legally due to Hall & Co., and the legal costs, and that the defendant applied the entire sum of the avails realized from the sale upon the execution issued upon their judgment against said Calvin, the defendant thereby became a trespasser *ab initio*, and was answerable for the entire property originally attached.

But we are of opinion that the present case does not fall within the principles governing the decisions of courts rendering the party liable as a trespasser *ab initio*. Here has been no such wanton abuse of legal process as will make the party liable in that way. Here has been no forcible injury to the property attached, and no such wanton misconduct in reference to it as will deprive the party of the protection of the process under which the attachment was made: *Herrin v. Simonds*, 11 N. H. 363; *Barrell v. White*, 3 Id. 210 [14 Am. Dec. 352].

The ground of the complaint is in fact a mere non-feasance. After the attachment of the property, by virtue of the writ of attachment, the same was sold according to the provisions of the statute, and the amount realized upon such sale was kept by the defendant until judgment was rendered in the action against said Calvin, and execution issued thereon and delivered to the defendant, when he applied thereon, in part discharge of it and of the costs thereof the entire sum realized as the avails of it upon the sale. The only ground of complaint suggested is, that the sum thus appropriated was greater than the amount embraced in the judgment and execution for the price of the goods sued for, other than the liquors and the costs of the suit. Admitting that the fact is so, and that the excess applied beyond the amount of what was legally due and the costs of the action was not properly and legally applied upon the execution against said Calvin, and that the plaintiff is entitled to receive

that excess, still we are of opinion that it can not be recovered in this form of action. The officer was undoubtedly obliged to apply the money to the extent of the sum justly due and the cost of the action. But if this form of action can be sustained upon the ground that the defendant is a trespasser *ab initio*, then the plaintiff would be entitled to recover the full value of all the goods attached, irrespective of the sum applied in discharge of the just debt of Hall & Co. against said Calvin. If the defendant is a trespasser *ab initio*, he is answerable as for a wrong in attaching the property originally, and for every other act touching it that was injurious to the plaintiff. But we are of opinion that the defendant is under no such liability as a trespasser. If he is liable to the plaintiff at all, the liability resting upon him is only that of an officer who, having sold the property of a judgment debtor, from which a larger amount has been realized than is required to answer the just and proper purposes of the sale, is responsible for the excess to the debtor.

This view, we think, is distinctly countenanced by the decision of the supreme court of Massachusetts in the case of *Gates v. Gates*, 15 Mass. 310. A case more directly in point is that of *Abbott v. Kimball*, 19 Vt. 551 [47 Am. Dec. 708]. The action was originally trover for sundry horses and harnesses, and was afterwards amended by the addition of several counts. The marginal note of the case is thus: "When property attached upon mesne process is sold by the attaching officer, a deputy sheriff, upon the writ, in pursuance of the revised statutes, chapter 28, sections 48-52, and judgment is finally rendered in favor of the defendant, in the action in which the attachment was made, a refusal on the part of the officer to pay to the defendant the amount for which the property was sold will not make him a trespasser *ab initio*, so as to render him liable in trover for the property. The only proper action against the deputy in such case is for money."

Redfield, J., in delivering the judgment of the court, remarked thus: "The court charges the jury that although the defendants made out all the facts alleged in their plea in bar, still the plaintiffs were entitled in this form of action to recover the amount of money for which the horses were sold, and interest from the time of the demand. No doubt if the officer had no right to deduct the expenses of keeping and sale, of which we say nothing (not being agreed fully), the officer might be liable, in some form of action, for that amount. But it seems to us that in that case the officer is not liable in trover. A re-

refusal to pay over the money, or claiming to retain part of it, upon grounds which are not well founded in law, will not make him a trespasser *ab initio*. And unless that is the case, trover will not lie even against the officer. It is like any other refusal to pay over money in his hands," and "the only proper action, in this view of the case, against the deputy is for money."

So in the present case, we think, if the plaintiff can recover at all against the defendant, for the money alleged to be misapplied by him, beyond the just debt and interest due to Hall & Co., and the costs of the suit and officer's fees, we are of the opinion that there is no ground for maintaining the present form of action. The application of the money upon the execution was, at most, a mere exercise of an erroneous judgment of the officer in reference to his duty and rights, and was wholly unattended with anything like a wrong with force. It was no more than a mere non-feasance as to this plaintiff. It was no more than the omission to pay over to the plaintiff the surplus money remaining in his hands after discharging that portion of the execution which was justly and legally due. There was no destruction or waste of the property or the money by this act of the defendant. Notwithstanding the application of the money by way of indorsement on the execution, in point of law it is still in the hands of the defendant for the plaintiff's use. The mere application in writing upon the execution can make no difference as to the rights of the plaintiff, and can not be regarded as being injurious thereto. There must, therefore, be judgment on the verdict.

OFFICER, WHEN TRESPASSER *AB INITIO*: See *Symonds v. Hall*, 59 Am. Dec. 53, note 55, where other cases are collected.

CONTRACT VOID IN PART IS NOT NECESSARILY VOID IN TOTO: See *Rand v. Mather*, 59 Am. Dec. 131, note 135, where other cases are collected.

STATE v. CLARK.

[28 NEW HAMPSHIRE, 176.]

CITY HAS POWER TO ENACT ORDINANCE PROVIDING THAT "NO INTOXICATING LIQUORS SHALL BE USED or kept in any refreshment-saloon or restaurant within the city, for any purpose whatever," where the legislature has conferred upon it such power.

KEEPING INTOXICATING LIQUORS IN CELLAR UNDER SALOON OR RESTAURANT is a violation of an ordinance which prohibits the keeping of such liquors in a saloon or restaurant.

APPEAL from the police court of the city of Concord. The respondent was convicted under the ordinance referred to in the opinion. The other facts are stated in the opinion of the court.

Peabody, for the defendant.

George and Foster, for the state.

By Court, GILCHRIST, C. J. The city ordinance prohibits the using or keeping intoxicating liquors in any refreshment-saloon or restaurant only. It does not prohibit the using or keeping elsewhere, but it selects places of a certain class, and prohibits their use in such places. There is nothing unreasonable in such an exercise of the judgment of the city authorities. The ordinance does not profess to prohibit either the use or the sale of liquors altogether. From motives arising out of a regard for public policy or morals, it declares that liquor shall not be kept in such places. It is, in fact, a sumptuary law, which goes no further than almost any laws of this description, nor is it any more stringent than many other laws which are enacted from a regard to the public peace and safety. By chapter 112, sections 1 and 2, of the revised statutes, the keeping of gunpowder in the compact part of any town, in a greater quantity than twenty-five pounds, is prohibited. There is also a provision in the revised statutes, chapter 118, section 9, prohibiting sales, etc., within two miles of places of meeting for religious worship.

In the case of *Heisenbrittle v. City Council of Charleston*, 2 McMull. 233, the council had passed an ordinance prohibiting shop-keepers, unless licensed, from keeping any spirituous liquors in their shops, or in any adjacent room; and a process was issued against the plaintiff for a violation of it. It was held by the court, Earl, J., that there was nothing in the constitution of the state or of the United States restraining the legislature from passing a general law like that under consideration, or from granting the power to do so to municipal corporations.

By the act of 1783, 7 Stat. 98, the city council of Charleston were vested with the power to pass "every by-law or regulation that shall appear to them requisite and necessary for the security, welfare, and convenience of the said city, or for preserving peace, order, and good government within the same." The ordinance provides that no persons owning or keeping a retail grocery store within the city, etc., not having a license,

etc., shall be permitted to keep in such shop, or in any room adjacent thereto, or on the premises connected with such shop, any wine, malt or spirituous liquors. It was said by the court that "the general powers of legislation, on all matters connected with the security, welfare, and convenience of the city, or for preserving peace, order, and good government within the same, are sufficiently comprehensive to cover the ordinance in question." The appeal of the plaintiff was therefore dismissed. This case has a very strong resemblance to the one now before us, and confirms the views taken by the court upon the question submitted.

In the case of *Stokes v. Corporation of New York*, 14 Wend. 87, the ordinance of the corporation required anthracite or hard coal to be sold by weight, and that it should be weighed by weighing-masters, not exceeding six in number, appointed by the common council; and it imposed a penalty upon any vendor of coal who should sell any anthracite or hard coal without being first weighed. A suit was brought to recover the penalty, and upon a writ of error from the superior court, for the city, it was contended by the plaintiffs in error that the ordinance was unconstitutional, and that the power to legislate on the subject could not be delegated to the corporation. It was held by the court that the appointment of weighers, and the law requiring coal to be weighed by them, was not a restraint upon trade, but a regulation of it, and that it was not unreasonable, because if the number of weighers was insufficient, as was suggested, the corporation could remove the difficulty by the appointment of an adequate number; and that the case was one clearly within the power of corporate regulation, and that it was unnecessary to discuss the question of the constitutionality of the ordinance and the law authorizing it.

There is also another question in the case. It appears that the saloon complained of was in a cellar under the building. The words used in the ordinance are, "refreshment-saloon or restaurant." These may as well be in one story as another—in the cellar under the building as in the attic at its top. It is enough if the liquors are kept in such places as those described, wherever they may be; and the law is equally violated whether the whole building or any part of it was appropriated to such purposes; and the cellar is as much a part of the eating-house as any other portion of the building. The judgment of the police court must, therefore, be affirmed.

POWER OF MUNICIPAL CORPORATIONS TO REGULATE SALE OF LIQUORS: See *Floyd v. Commissioners of Exeter*, 58 Am. Dec. 559, note 563; note to *Commonwealth v. Kimball*, 35 Id. 336, where this subject is discussed.

THE PRINCIPAL CASE IS APPROVED IN *State v. Noyes*, 30 N. H. 293, and in *State v. Freeman*, 38 Id. 428.

WOODS v. KIRK.

[36 NEW HAMPSHIRE, 324.]

CONDITION IN NOTE THAT MAKER WILL PAY IF HE SHALL GET CERTAIN LAND described in the note is equivalent to the condition if he shall get a valid title to the land; and such condition is not satisfied by his getting a deed, or a defeasible possession, or a defective title.

PARTY IS NOT DEBARRED FROM PROVING HONEST AND LEGAL DEFENSE by the circumstance that his evidence also tends to prove him guilty of a fraud in some other matter upon which his defense does not rest.

PARTY IS NOT ESTOPPED TO SHOW THAT HIS ADVERSARY HAS TAKEN ADVANTAGE of wrong or fraud committed against him to annul a contract or conveyance.

ASSUMPSIT on a promissory note, signed by the defendant, to be paid if he should get certain land therein described, otherwise to be null and void. The plaintiff alleged that the defendant did get the land according to the condition expressed in the note, but that he neglected to pay. At the time the note was given, Jonas Woods, the plaintiff's father, was in possession of the land referred to in the note. On the day the note was given, Jonas Woods executed a deed of the premises to the defendant. This deed was placed in the hands of a third person, to be delivered to the defendant upon his performing certain conditions. No part of the consideration agreed to be paid by the defendant was then paid, nor did it appear that it was ever paid by him afterwards. The plaintiff, in support of his case, offered in evidence this deed from Jonas Woods to the defendant, with proof that it was recorded at the request of the defendant, and that he had been for some time in possession of the land, claiming it under the deed. To rebut this, the defendant offered evidence of statements made by the plaintiff showing that this deed was invalid on account of the defendant's not having complied with the conditions on which it was to be delivered to him by the third person in whose hands it was placed; and also that the plaintiff shortly afterwards advised and assisted in a subsequent sale and conveyance of the premises by Jonas Woods to another party who soon after took and held them under this last-named

deed. This evidence was admitted over the objection of the plaintiff. A verdict was rendered for the defendant, and the plaintiff moved to set it aside, and for a new trial. Other facts appear from the opinion.

A. W. Sawyer, for the plaintiff.

B. F. Emerson, for the defendant.

By Court, *BELL, J.* There can be no doubt that the construction given to the special agreement upon which this action is founded by the court below was the correct one. The condition upon which the money was to be paid, namely, "if the defendant should get the land," was equivalent to "if the defendant should acquire a valid title to the land." It could not be satisfied by his acquiring a deed, or a defeasible possession, or a defective title. The burden was upon the plaintiff to show the truth of his averment, "that said Kirk did get the land aforesaid," and if he failed to prove that fact, he failed to show any ground of action, and the defendant was entitled to a verdict in his favor: *Pendergast v. Meserve*, 22 N. H. 109 [53 Am. Dec. 234]. The plaintiff offered no direct evidence that the land was effectually conveyed to the defendant, so that he got it, or acquired a valid title to it. He offered circumstantial evidence from which, if uncontradicted or unexplained, a jury would have been authorized and perhaps reasonably bound to infer that he had got or acquired a valid title to the land; that is, that he had a deed of the land duly acknowledged and recorded, and that he was in possession of the land, claiming it by virtue of that deed. This evidence was of course liable to be met by any competent proof of other circumstances from which a jury might rightfully draw a different conclusion. Such proof was offered by the defendant, consisting of the statements of the plaintiff that his deed was not valid, the acts of the plaintiff expressive of the same opinion and claim, and the fact that the property was held soon after by another purchaser, under a deed made to him by the advice and assistance of the plaintiff. This evidence had clearly a natural and legitimate tendency to satisfy a jury that the defendant did not get the land, even if he did get a deed and get possession.

The objection made to this evidence was not well founded, either in fact or in law. This was that the defendant, having got possession of the deed, and having had it recorded, was estopped from showing his own wrong or fraud in so doing.

without having complied with the conditions on which it was to be delivered to him.

If the doctrine relied on was well founded, it constitutes no objection to the admission of the evidence offered. This evidence had no tendency to show any wrong or fraud in the defendant. Its only tendency was to show that the plaintiff denied the validity of the deed, treated it as invalid, and that the defendant, by yielding the possession, had conceded its invalidity. As the evidence appears, it does not clearly show the ground on which the deed was claimed or allowed to be invalid; but if the evidence had shown that the plaintiff claimed it to be invalid on the ground of the defendant's wrong or fraud, in improperly gaining possession of the deed, and causing it to be recorded, that would not be evidence of such fraud or wrong so as to deprive the defendant of the use of the testimony; since it is not the fraud or wrong, so alleged by the plaintiff, on which the defendant relies, but on the fact that the plaintiff denied the validity of the deed, and took part in the acts adopted to avoid it. Still more clearly would this doctrine fail of any application in this case, if the plaintiff's objection to the validity of the deed rested, not on the improper delivery and recording of the deed, but on the failure of the conditions, whatever they were, on which the instrument was to be delivered over to the defendant. In that case, the acts of the defendant, complained of by the plaintiff, would be of no importance to the rights of either party.

It is undoubtedly true that a party shall not be permitted to prove his own fraud, as a ground on which to rest his action or his defense: *White v. Hunter*, 23 N. H. 128; Story on Cont. 167. But it is by no means true that a party who sets up a title or defense, which is honest and legal, will be debarred from proving such defense by the circumstance that his evidence tends also to prove him guilty of a fraud in some other matter. The case does not clearly show what was the nature of the wrong which it was contended the defendant was estopped to prove. But it is not true that a party is estopped to prove his own wrongful act. There are many cases where a man may rest his claim upon a wrongful act. A man may show himself a trespasser, and there is nothing here which shows that the defendant was guilty of any act of wrong of a higher grade than trespass.

It was contended that the defendant could not set up any failure to obtain a good title as a defense in this action, if his fail-

ure resulted from any act of his own; if it was attributable solely to his own neglect to comply with the conditions on which the deed was to be delivered. And in many cases this would be true. He could not exonerate himself from liability by his sole act, when the other party has done everything incumbent on him to make the contract binding. But that hardly seems the case which the defendant's evidence seems designed to establish. He did not contend that he had a right to defeat the contract at his pleasure. His position was that the plaintiff had denounced the deed as invalid; had treated the property as if the deed was invalid; had conveyed it to a third person, who had taken possession of it. His point is, not that the defendant has avoided the deed, but that the plaintiff had elected to set it aside, so that he did not get the land.

The general doctrine is, that fraud vitiates all contracts affected by it, but fraud does not render such contracts void absolutely. It renders them voidable, liable to be set aside by the party injured, if he so elects. It may, notwithstanding the fraud, be the interest of the party designed to be defrauded to insist upon the contract.

We do not recollect anywhere to have seen the position that a party is estopped to show that his adversary has taken advantage of a wrong or fraud committed against him to annul a contract or conveyance. This is all which the defendant offered to show in this case, namely, that the plaintiff had taken advantage of an assumed fraud or wrong of the defendant to annul the deed which once had some validity or capacity of becoming effectual, so that nothing passed by it, and that the defendant had yielded to his election. This he had a right to do.

Judgment on the verdict.

SMITH v. GODFREY.

[28 NEW HAMPSHIRE, 379.]

VALIDITY OF CONTRACT IS TO BE DECIDED BY LAW OF PLACE where it is made; but no nation is bound to recognize or enforce any contracts which are injurious to its own interests, or to those of its own citizens, or which are in fraud of its laws.

LAWS OF COUNTRY HAVE NO BINDING FORCE BEYOND ITS TERRITORIAL LIMITS, and their authority is admitted in other states, not *ex proprio vigore*, but *ex comitate*.

MERE KNOWLEDGE OF ILLEGAL PURPOSE FOR WHICH GOODS ARE PURCHASED will not affect the validity of the contract of sale in the country to which

they are to be taken and sold, where the goods are sold and delivered in the government where the contract is made, and the sale there is legal, and nothing remains to be done by the vendor to complete the transaction, and he is not in any way to be further connected with it. But if it is an ingredient of the contract between the parties that the goods shall be illegally sold, or that the seller shall do some act to assist or facilitate the illegal sale, or if the goods are to be delivered where the sale is prohibited, the contract will not be enforced.

LAWS PROHIBITING SALE OF LIQUORS IN NEW HAMPSHIRE can not extend to sales made in another state in which such sales are lawful, where the sale is complete in the latter state.

ASSUMPSIT upon an account for spirituous liquors sold in Boston, Massachusetts. The defendant offered to show that the liquors were bought to be sold in New Hampshire in violation of its laws, and that the plaintiffs knew at the time of the sale that they were to be thus sold. The court ruled this evidence incompetent to show a defense to the action. There was a verdict for the plaintiffs, upon which judgment was to be entered or a new trial granted, according to the opinion of this court upon the correctness of the ruling.

McMurphy, for the defendant.

Wells and Bacon, for the plaintiffs.

By Court, **EASTMAN, J.** There is, perhaps, no general principle of law better established than that the validity of a contract is to be decided by the law of the place where the contract is made. If valid there, it is valid elsewhere; but if void or illegal by the law of the place where made, it is void everywhere. This proposition, as a general one, is universally acknowledged and recognized. The rule, it is said, is founded not merely in the convenience but in the necessities of nations and states; for otherwise it would be impracticable for them to carry on an extensive intercourse and commerce with each other. The whole system of agencies, of purchases and sales, of mutual credits, and of transfers of negotiable instruments rests on this foundation; and in sustaining the principle, there seems to be a unanimous consent of all courts and jurists, foreign and domestic: *Story's Conf. L.*, sec. 242; 2 *Kent's Com.* 454; *Dyer v. Hunt*, 5 N. H. 401; *Douglass v. Oldham*, 6 Id. 150; *Bliss v. Houghton*, 18 Id. 126; *French v. Hall*, 9 Id. 137 [32 Am. Dec. 341]; *Sessions v. Little*, 9 Id. 271; *Bank of United States v. Donally*, 8 Pet. 361; *Wilcox v. Hunt*, 13 Id. 378; *Pearsall v. Dwight*, 2 Mass. 88 [3 Am. Dec. 85]; *Smith v. Mead*, 3 Conn. 253 [8 Am. Dec. 183]; *Trimby v. Vignier*, 1 Bing. N. C. 151; *Van Schaick v. Edwards*, 2

Johns. Cas. 355; *Alves v. Hodgdon*, 7 T. R. 237; *Burrows v. Jemine*, 2 Stra. 732.

But there are some exceptions to this rule, and among them is this, that no nation is bound to recognize or enforce any contracts which are injurious to its own interests, or to those of its own citizens, or which are in fraud of its laws. The laws of a country have no binding force beyond its territorial limits, and their authority is admitted in other states, not *ex proprio vigore*, but *ex comitate*, and every community must judge for itself how far this comity shall be permitted to interfere with its domestic interests and policy: Story's Conf. L., sec. 244; 2 Kent's Com. 457; *Andrews v. Pond*, 13 Pet. 65. Chancellor Kent says: "No people are bound to enforce or hold valid in their courts of justice any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates a public law:" 2 Kent's Com. 458. Story uses this language: "Contracts which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects, contracts against good morals, or against religion, or against public rights, and contracts opposed to the national policy or national institutions, are deemed nullities in every country affected by such considerations:" Story's Conf. L., sec. 244. And these views are sustained by the following, among other authorities: *Whiston v. Stodder*, 8 Mart. (La.) 95 [13 Am. Dec. 281]; *Greenwood v. Curtis*, 6 Mass. 358 [4 Am. Dec. 145]; *Blanchard v. Russell*, 13 Id. 1 [7 Am. Dec. 106]; *De Sobrey v. De Laistre*, 2 Har. & J. 193 [3 Am. Dec. 535]; *Thrasher v. Evertt*, 3 Gill & J. 234; *Ohio Ins. Co. v. Edmonson*, 5 La. 295. What shall be held to be injurious to the rights of a state or its citizens, or against public morals, or in evasion or fraud of the laws of a country, and how far courts shall go in sustaining this exception to the general rule which all admit to be so almost universal and important in its application, is not in all cases so clear.

In *Holman v. Johnson*, Cowp. 341, which is a leading case upon the question, goods were sold in France by a Frenchman to an Englishman, for the known purpose of being smuggled into England, and it was held that the Frenchman could maintain a suit in England for the price of the goods, upon the ground that the sale was complete in France, and that the vendor had no connection with the smuggling transaction. The contract, said the court, was complete, and nothing was left to be done. The seller, indeed, knew what the buyer was going to do with the goods, but he had no concern with the

transaction itself. A similar decision was made in *Pellecat v. Augell*, 2 Crompt. M. & R. 311. These cases both arose out of contracts made for the sale of goods intended as a breach of the revenue laws, and although in the latter case some stress seems to have been laid upon that fact, still the opinion of the court did not rest upon that ground. In *Territt v. Bartlett*, 21 Vt. 189, which was an action growing out of the sale of spirituous liquors, begun in New York, but completed in Vermont, Redfield, J., in speaking of the case of *Holman v. Johnson*, *supra*, says he should have no doubt that an action would lie in the courts of Vermont, where the sale and delivery were both made in another state, and the seller did nothing to promote the illegal object except what was necessary to pursue his own lawful business in the foreign state, although he might have known the illegal purpose contemplated by the vendee. See also, to the same point, *Merchants' Bank v. Spalding*, 12 Barb. 302.

The doctrine of these and other cases is, that the mere knowledge of the illegal purpose for which goods are purchased will not affect the validity of the contract of sale in the country to which they are to be taken and sold. If the goods are sold and delivered in the government where the contract is made, and the sale there would be legal, and nothing remains to be done by the vendor to complete the transaction, and he is not in any way to be further connected with it, an action can be maintained for the recovery of the price. But if it enters at all as an ingredient into the contract between the parties that the goods shall be illegally sold, or that the seller shall do some act to assist or facilitate the illegal sale, the contract will not be enforced. Or if the goods are sold to be delivered in the place where the sale is prohibited, the purchaser will not be held liable. The sale in such instance would not be complete in the foreign state, and the contract, being repugnant to the law of the country which made the prohibition, could not there be enforced. The principle, as we have above stated it, will not, we think, be found to be controverted by any well-considered case. It has been animadverted upon by some elementary writers, but they all admit, we believe, that such is the law. There are cases which hold that where a sale is made in a state or country of goods to be used in the same country in violation of law, and the seller is aware of the illegal purpose at the time, he can not enforce his contract in the courts of that country. But these authorities do not extend to contracts made in a foreign state, where the sale and use is legal.

It may be observed, also, that, as a general rule, where goods have been sold and delivered, the vendor has no longer any control over them; and although the purchaser may, at the time of the purchase, intend to sell them in another state in violation of the law of that state, yet he may subsequently change his purpose, and the goods, notwithstanding the original intention, may be disposed of elsewhere in strict conformity with law. With us the principle is established that the consideration to be paid for spirituous liquors sold without license can not be recovered. The sale being prohibited by statute, and the vendor being liable to a criminal prosecution for the selling, the traffic is made illegal, and contracts in respect to it can not be enforced. Wherever an indictment can be sustained for the illegal sale, there the price can not be recovered: *Pray v. Burbank*, 10 N. H. 377; *Caldwell v. Wentworth*, 14 Id. 431; *Lewis v. Welch*, Id. 294.

But these laws, prohibiting the sale of liquors in this state, can not extend to independent acts done beyond our limits. These plaintiffs made this sale in Massachusetts, where they had a right to make it by the laws of that state. It was there a lawful business, and whatever difference of opinion may exist in regard to the traffic, they had a right to pursue the business if they saw fit. If they had been indicted here for the sale, and had appeared to defend the indictment, it is plain that, unless the government could show them in some way connected with the transaction, so as to make out the sale to have been, in law, in this state, no conviction could be had. There is no pretense that they could be indicted for sales made by the defendant himself, in which they had no agency; and so long as the whole transaction by the plaintiffs was completed in Massachusetts, and they had no connection with the matter except to sell and deliver the spirit in that state, it is very clear that no indictment could be sustained against them in this state for that act, whatever may have been their knowledge as to the defendant's intentions. And if an indictment could not be sustained, and no penalty enforced against them, then there would be a failure to show the contract illegal, and the case would not come within our principle of illegal sales; the test of an illegal sale being the liability of the vendor to the penalty of the statute.

The case finds this sale to have been completed in Massachusetts, and there is nothing showing the plaintiffs to have been in any way connected with the sales in this state. There is nothing, in fact, that shows that they had any knowledge of the

intention of the defendant; but the proposition to show knowledge as a defense was the question upon the trial, and we have so treated it; and we are of opinion that the ruling of the court in excluding the evidence was correct, and that there should be judgment on the verdict.

LAW OF PLACE WHERE CONTRACT IS MADE OR IS TO BE PERFORMED GOVERNS: *Houghtaling v. Ball*, 59 Am. Dec. 331, note 333; *Speed v. May*, 55 Id. 540, note 542, where other cases are collected. A contract valid where made will be enforced everywhere else: *Ferguson v. Clifford*, 37 N. H. 97, citing the principal case.

RULE OF COMITY WHERE THERE IS CONFLICT OF LAWS can not prevail so as to allow a foreign law to counteract a general prohibitory law which regulates the policy of the state, or in which all the citizens of the state are interested: *Mahorner v. Hooe*, 43 Am. Dec. 706, note 715.

PENAL STATUTES OF ONE STATE ARE NOT IN FORCE BEYOND LIMITS of the state which enacted them: *Suffolk Bank v. Kidder*, 36 Am. Dec. 354; *Dickson v. Dickson*, 24 Id. 444; *Scoville v. Canfield*, 7 Id. 467.

NO COUNTRY WILL ENFORCE CONTRACT MADE ELSEWHERE if the enforcement would be to its injury: *Hinds v. Brazeeille*, 32 Am. Dec. 307, note 310, where other cases are collected.

FOREIGN LAWS CAN NOT PER SE OPERATE EXTRATERRITORIALLY: *Sneed v. Ewing*, 22 Am. Dec. 41.

EMERY v. BERRY.

[26 NEW HAMPSHIRE, 473.]

ANY ACT WHICH EVINCES CONTROL OVER PROPERTY OF DECEASED PERSON, without legal right to exercise such control being shown, makes a party exercising it an executor in his own wrong as against creditors; but acts of necessity or humanity, by which a person does not assume to have any control over the property more than others, will not constitute him an executor *de son tort*.

FATHER RESIDING IN NEW HAMPSHIRE WHO HAS IN HIS POSSESSION MONEY BELONGING TO ESTATE of his son, who died in another state, may be charged by a creditor of the deceased as an executor *de son tort* where there is no evidence to show for what purpose the money was sent to him, or that any person, either in New Hampshire or elsewhere, has any right to legal control over it.

EXECUTOR DE SON TORT MAY, IT SEEMS, DISCHARGE HIMSELF from liability as such by taking out letters of administration.

STATUTES OF SISTER STATE CAN NOT BE PROVED BY PAROL.

PRINTED VOLUME OF STATUTES OF SISTER STATE, purporting on its face to have been printed by its authority and to contain its laws, should be admitted as *prima facie* evidence to show what those laws are.

MERELY CLERICAL ERROR OF CLERK OF COURT IN MAKING UP RECORDS may be corrected by the docket, by the order of the court, without motion or notice to either party.

DEBT on a judgment alleged to have been rendered in the district court for the western district in the state of Maine, in favor of the plaintiff against Joseph Berry, deceased, who was the son of the defendant in this action. The pleas were: 1. *Nul tiel record*; 2. *Ne unques executor*. Asa Low, esq., whose testimony is referred to in the opinion, was called by the plaintiff, and testified that he was a practicing attorney and counselor in the state of Maine, and knew the laws of that state, and that by a statute of that state, passed in 1852, the former district courts had been abolished, and their powers and authority, and the business pending therein, and the records and files pertaining thereto, had been transferred to the supreme judicial court, and that the clerk of that court had the custody of the records and files of the former district courts. The other facts appear from the opinion.

Jordan, for the plaintiff.

Christie and Kingman, for the defendant.

By Court, EASTMAN, J. In examining the questions presented by this case, we shall pursue the order taken in the argument, and consider, first, the ruling of the court by which a verdict was taken for the defendant upon the issue to the jury. It may be stated, in general terms, that at common law an executor *de son tort* is one who, without any authority from the deceased or the court of probate, does such acts as belong to the office of an executor or administrator; and it is said that all acts of acquisition, transferring, or possessing of the estate of the deceased will make an executor *de son tort*, because these are the only *indicia* by which creditors know against whom to bring their actions: 2 Bac. Abr. 387, and authorities there cited. Our statute provides that "if any person shall unlawfully intermeddle with, embezzle, alienate, waste, or destroy any of the personal estate of a deceased person, he shall stand chargeable and be liable to the actions of the creditors and others aggrieved, as executor in his own wrong, to double the value of the estate so intermeddled with, embezzled, alienated, wasted, or destroyed:" R. S., c. 158, sec. 15. What precise acts shall be deemed an intermeddling so as to charge a person as executor in his own wrong has never, so far as we are advised, been directly passed upon by the courts of this state. The question has incidentally arisen in two or three cases, but no definite decision has been made: *Pickering v. Coleman*, 12 N. H. 148; *Leach v. Pillsbury*, 15 Id. 187. In

the latter of these cases it was said that "it seems that the single act of receiving and paying out a sum of money belonging to the estate of an intestate will make a person an executor *de son tort*, so far that he may be charged as such."

If a stranger gets possession of the goods of the deceased before probate of the will, he may be charged as executor in his own wrong: *Read's Case*, 5 Co. 33 b; Salk. 313, pl. 19; *Stokes v. Porter*, Dyer, 166 b; Roll. Abr. 918. And Mr. Justice Buller, in *Edwards v. Harben*, 2 T. R. 597, says: "In short, every intermeddling after the death of the party makes the person so intermeddling an executor *de son tort*." And the same learned justice, in *Padget v. Priest*, Id. 97, says: "It is clear, from all the cases, that the slightest circumstance of intermeddling will make an executor *de son tort*."

The case *Padget v. Priest*, *supra*, and the authority of *Stokes v. Porter*, *supra*, are cited and approved by Williams, in his note 2 to *Osborne v. Rogers*, 1 Saund. 265. A careful examination of the authorities will, we think, show that as between a creditor of the deceased and a person who may intermeddle with his goods, very slight acts indeed will make him liable as executor *de son tort*. Acts of necessity or humanity, such as locking up his goods, burying the corpse of the deceased, or feeding his cattle, and similar acts of charity, by which a person does not assume to have any control over the property more than others, will not constitute a person executor in his own wrong: 2 Bac. Abr. 288; 2 Bla. Com. 507; *Stokes v. Porter*, *supra*. But where one possesses himself of the goods of the deceased for the purpose of taking care of them, the object of the possession must be made to appear before he can be discharged from the responsibility arising from his possession: *Hubble v. Fogartie*, 3 Rich. 413 [45 Am. Dec. 775].

The best rule that occurs to us that can be laid down upon the subject is this, that all acts which assume any particular control over the property, without legal right shown, will make a person executor in his own wrong, as against creditors. Any act which evinces a legal control, by possession, direction, or otherwise, will, unexplained, make him liable. And this position the authorities seem fully to sustain: 2 Bac. Abr. 387; *Read's Case*, 5 Co. 33 b; *Edwards v. Harben*, 2 T. R. 597; *Padget v. Priest*, Id. 97; *Campbell v. Tousey*, 7 Cow. 64; *White v. Mann*, 26 Me. 361; *Wilson v. Hudson*, 4 Harr. (Del.) 168; *Hubble v. Fogartie*, 3 Rich. 413 [45 Am. Dec. 775]; *Osborne v. Rogers*, 1 Saund. 265, note. *Mountford v. Gibson*, 4 East, 441, and the other cases cited by

the defendant's counsel, will not, we think, when carefully examined, be found to conflict with these views.

The evidence in this case was competent to show the defendant executor in his own wrong, and liable under our statute. It tended to show that the defendant had in his possession four hundred dollars, money which he had received from the estate of his son, Joseph Berry, who was an alleged debtor of the plaintiff, and who died in California. He received it through a draft on Boston, sent by a Mr. Matthews from San Francisco. The object for which the money was sent is not stated. It was sent to the defendant, subject to no order of the deceased, or of any administrator or executor of his in California. Matthews would appear to have been acting as the friend of the deceased, and, without any administration upon the estate, to have taken upon himself to send the avails of the property of the deceased to his father in this state.

The case finds Berry to be dead. It finds, in effect, that the four hundred dollars belongs to his estate, and that the same is money, in the hands of the defendant in this state. It does not appear that any administrator, executor, creditor, or heir in California has any right to the property, or to its control. Nor does it appear that it was sent to this state by authority of any will or the decree of any probate court. Neither is anything disclosed in the case by which it appears that any one in this state or elsewhere has any right to any legal control over it. It is, then, simply personal property of the deceased in this state, in the hands of the defendant, subject to the rights or interference of no one, except as the statute shall point out. Being within our jurisdiction, under such circumstances it may properly be administered upon in this state, for the benefit of the heirs and creditors residing here.

There has been no administration upon the estate of the deceased in this state, and the defendant is the only person shown to have intermeddled with the property here. He is the only one who has had it in his possession and exercised control over it, and we infer from the facts stated, has declined to surrender the property or take out letters of administration upon the estate. If the defendant desires to avoid the penalty prescribed by the statute, it seems that it may be done by his now taking out letters of administration: *Shillebar v. Wyman*, 15 Mass. 322.

We are the better satisfied with the conclusion to which we arrived, as to the liability of this defendant, from comparing the section of the statute already cited with the twelfth section of

the same chapter. The latter provides that "no person shall intermeddle with the estate of any person deceased, or act as the executor or administrator thereof, or be considered as having that trust, until he shall have given bond to the judge, with sufficient sureties, in such reasonable sum as he shall approve, upon condition," etc. While this section provides that no person shall intermeddle with the estate of any person deceased without giving bond, the fifteenth provides that if any person shall unlawfully intermeddle with the personal estate of any deceased person, he shall stand chargeable as executor in his own wrong. The two sections taken together would seem to show that when the legislature speak of an unlawful intermeddling, they mean all such as takes place without giving bond as administrator or executor.

Having arrived at the result to which we have, we might omit giving any opinion upon the competency of the plaintiff's evidence to sustain the issue to the court. But as the case will probably be tried again, we think it but proper that some intimation should be given as to the other questions presented, as desired by the defendant's counsel; especially as we are of opinion that a portion of the plaintiff's evidence is clearly defective. The testimony of Mr. Low to prove the change in the organization of the courts of the state of Maine was inadmissible. The written or statute laws of a foreign government must be verified in the same manner as foreign judgments: by the exemplification of a copy under the great seal of state, or by a sworn copy. Unwritten laws may be shown by parol evidence: *Watson v. Walker*, 23 N. H. 471; *Church v. Hubbard*, 2 Cranch, 237; *Raynham v. Canton*, 3 Pick. 293; *Packard v. Hill*, 2 Wend. 411; *Lincoln v. Battelle*, 6 Id. 475; 1 Greenl. Ev., sec. 488. How far the several United States shall be governed by these principles when applied to themselves is not fully agreed. Upon strict rules of evidence, the laws of one state can be proved in the courts of another only as foreign laws; each state being sovereign and independent in all things not surrendered to the general government by the constitution. The relations of the several states to each other are those of foreign states in close friendship, and they are liable to be treated by each other, except so far as governed by the constitution of the United States, as foreign independencies: 1 Greenl. Ev., secs. 489, 504; *Mills v. Duryea*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234. It seems that the rule in New York and Connecticut, and some other states, requires the statutes of sister states to be

proved in the same manner as foreign laws: *Packard v. Hill*, 2 Wend. 411; *Brackett v. Norton*, 4 Conn. 517, 521 [10 Am. Dec. 179]; *Hemstead v. Reed*, 6 Id. 480; *State v. Twitty*, 2 Hawks, 441 [11 Am. Dec. 779]; *Bailey v. McDonnell*, 2 Harr. (Del.) 34; *Van Buskirk v. Muloch*, 3 Harr. (N. J.) 184.

But it has been otherwise held in the supreme court of the United States, and in the courts of several of the respective states. With them it has been decided that a printed volume, purporting on the face of it to contain the laws of a sister state, is admissible as *prima facie* evidence to prove the statute laws of that state: *Young v. Bank of Alexandria*, 4 Cranch, 384; *Thompson v. Musser*, 1 Dall. 458; *Thomas v. Davis*, 7 B. Mon. 227; *Raynham v. Canton*, 3 Pick. 293; *Comparet v. Jernegan*, 5 Blackf. 375; *Biddis v. James*, 6 Binn. 321 [6 Am. Dec. 456]; *Kean v. Rice*, 12 Serg. & R. 203; *Hanrick v. Andrews*, 9 Port. 9; *Mullen v. Morris*, 2 Pa. St. 85; *Clark v. Bank of Mississippi*, 10 Ark. 516; *State v. Stade*, 1 D. Chip. 303; *Taylor v. Bank of Alexandria*, 5 Leigh, 471; *Allen v. Watson*, 2 Hill (S. C.), 319. But notwithstanding the difference of opinion existing among learned jurists as to the admissibility of a printed volume purporting to contain the statutes of a sister state as *prima facie* evidence of the written laws of such state, the authorities appear to be uniform that such statutes can not be proved by parol: *Raynham v. Canton*, 3 Pick. 293; *Comparet v. Jernegan*, 5 Blackf. 375. And indeed, most of the authorities before cited are applicable to this position.

Of course that part of the testimony of Mr. Low which was introduced to show the change in the organization of the courts could not be admitted; for the change was made by express statute, and formed a part of the written laws of the state. His testimony in this and other respects, so far as it went to show statute provisions, was inadmissible. But we think we ought to hold that a printed volume of the statutes of a sister state, purporting upon its face to have been printed by its authority and to contain the laws of the state, should be admitted as *prima facie* evidence to show what those laws are. Such a course seems called for by the great convenience and saving of expense that it will afford to parties, and by that confidential relation which exists between the states. The rule, too, would seem to be almost entirely free from any danger of abuse, and error or imposition could easily be detected.

But the exception taken to the amendment of the record of the judgment can not prevail; that is, if we assume that the

powers and records of the district court were transferred to the supreme judicial court. The amendment was made to correspond with the minutes upon the docket. It was to cure a defect in the record which had been erroneously made by the clerk; and the order for the amendment was that it be made by stating the facts as they appeared upon the docket. The error was merely clerical, and one which the court could order corrected without motion or notice to either party.

It appears, also, by the testimony of Mr. Low, that the facts fully warranted the amendment. He appeared by the direction and employment of the defendants, and answered to the action as attorney for them. Had there been no appearance, the judgment would not have been good beyond the limits of the state. If a judgment is rendered against a defendant residing out of the state where the suit is pending, it will be inoperative beyond the limits of the state where it is rendered, unless the court obtain jurisdiction of the defendant's person. But if a defendant voluntarily submits to the jurisdiction of the court by appearing and defending in person or by attorney, he can not in this state question the validity of the judgment which that court might have rendered against him: *Downer v. Shaw*, 22 N. H. 277, 281.

Verdict set aside and new trial granted.

VALIDITY OF ACTS OF EXECUTOR DE SON TORT: See *Woolfork's Adm'r v. Sullivan*, 58 Am. Dec. 305; note to *Arnold v. Arnold*, 55 Id. 438, where this subject is discussed.

LIABILITY OF EXECUTOR DE SON TORT: See note to *Arnold v. Arnold*, 55 Am. Dec. 438. Whoever comes into the possession of property of an intestate after his death is responsible for it to the administrator when appointed: *Cullen v. O'Hara*, 4 Mich. 136, citing the principal case.

COURT MAY CORRECT MISTAKES IN ITS RECORDS made by its recording officer, either on suggestion or motion of those interested, or upon its own certain knowledge and mere motion: *Lewis v. Ross*, 59 Am. Dec. 49. Clerical errors may be amended by the court even after the term at which the judgment was rendered has expired: *Whitwell v. Emory*, Id. 220.

COURT OF CHANCERY WILL NOT INTERFERE TO CORRECT MISTAKE made by the clerk of a court of law in entering its judgment: *State Bank of Indiana v. Young*, 52 Am. Dec. 501, note 504.

PRINTED STATUTE-BOOK IS NOT CONCLUSIVE EVIDENCE of acts contained therein, but may be corrected by the original acts on file in the office of the secretary of state: *Spangler v. Jacoby*, 58 Am. Dec. 571.

FOREIGN STATUTORY LAW, HOW PROVED: See *Clarke v. Bank of Mississippi*, 52 Am. Dec. 243, note 256, where other cases are collected. Printed copies of statutes of sister states, if purporting to be published under the authority of the proper government, are required to be admitted in all proceedings in the state courts as *prima facie* evidence: *People v. Calder*, 30 Mich. 87, citing the principal case.

RUSSELL v. FABYAN.

[28 NEW HAMPSHIRE, 543.]

COVENANT TO PAY RENT ON SPECIFIED DAY CREATES NO DEBT until the day of payment arrives.

WHERE LESSEE UNDER LEASE RESERVING ANNUAL RENT IS EVICTED before the day of payment by one holding a title paramount to that of the lessor, payment on the day the rent became due to the person holding such paramount title is a good defense to an action on the lease for covenant broken. But if before any rent is paid such paramount title is defeated by the lessor, he may maintain an action for the rent that fell due during the eviction.

PAYMENT CAN NOT BE SHOWN UNDER GENERAL ISSUE IN ACTION OF COVENANT for rent, except with a brief statement. But payment may be shown in such action under a special plea of payment.

COVENANT upon a lease for rent. The eviction referred to in the opinion was by one Dyer, by the levy of an execution upon the premises, and the eviction was terminated by Russell's tendering to Dyer, before the expiration of the year after the return-day, the debt and costs, according to provisions of the statute, in full satisfaction of Dyer's claim. The other facts are stated in the opinion.

Lyford, for the plaintiff.

Bellows and J. Eastman, for the defendant.

By Court, EASTMAN, J. At the last term of this court, in an action between these parties, for the recovery of the rent which by the terms of the lease fell due in September, 1850, the court held that the eviction by Dyer, on the fourteenth of June, 1848, was a good answer to an action for the rent during the continuance of Dyer's title; provided the defendant paid the rent to Dyer before the eviction terminated. We held, also, that the eviction terminated by the tender of Russell, on the third of November, 1848, and that the rent due of September, 1850, was recoverable in that action. This action is brought to recover the rent for the two preceding years, being that which fell due in September, 1848, eight hundred dollars, and September, 1849, one thousand dollars; so that notwithstanding the eviction continued for only one year and five months, yet both of the days of payment happened within that time. A question is thus presented, whether the rent can be apportioned so that Russell can recover for any part of the two years.

In *Fitchburg Mfg. Co. v. Melvin*, 15 Mass. 268, it was held that where on a lease an annual rent is reserved, and the lessee

is evicted before the day of payment by force of a title paramount to that of the lessor, no action lies against the lessee on the covenant for the rent accruing before the eviction. According to the doctrine of that case, which is cited and approved in *Perry v. Aldrich*, 13 N. H. 350 [38 Am. Dec. 493], this question must be decided against the plaintiff. The contract was an entire one, to pay the rent on the first day of September in each year, and in an action upon the covenant it would be a good plea that it was paid on those days. At common law, rent might be apportioned as to estate, but not as to time. A covenant to pay rent on a specified day creates no debt until the day of payment arrives: *Countess of Plymouth v. Throgmorton*, 1 Salk. 65; *Wood v. Partridge*, 11 Mass. 493; *Perry v. Aldrich*, *supra*.

If, then, we should regard the action as brought merely to recover the rent from March, 1848, to June 14, 1848, the time of the eviction, or from November 3, 1849, the time when the eviction terminated, to March following, the suit would equally fail, upon proof of payment to the holder of the paramount title on the first of September, 1848 and 1849; for the days of payment were during the eviction, and there can be no apportionment. But there is no plea of payment filed by the defendant; and as the pleadings stand, he can not show payment in defense of the action. The contest between the parties has been principally upon the question of the eviction. In an action of covenant broken for rent, payment can only be shown under the general issue, with a brief statement, or under a special plea of payment: 1 Ch. Pl. 423, 426; 2 Saund. Pl. & Ev. 712; Gould's Pl. 329.

Counsel have, however, stated that the rent for 1849 was paid to Dyer by the defendant in September of that year, and they have exhibited papers tending to show that such was the fact. And we think the defendant should have leave to move the common pleas to amend his pleadings so as to show this payment, if it was made. That court will grant the motion or not as they shall think proper, and upon such terms as they may deem just. There is no suggestion that the rent for 1848 has been paid to any one, and there is no valid reason why the plaintiff may not have judgment for that amount. Upon the termination of the eviction, the plaintiff was restored to all his rights under the lease, and whatever was not paid during the eviction can be recovered by him. We so held in considering the other case.

The plaintiff may take his judgment for eight hundred dollars.

the rent for 1848, and abandon his claim for 1849; or if he elects, the matter of the payment of the one thousand dollars can be contested further, should the common pleas grant leave to plead payment.

Should it be shown that the rent for September, 1849, was duly paid to Dyer, Russell might, perhaps, sustain an action against Dyer for its recovery. But in regard to that question we give no opinion.

RIGHT TO RENT RESERVED PASSES, ON CONVEYANCE of the land, to the grantees: See *Mussey v. Holt*, 55 Am. Dec. 234, note 241, where other cases are collected.

EVICTION, WHEN DEFENSE TO CLAIM FOR RENT: See *Giles v. Comstock*, 53 Am. Dec. 374, note 378, where other cases are collected.

PROOF OF PAYMENT UNDER GENERAL ISSUE: See *Crews v. Bleakley*, 60 Am. Dec. 58, note 59, where this subject is discussed.

MURCH v. CONCORD RAILROAD CORPORATION.

[29 NEW HAMPSHIRE, 2.]

ONE RAILROAD COMPANY BY MERELY PERMITTING ANOTHER TO USE ITS ROAD IS NOT OBLIGED TO PUT ROAD IN REPAIR, or to make any change whatever in the arrangements of the road, or alterations in the road itself.

RAILROAD COMPANY DOES NOT ASSUME DUTY TO PASSENGERS OF ANOTHER RAILROAD COMPANY by merely giving the latter permission to use its road; nor, it seems, by contracting to make its road safe for such passengers. The remedy of a passenger injured is against the company with whom he contracted.

RAILROADS ARE NOT NECESSARILY PUBLIC WAYS; and if it could be inferred from the nature of their chartered powers that they are such, or if the court is bound to take notice that they had become public corporations, it does not follow that all their tracks are public ways.

DUTIES OF OWNERS OF RAILROADS THAT ARE PUBLIC WAYS ARE CLOSELY ALLIED to those of towns, which are bound to keep in repair the public highways within their limits, and to those of turnpike and bridge companies, which are bound to keep in repair their roads and bridges; but the liability of those whose duty it is to keep in repair public ways is limited by the nature of those ways.

OWNERS OF RAILROADS THAT ARE PUBLIC HIGHWAYS ARE BOUND TO MAKE SUITABLE PLACES OF ACCESS to their roads, and keep the same in such condition that they may safely accommodate those who may be reasonably expected to use them; but there is no obligation to do anything, either for the convenience or safety of passengers, at points where none are expected to pass.

RAILROAD COMPANIES OCCASIONALLY TRANSPORTING PASSENGERS UPON FREIGHT TRAINS are not common carriers of passengers upon such

trains, and are not chargeable for the want of accommodations such as would be otherwise justly required.

DAMAGES FOR NEGLIGENCE CAN NOT BE RECOVERED if it appears that the injury the plaintiff sustained was in any degree caused by his own negligence or want of due care.

CASE. The plaintiff was injured by a fall into a passway while he was proceeding as a passenger to get on board of a freight train of the Northern railroad, which was standing on a track of the defendants. The material facts and the questions involved in the case are sufficiently set forth in the opinion. There was a plea of the general issue to the declaration. On the evidence given at the trial, the court directed a verdict for the defendants, and it was agreed that judgment should be entered thereon, or the verdict set aside and judgment entered for such damages as might be thereafter assessed, according as the opinion of the superior court should be upon the whole case.

W. H. Bartlett and Perley, for the plaintiff.

George and Foster, and Quincy, for the defendants.

By Court, BELL, J. It is never necessary to state the general law of the land in any pleading. The courts are bound to apply the law, as they know it to be, to the facts stated in the pleadings, without regard to any erroneous statement of the law made in those pleadings. Incorrect statement of the law may be cause of demurrer, but if no demurrer is interposed, the party is in no way bound by that statement, which will be merely disregarded. Upon a careful consideration of the statement of the legal obligations of the defendants in this case, made by the plaintiff in his declaration, we are unable to assent to his idea of the law in two particulars. If we are right in our impressions as to these, the plaintiff's claim will be left without any legal foundation, whatever opinions the court may entertain as to the other points raised in the very ingenious argument for the plaintiff. As to those points, for this reason, we have not felt it necessary to inquire. The particulars referred to are these: 1. That upon the facts alleged, the defendants owed a duty to the plaintiff; and 2. That they were bound to furnish a safe place for passengers to get into the cars, at every place where they, or other corporations using their road, receive and take in passengers. The relation of the Northern railroad, who had agreed to take the plaintiff as a passenger in their cars to the Concord railroad, the defendants, is thus alleged: "At the time of committing the grievances hereinafter mentioned, and before

and since, a certain other railroad corporation, called the Northern railroad, were in the rightful use of said Concord railroad, by permission of said Concord Railroad Corporation, for the carriage and conveyance of passengers in the cars of said Northern railroad. The evidence in the case was in substantial agreement with these allegations. The effect of these relations upon the rights of the railroads may be first looked at. And we think it clear, that if the Northern railroad ask and obtain the permission of the Concord railroad to use their road, that permission, given without any further actual contract, draws after it no obligation to put the road in repair, or to provide new or different landings or starting-places, or, indeed, to make any change in the arrangements of the road whatever, or alterations in the road itself. These railroads stand in the same relation to each other as two individuals, one of whom has a path through his own land, or a privilege for himself and such as may obtain his permission to use it, of a way through another man's land, and the other has obtained permission to use such path or way for his own business. There surely could not be any pretense that the owner of the land or way, in such case, was bound, in consequence of such permission, to make such way safe, any more than the owner of a wood-lot, who had given a neighbor leave to haul his wood across the lot, would therefore be bound to made him a good and safe way.

If, then, such permission implies no duty to the Northern railroad to make or alter their landings, it is difficult to see on what principle they can be held to have assumed any duty of that kind to the passengers in their cars. Any third person who enters upon the railroad of which the defendants are alleged to be "the owners and proprietors, at any other place than those provided for entering upon their cars, or for any other purpose than to take his place as a passenger in those cars, is *prima facie* a trespasser;" and if his purpose is to enter the cars of the Northern railroad as a passenger, his only claim of a right to do so is under the reasonable construction of the permission granted to that corporation to use the Concord railroad for the convenience of themselves and such passengers as they might desire to convey in their cars. That permission could not, of course, extend further in the case of such passengers than in the case of the railroad itself—a permission to use the railroad as it is.

If the use of the road was granted to the Northern railroad upon a contract by which the Concord railroad bound

themselves to make their road such that passengers may safely go to and get into the cars, at all such places as either of those railroads received passengers, it is not perceived how such a contract could give to any passenger who might suffer damage from their neglect to perform their contract any right of action resting on such contract. Parties who contract are answerable to each other for the breach of their stipulations, but not to third persons. It has never been supposed that a passenger in a stage-coach, who had been injured by an accident resulting from defects of the materials or unfaithfulness of the construction of it, could maintain an action against the coach-maker, who had warranted its quality to the carrier. His remedy is against the carrier, and the maker is liable to the carrier alone: *Winterbottom v. Wright*, 10 Mee. & W. 109; and see *Thomas v. Winchester*, 6 N. Y. 397 [57 Am. Dec. 455]. In the present case, supposing a contract between the two railroads, it seems quite as clear that the remedy of the sufferer is against the company with whom he has contracted. By using the railroad of another corporation as a part of their track, whether by contract or mere permission, they would ordinarily, for many purposes, make it their own, and would assume towards those whom they had agreed to receive as passengers all the duties resulting from that relation as to the road; and if accident resulted to such passengers from any failure of duty of the owners of the road, for which they would be responsible if the road was their own, their remedy over would be against the owners. No privity whatever would exist between the passengers of the Northern railroad and the Concord railroad in consequence of any contract between the two railroads.

It has been said in the argument that every ferryman is bound to have safe and secure landings, and we think the principle is clear to a certain extent. But the analogy between the case of the ferry and the railroad does not support the argument founded upon it. The railroad companies support two characters; they are, like canal companies, the owners of artificial ways, which, as such owners, they are bound to keep in suitable repair for the accommodation of those who have by law the right to use them. They are also common carriers, transporting passengers over their own roads, and occasionally over roads owned by others. As common carriers they are, like ferrymen, bound to transport their passengers safely, and bound to provide suitable access to their ferries or ways. If they are, at the same time, carriers and owners of the road or ferry, they are, of course, bound to keep

them in good repair, but they owe this duty to those whom they contract or undertake to transport, as part of their agreement to carry safely. If a ferryman, for his own convenience, obtains permission of the owner of a private landing to land his passengers there, rather than at his own landing, the owner of such private landing does not, by his mere permission to land there, engage that the landing is either suitable or safe; he does not bind himself to alter or repair it, and he is not responsible for any injuries that may result, either from original defects or neglect to repair. The permission allows its use in its present state, but it imposes upon the owner no duty, either to the ferryman or his passengers. The railroad company who obtain consent of another road to use their track, like the ferryman who gets leave to use another landing, owe a duty to their passengers that they shall be carried safely so far, as it is sometimes loosely said, as human caution and foresight can accomplish that object; but they have no claim upon those who give such permission to insist that the landing or track shall be safe, neither have their passengers any such claim. If the owner of the landing or track, for a proper consideration, lease the landing or track, there might, under some circumstances, be an implied contract that the property was suitable for the use for which it was hired. And in such case, and in the case of an express contract to make them suitable, the letter would be responsible to the hirer for any damages that might result from its insufficiency or want of repair. But the individual who sustained damage from these causes would have no remedy against the letter, because there is no contract or duty existing between them. His remedy would be against the party with whom he contracted.

In the views thus presented, we have considered the question upon the facts alleged in the declaration, which states that the defendants are owners and proprietors of a railroad, and contains nothing from which it can be inferred that their rights or their duties are in any respect different from those of the owners of any private property, unless it should be thought that the idea of a public way, and of the duties of those who are bound to maintain public ways, is comprised or implied under the word "railroad." A highway, *ex vi termini*, is a public way, as to which certain duties are impliedly imposed by law upon those who are charged with its support and repair. But it seems to us yet to be settled that the mere term "railroad" or "railway" has such signification. Railroads, over which all have equal rights

to travel and to run their engines and trains, are, of course, public ways; and railroads over which all who come have a right to be transported, as all have a right to be ferried across a river, will, perhaps, fall within the same class; but it is understood that there are many railroads abroad which are constructed and used exclusively for the private purposes of the companies who own them, as for transporting coal from the mines to places of shipment, ore to the furnaces, and the like; and probably they are to be found in our country constructed and used exclusively for private purposes like these. In many of our cities and manufacturing places, it is supposed there are many miles of railroads built and used only for the accommodation of the business of their owners. If our impressions in this respect are correct, no public duties result from the fact that a party is owner of a railroad. And if it could be even inferred from the nature of its chartered powers that the Concord railroad was a public way, as was held in *Concord Railroad v. Greely*, 23 N. H. 237, or if the court were bound to take notice that any such corporation had become a public corporation, by adopting the act of 1844, Comp. Stat. 340, it would not follow that all their track is a public way, since it is supposed that many railroad companies, and from the plan exhibited this among others, have many private tracks, designated and used solely for the private business of the company.

If we were, however, to understand that the Concord Railroad Company is the proprietor of a public road, which they were by law bound to make and keep in repair for the use of all who have occasion to travel and pass upon it, it might be reasonably argued that their duties were closely allied to those of towns, who are bound to keep in repair the public highways within their limits, and to those of turnpike and bridge companies, who are bound to keep in repair their roads and bridges. And as to these, we are not aware that it has been doubted that they are responsible to every person who sustains damage by reason of the defects of their road, whether he was passing on foot or riding in his own carriage, or that of any third person in the due exercise of his right as a member of the community. But it is to be borne in mind that there is a well-settled distinction between highways of different classes, and that the liability of those whose duty it is to keep in repair public highways is limited by the nature of those ways. Thus no responsibility attaches to the party bound to support a footway that it is not suitable for horses or cattle, nor to the owner of a pack and

prime way, for persons on foot and on horses, that it is unsuitable for carriages; and upon the same principle the owners of a public railway are chargeable with no fault if it is not suitable for foot-passengers, or for horses, cattle, or carriages, nor even if it is so constructed as to be dangerous to be used for such purposes. As to their tracks, it is supposed their only obligation is to make and keep them suitable for the use of railroad carriages.

To render such tracks useful, either to the railroad companies or to the public, it is obviously necessary that they should be accessible for those who have occasion to use them, by proper connections with the public ways, and there necessarily results, as we apprehend, a duty upon the railroad companies to make suitable ways or places of access to their road for persons who have occasion to get upon their cars, or to put merchandise upon them to be carried. Originally the question how many such places of access to their tracks should be made and maintained, and where they should be placed, was left by the legislature to the self-interest of the companies. By the act of 1850, chapter 983, section 6, it is made their duty, under severe penalties, to establish reasonable and proper depots and stopping-places for the public accommodation. This statutory declaration of the duty of railroad corporations is in exact conformity with the rule of the common law regulating the duty of towns as to the manner of constructing highways, and, it seems to us, the rule of good sense and reason. They are to establish such depots and stopping-places—places where those who have occasion to use the road may have access to it—at such places as are reasonable and proper for the public accommodation, and they are to be constructed and fitted as the public highways are, in such a manner as is reasonable and proper for the public convenience. If the amount of business to be done at a particular depot is large, or the number of persons to be accommodated is considerable, the arrangements should be on a scale so extensive as to meet the wants of the community. If the number to be accommodated is small, the accommodations may be narrowed in proportion, without giving to any person any just ground of complaint. Where no persons could usually be expected to be taken on board the cars, it could not be either reasonable or proper that any preparations should be made. Nor would it alter the duty of a railroad corporation in this respect, if, as a matter of convenience to others, they should occasionally take up or set down a passenger at a point where

no preparation had been made for his accommodation. It would seem to us very clear that they can not be held to make every part of their road suitable for landing or taking passengers because they may at some time have occasion to take in or set down a passenger at any place.

There can, we think, be no doubt that it was the duty of the railroad corporation to have all their landings and places of receiving passengers so constructed that persons going to and from the cars as passengers may pass with safety. But the injury in this case arose not from the defective construction of any landing, at the points where passengers usually get in and out of the cars. It is not alleged in the declaration that the place where the accident occurred, or the place where the cars into which the plaintiff desired to get were standing, was a common landing, or a place where passengers usually enter or leave the cars. All that is said and all that appears by the case to be proved is, that the cars were standing at a place where, by the permission of the defendants, the Northern railroad took and received passengers to be conveyed in their cars. There is nothing which imports that it was a place where the companies usually or frequently took in passengers; and we may just as reasonably suppose that the qualifying words, to be understood before "took in and received passengers," were "once before," or the like, as "often or commonly."

The question, then, does not relate to the usual landing-places, but to the principle which governs the duties and obligations of railroad companies as to the safety of passengers at those points where they, for the accommodation of a particular individual, may take him in as a passenger or permit him to leave the cars. The rule of duty of towns is to keep their roads in such state of repair as may be necessary for the travel passing upon them. A similar principle, it seems to us, must govern the case of railroads, as it regards the passage to and from the tracks. Where there is usually and habitually some passing, the access must be such as may safely accommodate the passengers who may be reasonably expected to frequent it. But it can not be necessary to make such preparations and take such precautions as would be necessary at the great stations. And, on the other hand, at places which are in no sense passenger-stations, where there is no reason to expect anybody to pass, there is no necessity, and therefore no duty, to make any preparations or to adopt any precautions. There is no obligation to do anything either for the convenience or safety of passengers at points where none

are expected to pass. The general duty alleged in the writ is not imposed by law, and the company were not bound to make access to their road safe at every point where they might in point of fact take in or set down a passenger.

The claim in this case, as stated in the writ, and as attempted to be proved upon the trial, rests upon the idea that there is no difference in point of law between the duties of the railroad company at places where passengers may be occasionally received on board of freight trains and those where they are usually received in the passenger trains. But this seems to us entirely unsound. We suppose it makes no difference that the Concord railroad and the Northern railroad are common carriers of passengers by their passenger trains, and of freight by their freight trains. The stage proprietor is a carrier of passengers by his coaches, but he does not thereby become a common carrier of passengers by his baggage wagons, if he carries on that business at the same time. Both the companies and the individuals, in these cases, are bound to their customers by the same duties relative to their freight trains and baggage wagons, and have the same rights as to the roads over which they travel, as if they had no connection with the business of common carriers of passengers. As to common carriers of freight, it would be the duty of the railroad to furnish safe means of access from the public ways to their cars for loading and unloading merchandise. The question here raised is, whether there is any duty upon them to furnish safe means of access for passengers upon those trains.

The first question which arises upon the point is whether the railroad companies have made themselves common carriers of passengers by their freight trains, because it is not to be questioned that they owe a duty to provide access for those passengers in proportion to the occasion that calls for it. It is very clear that a wagoner who occasionally carries a passenger upon his wagons, as a matter of special accommodation and agreement, does not thereby become a common carrier of passengers. He only becomes such when the carrying of passengers becomes an habitual business. Upon the evidence stated in this case, that "both roads had been in the habit of occasionally transporting some passengers upon the freight trains when they were anxious to go," we think we should not be justified in saying that they were common carriers of passengers upon their freight trains: *Elkins v. Boston and Maine Railroad*, 23 N. H. 275. And it seems to us clearly that if they were not such common car-

riers, they were not chargeable for the want of accommodations, such as would be otherwise justly required.

The party who makes an arrangement to be carried on a baggage wagon or a freight car impliedly agrees to accept and be satisfied with such accommodations, as it regards carriages and seats and places of entering and leaving the carriages, as may be found in the usual course of the business. If the cars, at the time of his agreeing for his passage and taking his seat, are at a merchandise depot, he is to be satisfied with such means of entering the cars as are provided for rolling in the cask or box on which he is to be contented to take his seat, if nothing better offers. If the cars are at the time standing upon a part of the track where there is no provision for landing or receiving either goods or passengers, he is to be satisfied with such means and facilities as may casually be within his reach. The company, considered as owners of the road or as carriers, are not in either case bound to make landings, or any provision whatever, for the reception or discharge of passengers where none are expected to be. The duties and obligations of parties are construed reasonably, with reference to the nature of their business. We understand that the freight trains upon these roads sometimes amount to fifty or more cars, and extend in length to two thousand feet or more, and that it depends upon what is in this respect mere matter of accident, the arrangement of the loading, where a place may be found for the casual passenger who may be forced to adopt this way of traveling. It may be at any part of the train, and provision must be made, if at all, for a safe entrance at every part of the train and at every part of the road where a passenger may desire to be put on board. A rule like that must be equivalent to a refusal to allow any passengers to be carried in this mode, unless they are at hand to take their places at the regular depots where the trains are loaded. It would be of mischievous consequence to adopt a rule which would deprive the railroad companies of the power to accommodate those whose occasions compel them to resort to these undesirable modes of conveyance.

Upon the facts, then, as they appear in this case, we are of the opinion that the railroad company was not bound to make any provision for the accommodation of a passenger like the plaintiff, beyond those ordinarily required by their own business, nor to have their road so constructed that he could safely go to and get into the cars. But that from the nature of the engagement

the plaintiff agreed to be satisfied with the state of things as it existed, if it was safe and suitable for a freight train.

There is a further principle applicable to this case, which stands in the way of a recovery by the plaintiff. It is well settled at common law, whatever doubts may exist at the justice of the rule, that the party who claims damages for the neglect of the duty of others to exercise proper care can not recover if it appears that the injury he sustained was in any degree caused by his own negligence or want of due care. The facts stated show that the plaintiff was upon the Concord railroad track, several hundred feet below the freight depot, at two o'clock at night. The night was dark, and he knew nothing of the road, and was without any light or guide. He was at the southern end of a long train, and having learned that the conductor of the Northern train was at the head of the train towards the north, he passed up the track, which was on a high embankment, and fell into a passway built over a public road, left open at the top that it might serve as a cattle-guard. If the case had been submitted to the jury, it would have been their duty to decide whether this was negligence in the plaintiff, and if so, whether it in any degree co-operated to cause the damage he sustained. Referred to us, it seems impossible to hold it to have been done in the exercise of that due care which men in general exercise in transacting their own business, or even of that slight care which inattentive men ordinarily take in cases involving their lives or limbs. This, however, is a question of fact, on which a jury would, of course, judge for themselves.

The action, then, can not be maintained upon the facts presented by the case, and there must be judgment for the defendants.

RAILROAD COMPANY'S LIABILITY FOR INJURY TO ANOTHER'S CAR THROUGH NEGLIGENCE TO REPAIR TRACK: See *Cumberland Valley R. R. v. Hughes*, 51 Am. Dec. 513.

RAILROADS, WHETHER PUBLIC PURPOSES: See *Sharpless v. Mayor etc. of Philadelphia*, 59 Am. Dec. 759, and note.

TOWN'S LIABILITY FOR INJURIES THROUGH DEFECT IN HIGHWAY: See *Jones v. Inhabitants of Wallham*, 50 Am. Dec. 783; *Baxter v. Winooski Turnpike Co.*, 52 Id. 84; *Raymond v. City of Lowell*, 53 Id. 57, and notes to these cases; and see *City of Tallahassee v. Fortune*, 52 Id. 358; *Lloyd v. Mayor etc. of New York*, 55 Id. 347; *Hutson v. Mayor etc. of New York*, 59 Id. 528, and notes to the various cases, on the liability of municipal corporations for injuries through defects in streets.

TURNPIKE COMPANY'S LIABILITY FOR INJURIES THROUGH DEFECT IN HIGHWAY: See *Baxter v. Winooski Turnpike Co.*, 52 Am. Dec. 84, and note.

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CO-OPERATIVE NEGLIGENCE AS DEFEATING RIGHT OF RECOVERY FOR INJURIES: See *Freer v. Cameron*, 55 Am. Dec. 663; *Trow v. Vermont Central R. R.*, 58 Id. 191, and notes to these cases; also *Beatty v. Gilmore*, 55 Id. 514. The principal case is cited in *Toledo etc. Railway v. Goddard*, 25 Ind. 198; *Newhouse v. Miller*, 35 Id. 466, to the point that a party complaining of an injury caused by the negligence of another can not recover if it appears that by the want of ordinary care and prudence on his part he directly contributed to the injury.

THE PRINCIPAL CASE IS CITED IN *O'Brien v. Boston etc. R. R.*, 15 Gray, 24, to the point that railroad companies are not bound to receive passengers at any part of their route, but only at the regular stations or appointed places on the line of the road, established by them at reasonable distances for the proper accommodation of the public; and see it cited and commented upon in *Lucas v. Milwaukee etc. Railway*, 33 Wis. 56, on the liability of railroads for injuries to passengers on freight trains.

BURKE v. ALLEN.

[29 NEW HAMPSHIRE, 106.]

MAKER MAY SHOW THAT PAYEE AND INDORSEER WAS INSANE at the time of the indorsement of the note, as a bar to a suit thereon by the indorsee.

EXCEPTION TO ADMISSIBILITY OF EVIDENCE NOT TAKEN IN COURT BELOW can not be insisted upon in the superior court.

EVIDENCE TO SHOW THAT PLAINTIFF'S TESTATE HELD NOTE AS AGENT AND NOT AS OWNER MAY BE REBUTTED by evidence of the state of the accounts and money transactions between such party and his indorser.

ASSUMPSIT on a promissory note made by the defendant to one Hannah Allen, as payee, and indorsed by her to Daniel Allen, the plaintiff's testate. Plea, the general issue. The defendant sought to show as a defense to the action that Hannah Allen, at the time of the indorsement of the note, was insane, but the court ruled that this could not be permitted. The defendant gave evidence to show that after the note had been made David Allen was heard to ask Hannah Allen to indorse it, but she refused, saying that she did not want the defendant to pay the note; and that David replied that all he wanted with it was to raise money to pay her debts, that he wanted to pledge the note as collateral security, and that he would give it back again. The plaintiff was then permitted, against the defendant's objection, to prove the state of accounts and money transactions between Hannah Allen and David Allen, in order that the jury could better determine whether the note went into David Allen's possession as agent or owner. The plaintiff had a verdict which the defendant moved to set aside because of the rulings of the court.

A. and S. H. Edes, and Cushing, for the defendant.

Burke, for the plaintiff.

By Court, EASTMAN, J. Whatever may have been the doctrine formerly in regard to insanity as a valid defense against an action upon the contract of a party, it seems to be now well settled that the contracts of idiots and insane persons are, as a general rule, not binding either in law or equity. The rule that a man shall not be permitted to stultify himself is now entirely exploded. Being bereft of reason and understanding, he is considered incapable of consenting to a contract, or doing any other valid act: *Yates v. Boen*, 2 Stra. 1104; *Webster v. Woodford*, 3 Day, 90; *Thompson v. Leach*, 3 Mod. 310; Bull. N. P. 172; *Mitchell v. Kingman*, 5 Pick. 431; *Seaver v. Phelps*, 11 Id. 304 [22 Am. Dec. 372]; *Lang v. Whidden*, 2 N. H. 435; *True v. Ranney*, 21 Id. 52 [53 Am. Dec. 164]. See also *Davis v. Lane*, 10 Id. 156.

In *Seaver v. Phelps*, *supra*, which was trover to recover the value of a promissory note pledged to the defendant by the plaintiff when the latter was insane, it was held that it was not a legal defense that the defendant at the time when he took the pledge was not apprised of the plaintiff's being insane, and had no reason to suspect it, and did not overreach him, nor practice any fraud or unfairness. The court said the fairness of the defendant's conduct can not supply the plaintiff's want of capacity. But it appears to be agreed that when goods have been supplied to insane persons which were necessities, or which were suitable to their station and employment, and which were furnished under circumstances evincing that no advantage of their mental infirmity was attempted to be taken, and which have been actually enjoyed by them, they are liable in law as well as equity for the value of the goods: 2 Greenl. Ev., sec. 369, and cases cited.

This exception, however, does not impair the general principle that the contracts of insane persons are invalid; and had the present action been brought against Hannah Allen, the payee of the note, to charge her as indorser, she could have set up insanity at the time of the indorsement, and if proved, it would have been a good defense. The contract would be one that an insane person would be incapable of making. So far the authorities are all agreed. But can the maker of the note interpose such a defense? Can he be permitted to show in bar of the suit that the payee and indorser was, at the time of the in-

dorsement, insane? If an insane person can do no act whatever that shall bind him or his representatives, as some of the books show, and if all of his acts are absolutely void, then it would appear plain that the defense can be set up; for the indorsement could effect nothing in any way. It would be simply a void act. Story, in speaking of persons *non compos mentis*, says that it is a rule not merely of municipal law, but of universal law, that the contracts of all such persons are utterly void: Story on Prom. Notes, sec. 101.

But the authorities generally do not go to that extent, and they treat the contracts of insane persons as voidable, not absolutely void: *Seaver v. Phelps*, 11 Pick. 305 [22 Am. Dec. 372]; 2 Greenl. Ev., secs. 369, 370; *Dane v. Kirkwall*, 8 Car. & P. 679; *Richardson v. Strong*, 13 Ired. L. 106 [55 Am. Dec. 430].

In *Price v. Berrington*, 7 Eng. L. & Eq. 254, a *quære* is suggested, whether a conveyance executed by a lunatic is absolutely void in the absence of notice and fraud; and the lord chancellor, in speaking of the question, says that it is not necessary to pronounce a decision upon the abstract general question whether, in the present state of the law, a conveyance executed by a lunatic is absolutely void.

There is a distinction to be found in some of the cases between the contracts of lunatics and those of insane persons; the term "lunatic" embracing in such cases persons of imbecile mind, as well as those of disordered intellect. But that distinction we need not trace, as in the present case the proposition was to show insanity in the payee. If we are to treat the contracts of an insane person as standing upon the same ground as those of infants, as is contended in argument, and voidable no further than theirs, the weight of authority appears to be that the maker of a note can not, in a suit by an indorsee, avail himself of the defense of infancy in the payee; and that such a defense is only personal to the infant interposing it. Story says that it seems now to be well settled that the indorsee of a note, by such transfer and indorsement, acquires a good and valid title to the note, against every other party thereto except the infant, since it is not a void, but a voidable, title only: Story on Prom. Notes, sec. 80. Chitty regards the question as to infant indorsers as not fully settled, though his opinion appears to incline to that of Story: Ch. Bills, 19, 20.

The following cases, among others, hold the same doctrine: *Taylor v. Croker*, 4 Esp. 187; *Haly v. Lane*, 2 Atk. 182; *Nightingale v. Withington*, 15 Mass. 272 [8 Am. Dec. 101]. In the

last case, Parker, C. J., says: "An infant may indorse a negotiable promissory note, or a bill of exchange, made payable to him, so as to transfer the property to the indorsee, for a valuable consideration. If an action should be brought against the infant as indorser, for default of payment by the promisor, without doubt he may avoid such action by the plea of infancy. But that is a personal privilege, which none but himself can set up in avoidance of any contract made in his favor."

But while we think that to hold all contracts whatsoever of an insane person to be absolutely void is carrying the doctrine too far, we also think that there should be a distinction made between the contracts of a minor and those of an insane person. The contracts of minors are held voidable for the reason that they are supposed to lack that discretion, prudence, and experience which age gives; and for the further reason that their parents, being legally bound to support them, are also entitled to their time and service. But with a person who is really insane, there is not the capacity to compare, reflect, decide, judge; there is wanting the power to understand the consequences of the acts done, and in many instances to know what is done. A minor who indorses a note payable to himself, and receives the money therefor from the indorsee, understands fully what he is doing; and although the act may be indiscreet and one which his natural guardian will disapprove, and although by such indorsement he may not unavoidably bind himself, yet if the payor finds the note in the hands of the indorsee, properly indorsed, he may well suppose that it has been done by the assent of the father, and payment made without notice from the payee will protect him. Having contracted with the minor to pay the amount of the note to him or his order, he can not deny the contract which he has made, and must be held to pay according to its terms, either to the minor or his order. The minor alone can take advantage of his minority. Moreover, the indorsee may be entirely ignorant of the minority, and an innocent holder of the note. The maker, also, may not know of the minority.

But with an insane person the matter is very different. He understands not the effect of indorsing the note, nor whether he is receiving a valuable consideration for the same or not. He may not even know that he is parting with his property; and an indorsee who should take a note under such circumstances would be guilty of fraud. If at the time the note is given the payee should be insane, and the maker should be aware of the fact, he would be bound in equity and good conscience not to

pay it to an indorsee till he had ascertained that he was the rightful and legal holder. Or if when it is given he should not be aware of the existence of the insanity, or if after it should be given the payee should become insane, the reason is equally strong why he should not pay it without due inquiry, if he had notice of the insanity. And if, under such circumstance, he ought not to be protected in paying the note to the indorsee, then it would seem to follow as a legitimate consequence that he should be permitted to show the existence of insanity at the time of the indorsement, in defense of an action brought by the indorsee.

There might, perhaps, be an answer to such a defense; as by showing that the transfer was made by the authority of a guardian, if there should be one. But the fact that there can be a good replication made to a plea involving such a defense does not show the plea in itself considered to be bad. And it appears to us that the due protection of the rights of an insane person requires that this defense should be permitted; for unless it is, then payment to an indorsee must be good, and a judgment in his favor upon the note must be a valid bar to any suit upon the same by the insane person or his representatives. If the maker of a note pays it to one who is not the rightful holder, it will be no defense to an action by him who is: *Davis v. Lane*, 8 N. H. 224. But if he is precluded by law from setting up a special defense against the holder, the existence of that defense can not be shown in a suit against him by another party as a reason why he should be chargeable. So if the maker can not show insanity in the indorser at the time of the transfer, in defense of a suit by the indorsee, then insanity can not be shown by the indorser or his representatives as a reason why the note should be paid to him instead of the indorsee, and the act of indorsement would be made legal, and the *non compos* would be unprotected from the effects of his indorsement.

There is another view that may be taken of this question. An indorsee of a promissory note, to sustain his action against the maker, must show the making of the note and a due indorsement and transfer; but if the indorser is insane and incapable of making a legal transfer, then the plaintiff must fail to make his proof. He must fail to sustain the allegations of his declaration. He can not show an indorsement, which is a requisite essential to his recovery. This precise point has been so settled in Massachusetts: *Peaslee v. Robbins*, 3 Met. 164. In delivering the opinion in that case, Wilde, J., says: "The

plaintiff is bound to show a legal transfer of the note, by proof of the handwriting of the indorser; and it follows as a necessary consequence that the defendant must be allowed to impeach the plaintiff's title to the note, by showing that the indorsement was void. Evidence, therefore, of the indorser's mental incapacity to make a valid contract at the time he indorsed the note was material evidence. All the evidence of the indorser's incapacity, before and after the indorsement, was properly submitted to the jury, to enable them to decide correctly on the question of his incapacity at the time of the indorsement.

We are aware that in holding evidence of the payee's insanity at the time of the indorsement and transfer to be competent as showing a defense for the maker, we interfere to some extent with the principles governing the free circulation of negotiable paper. But we think that greater wrong would be done to the unfortunate insane by excluding the defense, and thereby holding payment to any one who might be possessed of the note to be good, than mischief to community from any infringement upon the general doctrine governing the transfer of negotiable paper, by receiving it. The counsel for the plaintiff has taken the position that this defense can not be shown under the general issue. But that exception was not taken in the court below, and can not therefore be insisted upon here. It would seem, also, that the position itself is unsound, and that insanity may be pleaded specially, or given in evidence under the general issue: *Mitchell v. Kingman*, 5 Pick. 431; Gould's Pl., c. 6, sec. 38.

We discover no error in the ruling of the court admitting the evidence of the state of the accounts and money transactions between the plaintiff's testate and the indorser. The objection was not to the kind of evidence introduced to show the state of their dealings, but to the admissibility of the dealings themselves. And as it was in its nature rebutting, and in answer to a new position of the defendant, it was competent.

But the ruling excluding the evidence of insanity was wrong, and for its rejection the verdict must be set aside, and a new trial granted.

VALIDITY OF CONTRACTS OF INSANE PERSON: See *Richardson v. Strong*, 55 Am. Dec. 430; *Boyce's Adm'r v. Smith*, 60 Id. 313, and prior cases in the notes thereto.

ADMISSIBILITY OF EVIDENCE NOT OBJECTED TO ON TRIAL NOT CONSIDERED ON APPEAL: *Clark v. State*, 40 Am. Dec. 481; *Hewett v. Buck*, 35 Id. 24.

KELLY v. GILMAN.

[29 NEW HAMPSHIRE, 385.]

WRITS OF MESNE PROCESS RUNNING AGAINST BODY OF DEFENDANT ARE VOID if made returnable after an intervening term, or at no definite term; although in general, where the return-day of process is mistaken or defectively stated, the process is voidable only, and the defect may be remedied by amendment.

MONTH REFERRED TO WITHOUT DESIGNATION OF YEAR WILL BE UNDERSTOOD to be of the current year, unless from the connection it is apparent that another year is intended. A writ, therefore, made in February, returnable at the court to be held on the fourth Tuesday of April, will be understood as returnable on the fourth Tuesday of April next.

TRESPASS for assault and battery and false imprisonment. The plaintiff, who was indebted on a note to the defendant, was caused to be arrested by the latter under a writ of *capias* and attachment, issued on the seventeenth day of February, 1853, returnable to the court of common pleas of Carroll county, at Ossipee, on the fourth Tuesday of April, but without any designation of what April. It was attempted to justify under this writ, and it was agreed that if the court should be of the opinion that this suit can, in law, be maintained, then judgment should be rendered for the plaintiff for such sum as should be afterwards adjudged as damages and costs, and otherwise for the defendant for costs.

N. and G. N. Eastman, for the plaintiff.

H. A. Bellows, for the defendant.

By Court, BELL, J. The position of the plaintiff's counsel is that the writ upon which the plaintiff was arrested is void, and consequently no justification for the arrest, because it is not made returnable at the next term of the court. The general rule seems to be that where the return-day of process is mistaken or defectively stated, it does not render the process void, but only voidable, liable to be set aside; but the defect may be remedied by amendment. Thus in *Jackson v. Crane*, 1 Cow. 38, a writ, tested January 1, 1823, returnable on a day in January next, was held not void, but voidable only, though it was taken for granted that several terms intervened between the *teste* and the return. Similar decisions were made in *Knapp v. Palmer*, 1 Cai. 486; *Kissam v. Morris*, 2 Wend. 259; *Shirley v. Wright*, 2 Ld. Raym. 775. To this general rule there seems a well-settled exception in cases of writs of mesne process running against the body of the defendant, and made returnable

after an intervening term, because of the danger of the defendant being subjected to a long imprisonment. Such writs are not voidable, but void absolutely, and incapable of amendment. It was so decided, in conformity to earlier decisions, in *Parsons v. Loyd*, 3 Wils. 341; *Shirley v. Wright*, 2 Ld. Raym. 775; *Bunn v. Thomas*, 2 Johns. 190; *Burk v. Barnard*, 4 Id. 309; *Jackson v. Crane*, 1 Cow. 38; *Blanchard v. Goss*, 2 N. H. 491. If, then, the writ before us is to be construed as returnable after an intervening term, or if it is held not to be returnable at any definite term of the court, within the principle of the case of *Wood v. Hill*, 5 Id. 229, where a writ returnable out of term was held void, it must be regarded as a mere nullity, incapable of amendment and affording no justification.

There are decisions which hold that writs of *capias ad respondendum*, made returnable as in *Burns v. Thomas*, *supra*, on the 17th of May next, where the teste was May 12, 1826, have been held void, as being returnable after several intervening terms, May next being construed as May, 1827: *Jackson v. Crane*, *supra*. But we are unable to adopt this conclusion. Defects of form, in this state, are not grounds of demurrer, or of pleas in abatement, where the person or case can be rightly understood, but the courts are to order amendment: R. S., c. 186, sec. 10. Still less should any defect render process entirely void where the matter intended can be understood, however defective the manner of expression. Every reasonable presumption should be made to support process, which must otherwise be held void, *ut res magis valeat quam pereat*. Process may be regarded as voidable by reason of defects, without serious prejudice of the rights of parties, because such defects are in their nature amendable, under the orders of the court, upon such reasonable terms as may be just to both parties; and such defects may be waived or released by agreement of parties, or by such acts of the party entitled to take advantage of them as show that they are not relied upon; as suffering a default, pleading over to the merits, and the like. But it is otherwise with such defects as render process void. Parties who have acted ignorantly, under such invalid process, may be subjected to be treated as wrong-doers and trespassers, where they have intended to act with entire propriety. And courts will hardly hesitate to sustain such process where, without violence to the ordinary usages of language, it may be so understood as to render it legal and operative.

In the present case the writ was made in February, return-

able at the court to be held on the fourth Tuesday of April, without the usual addition of "next." And we think that, consistently with common usage, the process may be well understood, both by the party and the court, as returnable on the fourth Tuesday of April next, because it seems to us that the word "next" is implied in such a case, according to the general understanding of speakers and hearers; and the word is generally inserted in legal proceedings rather to preclude all uncertainty than because it is ordinarily considered necessary in less formal writings. If, for instance, this were the case of one gentleman writing to another, and proposing to meet him for the purpose of transacting some business at Ossipee on the fourth Tuesday of April, it would not be thought possible to misunderstand it as applying to any other time than April next. More especially would this be the case if such letter were in answer to a previous letter of his correspondent, saying 'that he would meet him for the purpose at any time not later than the close of the court at Ossipee. For in every such case the circumstances and nature of the case form a necessary ingredient in giving a construction to language. And in this case the nature of the process strongly forbids any other construction; for it is conceded that unless it is understood to mean April next, it is merely inoperative, a paper entirely void and incurable.

In several cases this court have manifested their disposition to adopt such a construction in cases somewhat analogous to this, as would be consistent with the natural understanding of the community as to what was intended, and such as would give effect to the proceeding rather than to defeat it wholly. In the case of *Osgood v. Hutchins*, 6 N. H. 375, upon an application by a prisoner to take the poor debtor's oath, an order of notice, dated May 6th, specified the twenty-second day of May next as the day of hearing, and it was held, upon consideration of many authorities there cited, that from the nature of the case the twenty-second of the same month was intended. And the court say that in a clause like that under consideration, the term "next" may be referred to the month or the day, according as the intention of the parties apparent upon the face of the instrument or the subject-matter of the transaction may require; and if possible, such construction should be given as will effectuate the intention of the parties or give effect to the proceedings. In *Nettleton v. Billings*, 13 Id. 446, which was a *scire facias* against bail, the notice to the bail was dated October 3, 1842, and stated that the execution was returnable on the third Tues-

day of October next, and it was held that though reference is usually made to the next antecedent, yet that is not necessarily so, but regard may be had to the subject-matter. The word "next" might be understood to apply to the day as well as the month. The defendant, the bail, could not have been misled. He could not have supposed that the execution was returnable in October, more than a year from its date. And, it may be added, that any other construction than that adopted by the court would be subversive of the whole design of the notice. And in *Rogers v. Farnham*, 25 Id. 511, the same principle was applied. Upon an attachment of goods, the summons was returnable "on the third Tuesday of August instant." It was served August 2d, but had no date. It was held the process must be construed as returnable at the next court after the service. The court being of opinion that the defendant could not be misled by the defect, the ordinary understanding of such a paper being that it was returnable at the court held in the same month in which the service was made.

It seems by the United States Digest, vols. 3, 5, 9, tit. Writs, that the same principle as to the word "next" has been adopted in *Gibson v. Laughlin*, Minor, 182; *Posey v. Franklin Branch*, 2 McMull. 338; *Findley v. Ritchie*, 8 Port. 452; *Dandridge v. Stevens*, 12 Smed. & M. 723; *Winston v. Miller*, Id. 550; *Murphy v. Williams*, 1 Ark. 376. The only case we have found which more nearly approaches the present is *Tillson v. Bowley*, 8 Greenl. 163, cited for the defendant. In a complaint for bastardy, dated November 7, 1829, the child was alleged to be begotten on the eleventh of April, without the word "last," or in any way stating the year, and it was held to refer to April next preceding. It was said by the court that "it was impossible to mistake what April was intended. When a month is referred to, it will be understood to be of the current year, unless from the connection it is apparent that another is intended." This case was cited with approbation in *Nettleton v. Billings*, *supra*, and seems to us entirely sound. It is agreeable to the common understanding of language in such cases, and in accordance with the spirit of the decisions of this court. The principle stated is decisive of this case. April is to be construed as April next, and the writ is therefore valid, and there must be judgment for the defendant.

THE PRINCIPAL CASE WAS CITED AND FOLLOWED in *Nash v. Mallory*, 17 Mich. 234, in holding that where a writ of attachment was tested and issued on the seventh day of February, 1867, but made returnable "on Tuesday, the second day of April," without expressing the year, it must be understood as referring to the April of the then current year.

PRESCOTT v. CARR.

[29 NEW HAMPSHIRE, 453.]

DISTINCTION BETWEEN WHOLE AND HALF BLOODS IS NOT ADMITTED IN New Hampshire in determining who are to take by inheritance, except where the statute has interfered to change the descent of property derived in a particular manner by an infant who dies under age and unmarried.

APPEAL from the decree of a judge of probate. A petition for a decree of distribution had been presented to the judge by the administrator of Thomas Babb, jun., representing the mother of the latter, his brothers and sisters, and their representatives, as his only heirs, and excluding the representatives of his half-sisters, who claimed to be of the next of kin and co-heirs. The judge entertained an opinion adverse to the prayer of the petition, but by agreement a decree was entered in accordance with the prayer, and those claiming as next of kin and co-heirs appealed. Further facts appear in the opinion.

Stevens, for the appellants.

Rogers, for the appellees.

By COURT, EASTMAN, J. The deceased, Thomas Babb, jun., died intestate, of age, unmarried, without issue, and without a father living, leaving personal property not derived by descent or devise. He had, at the time of his death, the following heirs, who, according to our statute, were in the same line of inheritance, viz.: his mother, Sarah Babb, his own brother and sister, James and Amelia Babb, and two nephews, Thomas B. and Artemas Carr, children of another sister, Priscilla Carr, deceased. He had also, at the time of his death, the following nephews and nieces, viz.: True McClary and Lucy M. Prescott, Elizabeth Moulton and Sarah J. Lord, and Elbridge, Emery, Sewell T., and Samuel D. T. Stevens. These nephews and nieces were the children of the half-sisters of the deceased; and the half-sisters were the children of his father by a former wife.

The controversy, then, is between children and their representatives of the same father by different mothers; and the question is, Do they all take alike from their brother, the deceased? or do the brothers and sisters of the same mother of the deceased, together with the mother, take the whole of the property, to the exclusion of the half-bloods? By the fifth section of chapter 166 of the revised statutes, it is provided that the personal estate of any person deceased, not bequeathed, remaining in the hands of the administrator, on settlement of his ad-

ministration account, shall be distributed by decree of the judge:

1. To the widow, the share thereof by law prescribed; 2. The residue, in equal shares, to the same persons to whom the real estate, if there were any, would by law descend. As the deceased left no widow, his property, being personal estate, would, under this section of the statute, be distributed to the same persons to whom it would have descended had it been real estate. By the first section of the same chapter it is provided that "the real estate of every person deceased, not devised, etc., shall descend in equal shares: 1. To the children of the deceased and the legal representatives of such of them as are dead; 2. If there be no issue, to the father, if he is living; 3. If there be no issue nor father, in equal shares to the mother and to the brothers and sisters, or their representatives; 4. To the next of kin in equal shares."

The second section of the chapter is as follows: "If any person shall die under age and unmarried, his estate, derived by descent or devise from his father or mother, shall descend to his brothers and sisters, or their legal representatives, if any, to the exclusion of the other parent." The intestate in this case, leaving no issue and no father living, and being more than twenty-one years of age, and having accumulated his property himself, his estate must be distributed under the third clause of the first section, "in equal shares to the mother and to the brothers and sisters, or their representatives." It could not be distributed under the second section, because his estate was not derived by descent or devise from his father or mother. He was, moreover, not under age, as required by this section. Who then were his brothers and sisters, or their representatives, who would take his estate under the third clause of the first section?

In giving a construction to the second section, we held in *Crowell v. Clough*, 23 N. H. 207, that where a man dies leaving several children, and one of them dies under age and unmarried, the surviving children of the deceased father will take the deceased child's share in their father's estate, to the exclusion of his brothers and sisters of the half-blood by the same mother but a different father. But although it was held in that case that upon the facts presented, the property being derived by descent from the father, the half-bloods would not be entitled to a distributive share, yet it was so decided under the particular provisions of the second section of the statute; and the general doctrine that, independent of express statutory enactment, no distinction is admitted between the whole and half bloods,

was distinctly recognized. In the course of the opinion delivered by Perley, J., it was said that the estate of the deceased inherited from her father will not go to her heirs and next of kin, as it would if it had come to her from another source. And again: "The surviving children do not take, under the general rule of descent, as heirs and next of kin to the deceased brother or sister, but they take, under the special provision of the statute, the share of the deceased brother or sister, as part of the parent's estate."

Prior to the decision of *Crooke v. Watts*, 2 Vern. 124, the rule in regard to half-bloods appears not to have been uniform, but ever since that decision, which was in 1690, and which was affirmed in the house of lords, it has been regarded as settled that, under the English statute of distributions, brothers and sisters of the half-blood share equally with those of the whole blood: Shower's P. C. 108; *Smith v. Tracy*, 1 Mod. 209; *Earl of Winchelsea v. Norcliff*, 1 Vern. 403. No distinction exists between the whole and half bloods in ascertaining who, under that statute, are the next of kin entitled to distribution: 4 Burns' Ecc. Law, 422; *Burnet v. Mann*, 1 Ves. sen. 156; 2 Kent's Com. 424.

Our statute of descents is copied, in substance, from the English statute of distributions; and we never look to the source whence the estate was derived to determine who shall inherit, except in cases where our statute has made that circumstance material: *Perkins v. Nims*, 2 N. H. 461. And such, it is believed, has been the general rule in this state. No distinction has been admitted between the whole and half bloods, except where the statute has interfered to change the descent of property, which may have been derived in the particular manner set forth in the second section. Under that section, the doctrine of *Crowell v. Clough*, *supra*, is undoubtedly correct. The statute is the rule governing such cases, and the general principle of distributions is broken in upon. The statute of Massachusetts is substantially like ours, and the same construction has been put upon it as with us. Thus in *Sheffield v. Lovering*, 12 Mass. 490, the father died seised in fee of land, leaving an only child and a widow, the mother of the child; the child died under age, not having been married; and it was held that, on the death of the child, the land descended, in equal shares, to the surviving mother and to her children by a former husband, brothers and sisters of the half-blood to the child. This decision was made upon the ground that there were no brothers and sisters, children of

the father from whom the land descended, to take the property after the death of the child, under the special provision of the statute, and so it descended according to the general rule.

The Massachusetts statute, regulating the distribution of property among the brothers and sisters of the deceased children of the parent from whom it descended, differs from ours in one respect. It does not embrace property derived by devise and descent, as ours does, but only by descent: *Nash v. Culler*, 16 Pick. 491. But this does not affect the construction put upon the statutes, so far as they go.

After a careful consideration of this case, we entertain no doubt that, independent of the special provisions of the second section of our statute, there is no distinction to be made between brothers and sisters of the whole and half blood. We have one uniform, general rule for the descent of real and personal property. Whether real or personal, it goes alike to the same persons and in the same proportions; and the English statute of distributions is its basis; a statute which, says Chancellor Kent, being founded in justice, and in the wisdom of ages, and fully and profoundly illustrated by a series of judicial decisions, has been well selected as the most suitable and judicious basis on which to establish our American law of descent and distribution: 2 Kent's Com. 428.

Upon these principles the property of the deceased, not having been derived by descent or devise from his father or mother, will fall to his mother, and to all of his brothers and sisters and their representatives of the half blood as well as the whole. All of the children of Thomas Babb, sen., or their representatives, whether the issue of his first or second marriage, are entitled to a distributive share of the estate of the deceased.

The opinion of the judge of probate was therefore right, but the decree as entered must be reversed.

Decree reversed.

INHERITANCE OF HALF-BLOOD.—IN ENGLAND.—At the common law, the half-blood was entirely excluded from taking an estate by inheritance, by the artificial rule of evidence that the one who is of the whole blood of the person last seized affords the best presumptive proof that he is of the blood of the first feudatory or purchaser: 2 Bla. Com. 228-231; 4 Kent's Com. 403; 3 Washb. Real Prop., c. 1, sec. 2, subd. 18; but by the statute of 3 & 4 Wm. IV., the half-blood is to succeed to the inheritance next after any relation in the same degree of the whole blood and his issue, where the common ancestor shall be a male, and next after the common ancestor where such ancestor shall be a female; and no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister

shall be traced through the parent: See *Wms. Real Prop.* 77. In the case of succession to personal estate by the English law, it may here be observed there was formerly some difference of opinion as to whether the half-blood took a full or half share with the whole blood, since the statute simply directed distribution to be made among the next of kindred of equal degree to the intestate; but the case of *Crooke v. Watts*, 2 Vern. 124; Shower's P. C. 108, has settled the law in this particular in favor of the half-blood, who now take whole shares: See 4 Burns' Ecc. Law, 422; *Burnet v. Mann*, 1 Ves. sen. 156; S. C., 1 Myl. & K. 672, note; *Smith v. Tracy*, 1 Mod. 209; *Jessopp v. Watson*, 1 Myl. & K. 665.

IN UNITED STATES.—Much difference exists in the laws of the several states in respect to inheritance of the half-blood; and Chancellor Kent says that "the laws of all countries, and of our own in particular, are so different from each other on the subject that they seem to have been the result of accident or caprice, rather than the dictate of principle:" 4 Kent's Com. 406. In some states no distinction is made between the whole and the half blood, but in most of them a difference more or less extensive exists, by which the half-blood is postponed. In none of the states, however, is the half-blood entirely excluded.

1. *States where Half-blood is not Expressly Excluded or Included.*—A few of the statutes regulating descents, namely, those of New Hampshire, Rhode Island, Iowa, and Louisiana, are broad in their nature, and do not in express terms provide that the half-blood shall or shall not inherit; and with reference to these, as was held in the principal case, no distinction is in general admitted between the whole and the half blood: See *Gardner v. Collins*, 3 Mason, 398; 2 Pet. 58; *Clark v. Sprague*, 5 Blackf. 412; *Pearson v. Orice*, 6 La. Ann. 232; *Neeley v. Wise*, 44 Iowa, 544. There is, however, a general exception in Rhode Island in favor of the blood of the ancestor, in the case of real estate which came to the intestate by descent, gift, or devise from a parent or other kindred; and in New Hampshire, if the estate was derived by the intestate by descent or devise from a parent, it descends to his brothers and sisters, or their legal representatives, to the exclusion of the other parent.

Meaning of "Brothers and Sisters," "Next of Kin," etc.—There is an almost uniformity of opinion that when a statute provides for the inheritance of "brothers and sisters," the term includes the half-blood: *Gardner v. Collins*, *supra*; *Sheffield v. Lovering*, 12 Mass. 490; *Rowley v. Stray*, 32 Mich. 70, 75; *Oliver v. Sanders*, 8 Ohio St. 501; *White v. White*, 19 Id. 531, 536; *Clark v. Sprague*, *supra*; *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442; *Aldridge v. Montgomery*, 9 Ind. 302; *Clay v. Cousins*, 1 T. B. Mon. 75; *Marlow v. King*, 17 Tex. 177, 178; see the principal case; but the opposite conclusion was reached in South Carolina, in *Wren v. Carnes*, 4 Deau. 405; *Lawson v. Perdriauz*, 1 McCord, 456, in construing the amendment of 1797 to the act of 1791 relating to descents and distributions; and see *Clark v. Pickering*, 16 N. H. 284; *Crowell v. Clough*, 23 Id. 207; *Perkins v. Simonds*, 28 Wis. 90. And where a statute provides that if there are no children of the intestate all his right, title, and interest in his real property "shall vest in and be divided equally among the next of kin in equal degree, and those who shall represent them if any of them be dead, computing according to the degrees of the civil law," brothers and sisters of the half-blood, it seems, inherit equally with those of the whole blood, since by the civil law they are equally next of kin: *Gardner v. Collins*, 3 Mason, 398, 403; and the term "next of kin" found in other statutes is likewise so construed to include

the half-blood in *Edwards v. Baradale*, 2 Hill Ch. (S. C.) 416; S. C., Riley Ch. 16; *Karwon v. Lowndes*, 2 Dessau. 210; *Guerard v. Guerard*, 4 Id. 405, note; *Hillhouse v. Chester*, 3 Day, 166; *McKinney v. Mellon*, 3 Houst. 277. So the words "lawful heirs" in a will refer to heirs of the half as well as of the whole blood: *Sharp v. Kleinpeter*, 7 La. Ann. 284.

2. *States where Distinction between Whole and Half Blood is Expressly Abolished.*—In Maine: R. S. (1883), c. 75, sec. 2; Massachusetts: Pub. Stat. (1882), c. 125, sec. 2; Vermont: Rev. Laws (1880), sec. 2231; Washington: Code (1881), sec. 3307—it is provided that "kindred of the half-blood shall inherit equally with those of the whole blood in the same degree;" and the meaning of this, in the ordinary case of inheritance, is evidently plain: *Hatch v. Hatch*, 21 Vt. 450; so kindred of the half-blood in any degree take equally under the act with those of the whole blood in the same degree, in the distribution of personal property: *Larrabee v. Tucker*, 116 Mass. 562. In Illinois the statute is even stronger in its wording in favor of the half-blood, for it reads: "In no case shall there be any distinction between the kindred of the whole and the half blood:" R. S. (Cothran, 1883), c. 39, sec. 1; and it is held that it is not confined in its application to cases where the ancestor from whom the estate is derived leaves children by different mothers; the children of the same mother, but who have different fathers, are no less brothers and sisters of the half-blood than are the children of the common father, but who have different mothers: *Oglesby v. Pasco*, 79 Ill. 164. In Kansas the provision is more restricted in its language: "Children of the half-blood shall inherit equally with children of the whole blood:" Comp. Laws (Dassler, 1881), c. 33, sec. 29. Where an act declares that if a married woman "die possessed of slaves or other personal chattels as her separate property, leaving issue of her body, either by a former husband or by her surviving husband, such slaves and other personal chattels shall descend to her children in equal shares," the children of a first marriage are entitled to an equal share of their deceased mother's personal chattels with the children of the second marriage: *Marshall v. King*, 24 Miss. 85; *Bates v. Cotton*, 32 Id. 266. The following provision is found in the Georgia code (1882), section 2434: "Brothers and sisters of the intestate stand in the second degree, and inherit, if there is no widow or child, or representatives of child. The half-blood on the paternal side inherit equally with the whole blood. If there be no brother or sister of the whole or half blood on the paternal side, then those of the half-blood on the maternal side shall inherit. The children or grandchildren of brothers and sisters deceased shall represent and stand in the place of their deceased parents, but there shall be no representation further than this among collaterals."

3. *States Favoring Blood of Ancestor in Ancestral Estates Only.*—In California the statutory provision on the question under consideration is as follows: "Kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance:" Civil Code, sec. 1394; and a like provision is found in Dakota: Civil Code, sec. 787; Michigan: Gen. Stat. (Howell, 1882), sec. 5776 a; Minnesota: Gen. Stat. (1878), c. 46, sec. 7; Montana: R. S. (1879), 2d div., sec. 543; Nebraska: Comp. Stat. (1881), c. 23, sec. 33; Nevada: 1 Comp. Laws (1873), sec. 797; Utah: Comp. Laws (1876), sec. 721; Wisconsin: R. S. (1878), sec. 2272. In New York: 1 R. S. 753, sec. 15; 3 Id. (Bank's ed., 1882), 2212, sec. 15; and Arkansas: Dig. (Gantt, 1874), sec. 2173—it is provided, substan-

tially as above, that "relatives of the half-blood shall inherit equally with those of the whole blood in the same degree, and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance." In Alabama: "There is no distinction made between the whole and the half blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift from or of some one of his ancestors, in which case all those who are not of the blood of such ancestor are excluded from the inheritance, as against those of the same degree;" Code (1876), sec. 2236; and it will be observed that the clause referring to ancestral estates is more specific than those of a like nature quoted above. In Indiana the section is: "Kindred of the half-blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate by gift, devise, or descent from any ancestor, those only who are of the blood of such ancestor shall inherit; provided that on failure of such kindred, other kindred of the half-blood shall inherit as if they were of the whole blood;" R. S. (1881), sec. 2472.

The North Carolina act of 1784, section 3, provided: "That if any person dying intestate should at the time of his or her death be seised or possessed of, or have any right, title, or interest in or to, any estate or inheritance in lands or other real estate in fee simple, and without issue, such estate or inheritance shall descend to his or her brothers, and for want of brothers, to his or her sisters, as well those of half-blood as those of whole blood; * * * provided always that when the estate shall have descended on the part of the father, and the issue to whom such inheritance shall have descended shall die without issue, male or female, but having brothers or sisters of the paternal side, of the half-blood, and brothers and sisters of the maternal line, also of the half-blood, such brothers and sisters respectively of the paternal line shall inherit in the same manner as brothers and sisters of the whole blood, until such paternal line is exhausted of the half-blood; and the same rule of descent and inheritance shall prevail amongst the half-blood of the maternal line, under similar circumstances, to the exclusion of the paternal line." The Tennessee act of 1784, chapter 22, section 3, which has been reenacted in 2 Stat. (1871), sec. 2420, in a somewhat modified form, was the same. The present statute of North Carolina is as follows: "Collateral relations of the half-blood shall inherit equally with those of the whole blood, and the degrees of relationship shall be computed according to the rules which prevail in descents at common law; provided always that in all cases where the person last seised shall have left no issue capable of inheriting, nor brother nor sister, nor issue of such, the inheritance shall vest in the father, if living, and if not, then in the mother, if living;" Battle's Revision (1873), c. 36, rule 6. The act of 1808 was the same, except it provided for the vesting of a life estate only "in the parents of the intestate, or in either of them if one only be living, and on the death of one of the parents, then in the survivor, and afterwards be transmitted according to the preceding rules." Two of the preceding rules, which are the same now as then, are: Rule 4: "On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise, or settlement from an ancestor to whom the person thus advanced would, in the event of such ancestor's death, have been the heir, or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seised, who were of the blood of such ancestor.

subject to the two preceding rules;" Rule 5: "On failure of lineal descendants, and where the inheritance has not been transmitted by descent, or derived as aforesaid from an ancestor, or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relation, capable of inheriting, of the person last seised, whether of paternal or maternal line, subject to the second and third rules." The exception so made in the foregoing states in favor of the blood of an ancestor from whom an estate is derived, grafted on these broad provisions in relation to the inheritance of the half-blood, is evidently a relic of the feudal law, which, it seems to us, the legislatures, having gone thus far, might with propriety have omitted. The reason is not satisfactory why, under our system of landed property, this distinction should be made with an estate capable of being inherited, while no distinction at all is observed in the case of distribution of personal property, by whatever means acquired. Chancellor Kent says: "There seems to be no very strong general principle (though no doubt the feelings of nature might interpose some powerful appeals in particular cases) why the half-blood should be admitted equally to the inheritance of the ancestor which he acquired by purchase, and excluded from that which he acquired by descent, devise, or gift from some remoter ancestor in whose blood they do not equally partake. If the ancestor was lawfully seised in fee, why should the course of descent be varied according to the source from which his title proceeded, or the manner of his procuring it?" 4 Kent's Com. 406. It is clear that under these statutes last above given, if the estate is a newly purchased inheritance, or did not come to the intestate by descent, devise, or gift, or by descent alone, from some of his ancestors, the distinction between the half and the whole blood in the same degree is abolished: *Brown v. Burlingham*, 5 Sandf. 418, 422; *McCracken v. Rogers*, 6 Wis. 278; *Armington v. Armington*, 28 Ind. 74; *Van Sickle v. Gibson*, 40 Mich. 170.

It will also be noticed that the exception as to ancestral estates in the North Carolina and Tennessee acts of 1784 applies only where such estates are derived by descent; and therefore where the intestate took by devise, his brothers and sisters of the half-blood, although not of the blood of the ancestor, inherit equally with those of the whole blood: *McKay v. Hendon*, 3 Murph. 209; *Ross v. Torns*, 2 Hawks, 9; *Nichol v. Dupree*, 7 Yerg. 415; see also *Hall v. Jacobs*, 4 Har. & J. 245, under the Maryland act of 1786, chapter 45. And where the intestate acquired the estate by will of his father, the maternal sister of the half-blood takes in preference to a nephew of the whole blood: *Doe ex dem. Sheppard v. Sheppard*, 3 Murph. 333. And under rule 4 of the North Carolina statute as it now stands, in order that the blood of the ancestor shall prevail where the estate is derived from him by gift, devise, or settlement, the intestate must have been the heir or one of the heirs of such ancestor. Thus where land was devised by a father to a second son, who as the law stood was not the heir, and the son afterwards died intestate and without issue, leaving surviving him a sister of the whole blood, and the issue of a sister of the half-blood on the mother's side, the latter take a moiety of the land: *Doe ex dem. Burgwyn v. Devereux*, 1 Ired. L. 583; and where a paternal grandfather devised land to his grandson, who died in the life-time of his father, the devisee not being an heir or one of the heirs of the deviser, the estate passed to his uncles and aunts on both the maternal and paternal sides: *Osborne v. Widenhouse*, 3 Jones Eq. 238; but where a devise was made by a grandfather to a grandson, who would have succeeded to the land of the former had he died intestate, upon the devisee's dying intestate and without issue, the estate derived shall descend, under the act of 1808,

which is the same as the existing statute, to his first cousin on the part of his grandfather, rather than to a half-brother who is not of the blood of the devisor: *Den ex dem. Felton v. Billups*, 2 Dev. & B. L. 308.

The difficulty arises in the construction of the exception or proviso. Where the claimants of an ancestral estate are part of the whole and part of the half blood, not of the blood of the ancestor, there is little room for doubt that the latter are excluded in favor of the former. Thus, where lands come to the intestate by descent, his brothers and sisters of the whole blood take in exclusion of brothers and sisters of the half-blood, not of the blood of the ancestor: *Aulridge v. Montgomery*, 9 Ind. 302; *Doe ex dem. Pipkin v. Coor*, 2 Murph. 231; *Deadrick v. Armour*, 10 Humph. 588. And where the issue represents the parent, if an estate descended to the intestate from his mother, a niece of the whole blood will take in exclusion of a sister of the half-blood of the intestate on the paternal side: *Doe ex dem. Ham v. Martin*, 1 Hawks, 423. But the questions present themselves, What is the meaning of the words "ancestor," and "of the blood?" and does a remote relative of the blood of the ancestor exclude a nearer relative not of such blood? In the first place, it is settled, both with reference to the statutes in question and other statutes where the expression occurs, that the phrase "of the blood" includes the half-blood: *Gardner v. Collins*, 2 Pet. 58; *Den ex dem. Delaplaine v. Jones*, 3 Halst. 340; *Baker v. Chalfant*, 5 Whart. 477; *Beebe v. Griffing*, 14 N. Y. 235; *Stallworth v. Stallworth*, 29 Ala. 76; *Johnson v. Copeland's Adm'r*, 35 Id. 521; *Cutter v. Waddington*, 22 Mo. 206. Thus, on the death of a child intestate, slaves which she derived by descent from her father are to be distributed among her brothers and sisters of the half-blood on the father's side, and to the exclusion of brothers and sisters of the half-blood by the mother; but money, which was the product of the hire of the slaves after they were distributed to the intestate, is not an "inheritance," and did not come to the intestate by "descent, devise, or gift," and is to be distributed equally among all the brothers and sisters: *Johnson v. Copeland's Adm'r*, *supra*. In the next place, the term "ancestor" refers to the immediate ancestor from whom the intestate received the inheritance, devise, or gift, and not to a remote ancestor who was the original source of title: *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Valentine v. Wetherill*, 31 Barb. 655; *Emanuel v. Ennis*, 16 Jones & S. 430; 8 C. C., 16 N. Y. Week. Dig. 430; *Lessee of Prickett v. Parker*, 3 Ohio St. 394; *White v. White*, 19 Id. 531; *Cutter v. Waddington*, 22 Mo. 206; *Smith v. Smith*, 23 Ind. 202; *McMakin v. Michaels*, Id. 462; *McClanahan v. Trofford*, 46 Id. 410; *Heavenridge v. Nelson*, 56 Id. 90; and the same is true when instead of "ancestor" the word "kindred" is used: *Gardner v. Collins*, 2 Pet. 58. Thus, where an intestate died unmarried and without issue, seized of certain real property which had descended to him from a deceased brother of the whole blood, who had in turn taken the property by descent from his mother, half-brothers by the father, being of the "blood" of the "ancestor," share equally with the brothers of the whole blood: *Emanuel v. Ennis*, *supra*; and where an infant died seized of land which had descended to her from her father, and to her father from her grandfather, the property passes from her to the half-brother and half-sister of her father, though they were not of the blood of the grandfather, to the exclusion of the grandfather's brothers and sisters: *White v. White*, *supra*; so where land descended to two children from their father, and upon the death of one his half went to the other, upon the death of the latter intestate, his half-brothers by his mother are not excluded from inheriting the moiety which came to him from his brother: *Lessee of Prickett v. Parker*; *Cutter v. Waddington*; *Wheeler v. Clutterbuck*, *supra*; but

they are excluded from inheriting the moiety directly descended from the father: *Cutter v. Waddington*, *supra*; and where one third of the intestate's estate was acquired directly from her father, and two thirds by descent from her brothers and sisters, the paternal brothers and sisters take the one third in preference to the intestate's half-sister by her mother, but the two thirds descend to the half-sister, the intestate having no mother living at the time of her death: *Valentine v. Wetherill*, *supra*; so if a husband die intestate, leaving a second wife, and a child, the only issue of the second marriage, and also a child by his first marriage, and afterwards the second wife die intestate, without having again married, the one third of the husband's land which she took in fee simple at his death descends to her own child: *Smith v. Smith*, *supra*; and to the same effect is *McMakin v. Michaels*, *supra*; and where a man died, leaving a widow and one child, who inherited his real estate equally, and subsequently the widow also died intestate, leaving the said child, and other children by a former husband, her portion of the land descends in equal shares to all her children: *McCanahan v. Trafford*, *supra*; and where, also, the owner of lands died intestate, leaving surviving him a widow, children by her, and children by a former marriage, and subsequently the widow died, leaving such children, and also children by a prior marriage, her interest in the lands descends equally to all her children by both marriages, to the exclusion of her second husband's children by his first marriage: *Heavenridge v. Nelson*, *supra*. As to the meaning of the general words "brothers and sisters," "next of kin," etc., found in these statutes, see *supra*, this note.

A more difficult question, which may arise under all the statutes except that of Alabama, is the one above suggested, viz.: Does a remote relative of the blood of the ancestor exclude a nearer relative not of such blood? Different courts give opposing answers to this inquiry. Thus in Michigan it is held that the provision is not to be construed to divert the descent of an ancestral inheritance from the nearest of kin; but if there are several next of kin in the same degree, who are not all of the same blood, then only such of them will take as are of the same blood as the ancestor from whom the estate was derived: *Ryan v. Andrews*, 21 Mich. 229; *Rowley v. Stray*, 32 Id. 70; and a like conclusion is reached in Indiana: *Robertson v. Burrell*, 40 Ind. 328; *Cox v. Matthews*, 17 Id. 367, 370. "If there is but a single next relative," says Campbell, C. J., in *Ryan v. Andrews*, *supra*, "he or she will take the whole estate without reference to whether the kindred is on one side of the one parent or the other. If there are several next of kin, and they are not all related on the same side, then only such of them will take as are of the blood of the ancestor from whom the estate was derived." Therefore, it was held that where an estate descended to the intestate from his father, it goes to the intestate's maternal grandmother in preference to more distant relatives of the father; and where an intestate who had inherited his estate from his father left, as his nearest surviving kindred, his paternal grandmother, and the children of his mother's second marriage, the latter take in preference to the former: *Rowley v. Stray*, *supra*; so brothers and sisters of the half-blood, who are not of the blood of the ancestor from whom the land descended, are not postponed in favor of the uncles and cousins of the intestate who are of such blood: *Robertson v. Burrell*, *supra*. But in Arkansas, after an elaborate discussion of the statute of descents and distributions, the conclusion was reached in *Kelly's Heirs v. McGuire*, 15 Ark. 555, that in real estate which descended from a father, half-sisters by the mother take nothing, but it goes to the paternal grandfather and de-

ascendants of a paternal aunt; see also *Scull v. Vaughn*, Id. 695; and in Missouri, in *Cutter v. Waddington*, 22 Mo. 206, the view is maintained that where the ancestral estate came to the intestate from his father, brothers of the half-blood on the mother's side are entirely excluded in favor of paternal aunts; so in Wisconsin, in *Perkins v. Simonds*, 28 Wis. 90, it is held that the exception in the statute applies to all cases falling within its terms, and is not limited to cases where the intestate does not leave issue, widow, father, mother, brother, or sister; and therefore where an intestate left a mother, his estate descended from his father goes to his father's brothers and their representatives in preference to the intestate's half-sisters by the mother; compare *Estate of Kirkendall*, 43 Id. 167; and in New York the decisions are in harmony with these latter cases, which seem to us to announce the correct interpretation of the statutory enactments: *Valentine v. Wetherill*, 31 Barb. 655; *Conkling v. Brown*, 57 Id. 655. In North Carolina the earlier cases preferred half-blood not of the blood of the ancestor to more remote kindred of such blood: *Ballard v. Hill's Heirs*, 3 Murph. 410; *Doe ex dem. Seville v. Whedbee*, 1 Dev. L. 160; and see *Doe ex dem. Prichard v. Turner*, 2 Hawks, 435; and the same ruling obtains in Tennessee: *Nesbit v. Brynn*, 1 Swan, 408; *Chaney v. Barker*, 3 Baxt. 424. But other North Carolina decisions under different statutes give preference to more remote collaterals of the blood of the ancestor: *Bell v. Dozier*, 1 Dev. L. 333; *Den ex dem. Felton v. Billups*, 2 Dev. & B. L. 308; *Dozier v. Grandy*, 66 N. C. 484; although it must be remembered that under the proviso of rule 6, of the act of 1808, a life estate might first go to a surviving parent: *Bell v. Dozier*, *supra*; but as the law now stands, the inheritance vests in such parent, and, it is held, to the exclusion of the half-blood not of the blood of the ancestor. Thus where intestates die seized of land descended from the maternal side, leaving no issue, nor brothers or sisters, except half brothers and sisters not of the mothers' blood, surviving fathers will take the inheritance, and the same rule would of course apply, under like circumstances, where the lands descended from the paternal side, regard not being had to the question whether the parent is of the blood of the purchasing ancestor: *McMichael v. Moore*, 3 Jones Eq. 471; *Little v. Buie*, 5 Id. 10. In North Carolina, also, the case where the blood of the ancestor has become extinct is specially provided for by rule 5; and consequently, where an estate has been transmitted by descent from a maternal ancestor, and the blood of such ancestor has become extinct upon the death of the person last seized intestate and without issue, the estate descends to her nearest collateral relatives, who were a brother and two sisters of the half-blood on the father's side: *Den ex dem. University of North Carolina v. Brown*, 1 Ired. L. 387.

In certain states the exception as to ancestral estates, instead of being general, is confined to infants dying intestate: Florida: Dig. Laws (McClellan, 1881), c. 92, sec. 2; Kentucky: Gen. Stat. (1883), c. 31, sec. 9; Virginia: Code (1873), c. 119, sec. 9. These statutes are somewhat different, however, in their language. In Kentucky, under the section above referred to, and under section 3, to be hereafter quoted, of the same chapter, where an infant dies possessed of real estate devised to him by his father, having brothers and sisters of the whole and of the half blood by the father, those of the half-blood take half-shares with those of the whole blood, but are not entirely excluded: *Talbott's Heirs v. Talbott's Heirs*, 17 B. Mon. 1. It is held that where a statute provides that "when any of the children of the intestate die before twenty-one years of age and unmarried, such child's share shall descend among the surviving brothers and sisters;" by the term "surviving brothers and sisters"

is meant the children of the intestate, and no others, to the exclusion of brothers and sisters of the half-blood by the mother: *Clark v. Pickering*, 18 N. H. 234; and where a man dies leaving several children, and one of them dies under age and unmarried, the surviving children of the deceased father will take the deceased child's share in their father's estate, to the exclusion of brothers and sisters of the half-blood by the same mother, but by a different father: *Crowell v. Clough*, 23 Id. 207; so held under the N. H. R. S. (1842), c. 168, sec. 2; Gen. Laws (1878), c. 203, sec. 2, which is: "If any person shall die under age and unmarried, his estate derived by descent or devise from his father or mother shall descend to his brothers and sisters, or their legal representatives, if any, to the exclusion of the other parent." And under a territorial statute of Wisconsin, which was substantially the same as that which received a construction in *Clark v. Pickering*, *supra*, it was held in *Perkins v. Simonds*, 28 Wis. 90, that the portion of the estate therein described must be regarded as descending to the surviving brothers and sisters from the father, and not from the deceased child, citing *Sheffield v. Lovering*, 12 Mass. 490; *Nash v. Cutter*, 16 Pick. 491, decided under a similar statute; and *Crowell v. Clough*, *supra*, and the principal case, as adopting the doctrine of these cases in New Hampshire under a like statute; therefore where lands came from the father, sisters of the half-blood by the mother are excluded in favor of the father's brothers and their representatives.

It may here be observed that under the foregoing statutes the half-blood share equally with the whole blood in the distribution of personal estate, by whatever means it may have been acquired by the intestate: *Champlin v. Baldwin*, 1 Paige, 562; *Kelly's Heirs v. McGuire*, 15 Ark. 556; *Johnson v. Copeland's Adm'r*, 35 Ala. 521; *Henderson v. Sherman*, 47 Mich. 267; *Kyle v. Moore*, 3 Sneed, 183; *Deadrick v. Armour*, 10 Humph. 588.

4. *States where Half-blood Take Half-portions.*—In several states the half-blood inherit, but only half-portions. Thus in Florida it is provided that "where the inheritance is directed to pass to the ascending and collateral kindred of the intestate, if part of such collaterals be of the whole blood to the intestate, and the other part of the half-blood only, those of the half-blood shall inherit only half as much as those of the whole blood; but if all be of the half-blood, they shall have whole portions, only giving the ascendants, if any there be, double portions." Dig. Laws (McClellan, 1831), c. 92, sec. 4; this provision, with a few minor differences in language, is found in Missouri: 1 R. S. (1879), sec. 2164; and in Texas: R. S. (1879), art. 1648; except that the last clause reads, "but if all be of the half-blood, they shall have whole portions." In Virginia, Code (1873), c. 119, sec. 2; and in West Virginia, R. S. (Kelly, 1879), c. 66, sec. 2, the section is: "Collaterals of the half-blood shall inherit only half so much as those of the whole blood; but if all the collaterals be of the half-blood, the ascending kindred, if any, shall have double portions;" the Kentucky statute differs somewhat from this: "Collaterals of the half-blood shall inherit only half so much as those of the whole blood, or as ascending kindred, when they take with either:" Gen. Stat. (1883), c. 31, sec. 3. In Colorado, Gen. Stat. (1883), sec. 1041; and Wyoming, Comp. Laws (1876), c. 42, sec. 3, it is provided that "children and descendants of children of the half-blood shall inherit the same as children and descendants of the whole blood, but collateral relatives of the half-blood shall inherit only half the measure of collateral relatives of the whole blood, if there be any of the last-named class living." It is evidently plain that under these statutes, where a deceased person leaves brothers and sisters of the whole and of the half blood, the latter inherit half as much

as the former: *Lee v. Smith*, 18 Tex. 141; *Petty v. Malier*, 15 B. Mon. 591; see also *Brown v. Tuberville*, 2 Call, 390; *Blunt v. Gee*, 5 Id. 481; but if he leaves no brothers or sisters of the whole blood, but those of the half-blood, the latter inherit as if they were of the whole blood: *Marlow v. King*, 17 Tex. 177. It seems that more of a distinction between brothers and sisters of the whole and of the half blood than now formerly existed in Missouri: *Ravenscroft v. Shelby*, 1 Mo. 694. In regard to the limited exception made in some of the foregoing states as to ancestral inheritances, see *supra*, this note, subdivision 3.

5. *States where Whole Blood is Preferred to Half-blood.* The whole blood is given more of a preference in the remaining states over the half-blood. In Mississippi it is provided that "there shall in no case be a distinction between the kindred of the whole and half blood, except that the kindred of the whole blood in equal degree shall be preferred to the kindred of the half-blood in the same degree:" Rev. Code (1880), sec. 1271; and an early statute to the same effect existed in Alabama. Under this provision, brothers and sisters of the whole blood of course exclude those of the half-blood: *Hulme v. Montgomery*, 31 Miss. 105; *McLemore v. McLemore*, 8 Ala. 687; and children of a deceased brother or sister of the whole blood will also exclude brothers or sisters of the half-blood, since by other statutes they represent their parents: *Hitchcock v. Smith*, 3 Stew. & P. 29; *Scott v. Terry*, 37 Miss. 65; *King v. Neely*, 14 La. Ann. 165 (under the law of Mississippi); so where the intestate leaves no wife or descendants, or brothers or sisters of the whole blood, brothers of the half-blood take the estate, real and personal: *Fatheree v. Fatheree*, 1 Walk. (Miss.) 311.

The present statute of New Jersey is as follows: "When any person shall die seized of any lands, tenements, or hereditaments as aforesaid, without devising the same in due form of law, and without leaving lawful issue, and without leaving a brother or sister of the whole blood, or any lawful issue of any such brother or sister, and without leaving a father or mother capable of inheriting the said lands, tenements, or hereditaments by this act, and shall leave a brother or sister of the half-blood, or a brother or brothers and a sister or sisters of the half-blood, the inheritance shall descend to such brother or sister of the half-blood, or to such brother or brothers and sister or sisters of the half-blood, as the case may be, as tenants in common in equal parts; and in case any such brother or sister of the half-blood, who should have inherited by this act, if living, shall die before the person so seized, and leave a lawful child or children, such child or children surviving the said person so seized shall inherit, if a child solely, and if children as tenants in common in equal parts, such shares as would have descended to to his, her, or their father or mother if such father or mother had survived the person so seized; and the same law of descent and inheritance and descent shall be observed in case of the death of any child of such brother or sister of the half-blood, before the person so seized, leaving a child or children; provided always that in case the said lands, tenements, or hereditaments came to the person so dying seized by descent, devise, or gift of some one of his or her ancestors, all those who are not of the blood of such ancestors shall be excluded from such inheritance:" Revision (1877), p. 293, sec. 5. Here, then, brothers and sisters of the whole blood and their issue are preferred to brothers and sisters of the half-blood, with a further exclusion in case of ancestral estates. The early New Jersey statute was the same in its main features: *Patterson's Laws*, 44; but there was no clause in reference to ancestral estates. It was held under this latter act that where a person died seized of land as

quired, by deed of gift from her father, her brothers and sisters of the half-blood by her mother were entitled to inherit together with her half-sister by her father: *Arnold v. Den ex dem. Phamix*, 2 South. 862; and this construction was followed in *Den ex dem. Hance v. McKnight*, 6 Halst. 385; but see *Den ex dem. Lloyd v. Urison*, 1 Pen. 212; *Den ex dem. Pierson v. De Hart*, 2 Id. 481. The early statute provided also for the inheriting by brothers and sisters of the half-blood simply, and did not in terms extend further, as does the present act. It was therefore held in *Stretch v. Stretch*, 1 South. 182, that children of brothers of the half-blood can not inherit. Under a statute substantially the same as the existing one, in the case of ancestral estates, the brothers and sisters of the half-blood of the intestate, who are of the blood of the ancestor from whom the estate came, shall inherit, but those not of the blood shall be excluded: *Den ex dem. Delaplaine v. Jones*, 3 Halst. 340; and see further, on the meaning "of the blood," the cases cited *supra* in this note.

In Pennsylvania it is provided that "in default of issue, and brothers and sisters of the whole blood and their descendants, and also of father and mother competent by this act to take an estate of inheritance therein, the real estate of such intestate, subject to the life estates hereinbefore given, if any, shall descend to and be vested in the brothers and sisters of the half-blood of the intestate, and their issue, in like manner respectively as is hereinbefore provided for [in] the case of brothers and sisters of the whole blood and their issue:" 1 Brightly's Purdon's Dig. (1872), 808, sec. 23. It is further provided, section 27: "That no person who is not of the blood of the ancestors or other relations from whom any real estate descended, or by whom it was given or devised to the intestate, shall, in any of the cases before mentioned, take any estate of inheritance therein." Under these sections, it is held that if a daughter, to whom real estate has been devised, die intestate, seized of it, leaving brothers and sisters both of the whole and of the half blood, descended from the devising ancestor, those of the whole blood took her estate: *Stark v. Stark*, 55 Pa. St. 62; but where real estate descended from a brother to the intestate, who left no issue, or brothers or sisters of the whole blood, the land passes to the sisters of the half-blood, to the exclusion of more remote kindred of the whole blood on the father's side: *Baker v. Chalfant*, 5 Whart. 477. So if one dies seized of an estate acquired by devise or descent from his father, and his next of kin on his father's side are uncles and aunts of the whole and the half blood, no distinction is made between them by the intestate law: *Danner v. Shissler*, 31 Pa. St. 289; and on the death of a child who inherited from his father, the latter's half brothers and sisters take in preference to a grandmother: *May v. Espenshade*, 3 Luz. Leg. Obs. 142. Half brothers and sisters of the blood of the ancestor from whom the estate descended inherit in preference to first cousins of such blood: *Hart's Appeal*, 8 Id. 32. Cousins of the whole and the half blood take equally: *Dorsey v. Van Horn*, 9 Week. Not. Cas. 95; *Davis' Estate*, Id. 479; *Kiegel's Appeal*, 12 Id. 179; and see *Graham's Estate*, 6 Id. 402. If a person, having made a small improvement, without residence, dies, and after his death a warrant to include the improvement is taken out for the benefit of his daughter, and paid for with funds derived from the father, on her death it descends to a brother of the half-blood on the mother's side in preference to more remote kindred of the whole blood, it not being deemed an inheritance *ex parte paterna*: *Simpson v. Hall*, 4 Serg. & R. 337. An early statute of Pennsylvania provided that "the real and personal estate of any person dying intestate, in case such person leave neither widow nor lineal descendants, nor

father or mother, or brother or sister, of the whole or half blood, or lawful issue of any brother or sister of the whole or half blood, shall descend to and be divided among the next of kin in equal degree." Under this, it was held that if a person dies intestate, seized of real estate, which descended from his father, and leaves a mother and brother of the half-blood, a paternal aunt, and several cousins on the paternal side, there was a *canon omnisus* in the act, and the estate descended to the heir at common law: *Cresce v. Laidley*, 2 Binn. 279. And if an intestate leaves neither wife nor children, but brothers and sisters of the half and of the whole blood, the former are entitled to equal distributive shares of the personal estate with the latter, the act not providing for such a case: *Preston v. Hoskins*, 2 Yeates, 545.

In Connecticut: Gen. Stat. (Rev. 1806), tit. 20, c. 2, sec. 59; Delaware: Rev. Code (1874), c. 85, sec. 1; Ohio: 1 R. S. (1880), sec. 4158; South Carolina: Gen. Stat. (1882), sec. 1845; and Maryland: Rev. Code (1878), art. 47, sec. 1 et seq.—the whole blood are also preferred to the half-blood, and the further distinction in the first three states as to ancestral estates is maintained. Under the statute of distributions as it existed in Connecticut previous to the revision of 1784, the half-blood were entitled to an equal share with the whole blood in an estate which came from their common ancestor: *Clark v. Russell*, 2 Day, 112. In Delaware the half-blood are not excluded from inheriting, if there be no heir of the whole blood: *Kean's Lessee v. Hoffecker*, 2 Harr. (Del.) 103; S. C., 29 Am. Dec. 336, 340; and children of deceased sisters of the whole and half blood of the father of an intestate are entitled to share as next of kin, in equal degree, in the distribution of the residue of his personal estate: *McKinney v. Mellon*, 3 Houst. 277. In Ohio, on the death of an intestate, leaving no issue or widow, so much of his estate as came to him by descent passed to his brothers and sisters of the blood of the ancestor from whom the estate came, whether they were of the whole or half blood of the intestate; but that part of his estate which came to him by purchase passed to his brothers and sisters of the whole blood only: *Freeman v. Allen*, 17 Ohio St. 527. In South Carolina, where the nearest relations of an intestate are an uncle and an aunt of the half-blood and first cousins of the whole blood, the former are entitled to take the whole real and personal estate in exclusion of the latter, under the seventh clause of the first section, statute of 1791, which provided that "if the intestate shall leave no lineal descendant, father, mother, brother, or sister of the whole blood, or their children, or brother or sister of the half-blood, or lineal ancestor, then the widow shall take two thirds of the estate, and the remainder shall descend to the next of kin"—they being the next of kin: *Karwoon v. Lowndes*, 2 Desau. 210; but where the distributees of an intestate are brothers and sisters of the half-blood, and children of predeceased brothers and sisters of the whole blood, it was held that under the fifth clause of the same section the brothers and sisters of the half-blood take equally, and the children of every predeceased brother or sister of the whole blood took among them a share equal to the share of a brother or sister of the half-blood: *Felder v. Felder*, 5 Rich. Eq. 509; children of a predeceased brother of the half-blood are not entitled to share the estate with brothers of the whole blood: *Ex parte Mays*, 2 Rich. L. 61. First cousins of the whole and of the half blood take equally as next of kin: *Edwards v. Barksdale*, 2 Hill Ch. (S. C.) 416; S. C. Riley Ch. 16; and an uncle of the half-blood shares equally with an uncle of the whole blood: *Guerard v. Guerard*, 4 Desau. 405, note. By the act of 1819 a sister of the half-blood is excluded in distribution by sisters and children of a predeceased sister of the whole blood: *City Council v. Hagermeyer*, Riley

Ch. 117. In Maryland it is held that there is no distinction, under the act of 1786, chapter 45, between brothers and sisters, children of the same father, of the whole and the half blood, where the estate descended from the father: *Lowe v. Maccubbin*, 1 Har. & J. 550; see section 26 of the statute above referred to.

HALF-BLOOD BORN AFTER INTESTATE'S DEATH.—There would seem to be no question that a half brother or sister *en ventre sa mere* at the time of the death of an intestate can inherit, where the half-blood who are born before the intestate dies are permitted by law to take: See *Burnet v. Mann*, 1 Ves. sen. 156, more fully and correctly reported in 1 Myl. & K. 672, note; and this rule has been extended by some authorities under the common-law principle of shifting inheritances to cases where the half brother or sister was not *en ventre sa mere*: *Cullar v. Cullar*, 2 Hawks, 324; *Doe ex dem. Seville v. Whedbee*, 1 Dev. L. 160; *Caldwell v. Black*, 5 Ired. L. 463; *Baker v. Heiskell*, 1 Coldw. 641; *Dunn v. Evans*, 7 Ohio, 169; *Springer v. Fortune*, 2 Handy, 52; but it is held that the doctrine of shifting descents does not prevail in Indiana: *Cox v. Matthews*, 17 Ind. 367; and a later case in Ohio reaches the same conclusion, under the statute of descents and distributions of that state, in opposition to the earlier cases above cited: *Drake v. Rogers*, 13 Ohio St. 21; see also *Grimes v. Orrand*, 2 Heisk. 298. The following statute also now exists in North Carolina: "No inheritance shall descend to any person as heir of the person last seised, unless such person shall be in life at the death of the person last seised, or shall be born within ten lunar months after the death of the person last seised:" Battle's Rev., c. 36, sec. 7.

BASTARDS OF HALF-BLOOD.—The right of inheritance of bastards of the half-blood will be found discussed in the note to *Simmonds v. Bull*, 56 Am. Dec. 261-265, in considering their rights of inheritance in general.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW JERSEY.

GILES v. HALSTED

[4 ZABRISKIE, 366.]

CONDITION IS NOT NECESSARY PART OF MONEY BOND, but the instrument may be complete and binding without any condition. Its office is simply to suspend the efficacy of the obligation under which it is written, upon the happening of some event or the performance of some act.

WHERE CONDITION IN BOND IS SENSELESS AND INOPERATIVE, the obligation which it professes to control is pure, simple, and single.

WHERE CONDITION OF BOND IS, BY MISTAKE, SO DRAWN AS TO BE SENSELESS and void, the bond does not thereby become void or inoperative, but will be enforced either as a single bond without any condition, or the condition will be read and taken according to the evident intention of the parties.

ACTION on a penal bond. The facts are stated in the opinion.

Hamilton, for the plaintiff.

No counsel appeared for the defendant.

By Court, OGDEN, J. The declaration in this case is in the common form in debt, as upon a single bond given by the defendant to one John C. Morrison. The defendant cravedoyer, and upon receiving a copy of the bond, and the condition thereunder written, he demurred to the declaration, and assigned as causes of demurrer, that it appears by the condition of the bond mentioned in the declaration that the money in the condition mentioned was to be paid to the said defendant, and not to the said John C. Morrison; and also, that it appears by the condition of the bond that the said defendant was not bound to pay to the said John C. Morrison the said sum of money in the said con-

dition of the said bond mentioned, and because the declaration is in other respects uncertain, informal, and defective.

The plaintiff filed a joinder in demurrer. By the oyer the bond is made a part of the declaration, and the court must look at the pleading as if the condition had been set out therein: *Cooke v. Graham's Adm'r*, 3 Cranch, 235. The bond is in the ordinary language of a money bond, whereby the defendant acknowledged himself held and firmly bound unto John C. Morrison, of the city of New York, in the sum of two thousand dollars, legal money of the United States, to be paid to the said John C. Morrison, or to his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, he bound himself, his heirs, executors, and administrators, firmly by these presents; sealed with his seal, and dated January 1, 1833.

The condition thereunder written is, that if the above-bounden — heirs, executors, administrators, or any of them, shall pay or cause to be paid unto the above-named William Halsted, — certain attorney, executors, administrators, or assigns, the sum of one thousand dollars within one year from the date thereof, then the above obligation to be void, else to be and remain in full force and virtue. Then follow the seal and signature of the defendant, in the presence of Garret D. Wall. As the plaintiff, primarily, was not bound to set out in his declaration the condition of the bond, but it has been made a part of the pleading by the act of the defendant in craving oyer, the court will consider it as if artistically introduced with all such averments as would be legal, necessary, and sufficient to prevent it from destroying the obligation if it ought not in law so to do.

The defendant having accompanied the demurrer with an affidavit "that it is not filed for the purpose of delay, but because he believes he has a just and legal defense to the said action upon the merits of the case," it is proper that the court should look into the grounds of the demurrer, and determine whether such belief of the affiant rested upon any legal foundation. As the argument was had *ex parte* by the plaintiff, without an answer by the defendant, we were not referred to cases in support of his grounds for interposing that pleading, and giving it, by his verification, a statutory standing in court. A condition is not a necessary part of a money bond. The instrument may be, and in this case it is, complete and binding without a condition. Oyer may be craved of a condition and not of the bond, or of a bond and not of the condition. Its office is not to destroy the

nature of the obligation under which it is written, unless it discloses that the performance depends on the doing of an act which is either impossible, unlawful, or contrary to sound morals; but it is simply to suspend its efficacy upon the happening of some event or the performance of some act. If it has neither of these qualities, it is senseless and inoperative, and the obligation which it professes to control is pure, simple, and single. *Bac. Abr.*, tit. Conditions, L, 647-649; *Wentworth v. Earl Stafford*, 1 L. Raym. 68.

The condition to this bond does not look to the happening of any event. If it refers to anything, it must be to the performance of some act. What is that act? The payment within one year from the date thereof, to the obligor in the bond, of one thousand dollars, and the interest thereon. But by whom? Not by Morrison, the obligee, because his name does not appear in the condition, nor by any other person by designation or from just inference.

The blank for the name of the performer of the condition was not filled up. It has no performer. From its terms, it contemplated the doing of a lawful and possible, yet highly improbable, act; but being defective in not stating by whom the act, which alone could suspend the legal effect of the promise in the obligation, was to be done, it is no condition, but is senseless and void.

The intention of the parties to the instrument is plain and palpable. The instrument is a promise on the part of the obligor, on sufficient consideration, to pay to the obligee a sum of money *in præsenti*, but it was to be suspended for a year, and at that time it was to be discharged upon payment by the obligor of a less sum, and the interest from the date; but it was not that the obligee should suspend his own demand upon the obligor, and finally extinguish it by his or any other party paying to the obligor one thousand dollars and the interest.

The scrivener, in filling up the blanks in a printed form of a bond, has ignorantly or carelessly misplaced the obligor's name in the condition, and omitted the name of the obligee, whereby the condition was made defective, and as it stands is senseless, and the promise in the obligation is left intact and operative as a single bond. The condition must be read and taken to be as the parties manifestly intended it should have been filled up, or it must be considered as senseless and inoperative.

Let the demurrer be overruled, with costs.

POTTS, J. I concur in overruling this demurrer. It is perfectly clear that a mistake has occurred in filling up the condition of the bond, by inserting in it the name of William Halsted, the obligor, instead of John C. Morrison, the obligee named in the bond itself. As it stands, it is insensible, and repugnant to the manifest intention of the parties. It is just to supply mistakes in the conditions of bonds: 1 Bac. Abr. 649, tit. Conditions, L, and cases there cited; *Cooke v. Graham's Adm'rs*, 3 Cranch, 235; Ch. Cont. 73 et seq. The condition might perhaps be treated as void, but it is more consonant with justice and the rights of the case to construe it according to the manifest intention of the parties to it.

GREEN, C. J., concurred.

DEFECTS IN EXECUTION OF BONDS, EFFECT OF.—The omission to write the names of obligors in the body of a bond does not avoid it: *Johnson v. Steamboat Lehigh*, 53 Am. Dec. 162, note 163. An appeal bond properly signed and sealed, and duly attested, is valid against the sureties, notwithstanding the omission to insert their names in the body of the instrument: *Cooke v. Crawford*, 46 Id. 93, note 95. The omission to name the obligee in a bond is a defect which can not be supplied by an averment: *Phelps v. Call*, 47 Id. 327, note 328, where other cases are collected. A bond delivered with a blank left for the insertion of the amount is not the deed of the party signing it: *Williams v. Crutcher*, 35 Id. 422, note 425, where other cases are collected. The obligor's name need not appear in a bond; it is sufficient if it is annexed to the instrument: *Pegauwickett Bridge v. Mathees*, 26 Id. 737, note 738, where prior cases in this series are collected.

STATE v. OVERTON.

[4 ZABRISKIE, 435.]

PASSENGER ON RAILROAD TRAIN WHO REFUSES TO PAY HIS FARE MAY BE REMOVED therefrom at a suitable time and place, if no unnecessary force be used in effecting such removal.

PASSENGER ON RAILROAD TRAIN, BY PURCHASING TICKET BETWEEN TWO POINTS on its line, acquires a right to be carried directly from the one point to the other without interruption, but not to be carried from one point to the other at different times and by different lines of conveyance. If he leaves the train before reaching his destination, he forfeits all rights under his contract, and can not resume his journey on a different train by virtue of the check given to him by the conductor of the original train.

RAILROAD COMPANY MAY CHARGE WAY-PASSENGER HIGHER FARE for traveling over its road by different journeys than it charges through-passengers.

VALIDITY OF BY-LAW OF CORPORATION IS PURELY QUESTION OF LAW, to be determined by the court.

REGULATIONS OF RAILROAD COMPANY OPERATING UPON AND AFFECTING RIGHTS OF PASSENGERS are not, properly speaking, by-laws of the corporation, and their validity depends upon the fact of their being reasonable, which fact is to be determined by the jury.

ASSAULT and battery. The opinion states the case.

Whelpley, for the defendant.

Dalrymple, for the state.

By Court, GREEN, C. J. The defendant was convicted in the over and terminer of Morris, of an assault and battery upon Theodore A. Canfield. A motion having been made for a new trial, upon the ground that the charge of the court was erroneous, and that the verdict was against law and contrary to the evidence, the question was reserved and submitted to this court for its advisory opinion. The material facts are, that on the eighteenth of March, 1853, Canfield, the prosecutor, procured at the office of the Morris and Essex Railroad Company, in Newark, a passenger's ticket to Morristown. He paid for the ticket the regular fare from Newark to Morristown, and took his seat in the cars. At Millville, one of the way-stations upon the road, he left the train. Before leaving the cars he received from Van Pelt, the conductor of that train, a conductor's check, upon which was printed the words "Conductor's check to Morristown." About an hour afterwards, Canfield took the next train of cars which passed the Millville station for Morristown, of which train Overton, the defendant, was conductor. Upon being asked by the conductor for his fare, Canfield tendered in payment the check received by him from Van Pelt, the conductor of the train in which Canfield had first taken his seat; this the conductor refused to accept, and the passenger refusing to pay his fare, and declining to leave the cars upon request, he was, without unnecessary force or violence, and without personal injury, removed by the defendant from the cars at one of the way-stations upon the road, before reaching Morristown. The company furnished, at the office in Newark, through-tickets to Morristown, and also tickets to Millville and other way-stations upon the route. The cost of a ticket directly from Newark to Morristown was less than the cost of a ticket to Millville and another ticket thence to Morristown. Some years previous to the transaction, the company had given public notice that conductor's checks were not transferable from one train to another.

It was not questioned upon the trial that a railroad company are not bound to carry a passenger unless upon payment or

tender of his fare; that they may, in such case, either refuse to permit him to enter the cars, or having entered them, they may require him to leave them before the termination of the journey; and that if he refuses to leave, they may remove him at a suitable time and place, using no unnecessary force. The ground upon which the conviction was asked was, that in fact the passenger had paid his fare; that he offered to the conductor competent and satisfactory evidence of that fact; and that consequently the act of the conductor in removing him from the cars was illegal. Had the passenger in fact paid his fare? or was the check given by the conductor of another train evidence of that fact? He had, it is admitted, paid his fare to Morristown by the train in which he originally took his passage. Did that authorize him to leave the train at any point upon the road, and to resume his place for his original destination in a different train at his pleasure?

The question is obviously a question of contract between the passenger and the company. By paying for a passage and procuring a ticket from Newark to Morristown, the passenger acquired the right to be carried directly from one point to the other, without interruption. He acquired no right to be transported from one point to another upon the route at different times and by different lines of conveyance until the entire journey was accomplished. The company engaged to carry the passenger over the entire route for a stipulated price. But it was no part of their contract that they would suffer him to leave the train and to resume his seat in another train at any intervening point upon the road. Their contract with the passenger would have been executed if they had proceeded directly to Morristown without stopping at any intervening point; nor could he have complained of a violation of contract if no other train had passed over the road in which he might have completed his journey. If the passenger chose voluntarily to leave the train before reaching his destination, he forfeited all rights under his contract. The company did not engage and were not bound to carry him in any other train, or at any other time, other the residue of the route.

The production of the conductor's ticket in no wise altered the case, or affected the terms of the original contract. It was evidence, indeed, that the holder had paid his passage and was entitled to be carried to Morristown. But how and when? Why, clearly, according to the terms of his original contract. It was evidence that he had paid his fare to Morristown, and was en-

titled to be carried there by the train in which he had originally taken his passage; for that purpose alone it was given to him; that train he had left voluntarily, without the knowledge or assent of the conductor, and without giving up his check. The check was therefore valueless; the right of which it was the evidence the passenger had voluntarily relinquished. This is the clear legal effect of the contract between the company and the passenger, in the absence of any evidence to the contrary. If the passenger insists that under his contract, by virtue of general usage or the custom upon the road, he is entitled to be carried at his pleasure, either by one or different trains and at different times, over various portions of his journey, the burden of proof was upon the state. No such usage was established, although some evidence was offered upon the trial for the purpose of proving it.

The defendant offered evidence to show that some years previous to the transaction the company had adopted a rule and given public notice that a conductor's check was not transferable from one train to another. This, properly considered, is a simple warning to passengers that they would be carried strictly according to the terms of their contract. Even if a previous custom had been proved (which it was not) for passengers to be carried over different parts of their journey by different trains, it was a mere warning that in the future the custom would not prevail. Upon the trial this action of the company was presented to the court, and by them submitted to the jury, as if it were a by-law or regulation of the company affecting the rights of passengers, upon the reasonableness and consequent validity of which the jury were to decide. The court clearly intimated its opinion that the regulation of the company was valid, but under the influence of the ruling of another tribunal submitted the validity of the regulation as a matter of fact to the jury. In this the court erred. Here was no evidence of any by-law or of any regulation made by the company affecting the rights of passengers, upon the reasonableness or validity of which either court or jury were called upon to decide. The right of the passenger rested upon his contract. The notice given by the company was in strict conformity with his rights under the contract. Upon the evidence in the cause, if no proof had been offered of the notice given by the company that conductors' checks were not transferable, the defendant would have been entitled to a verdict. Proof of that notice certainly placed him in no worse position. The company have an un-

questionable right, under their charter, independent of any by-law or regulation, to charge different rates by different trains, or a higher price for traveling over the road as a way-passenger by different journeys than for a through-passenger. This was in reality all that was involved in the evidence of the action by the company, as proved upon the trial. The case does not fall within the operation of the principle by which it was held to be controlled.

Assuming at the bar, as was done upon the trial, that the guilt or innocence of the defendant depended upon the validity of a regulation made by the company affecting the rights of passengers, the question was elaborately argued whether the validity of such regulation can in any case be submitted as a question of fact to be decided by a jury, and the broad principle was assumed that the validity of every regulation made by a railroad company, regulating the concerns and affecting the rights of the road, is a question of law, to be decided by the court, and never can be submitted to a jury; that the company is bound to make regulations for the comfort and convenience of passengers; that the power is regulated by their charter; that what is lawful is reasonable; and that therefore every regulation is reasonable which is not unlawful.

The validity of the by-law of a corporation is purely a question of law. Whether the by-law be in conflict with the law or with the charter of the company, or be in a legal sense unreasonable, and therefore unlawful, is a question for the court, and not for the jury: *Commonwealth v. Worcester*, 3 Pick. 462; *Paxon v. Sweet*, 1 Green, 196; *Angell & Ames on Corp.* 357. But the by-laws of a private corporation bind the members only by virtue of their assent, and do not affect third persons. All regulations of a company affecting its business, which do not operate upon third persons, nor in any way affect their rights, are properly denominated by-laws of the company, and may come within the operation of the principle. Within this limit it is the peculiar and exclusive office of the court to decide upon the validity of the regulation.

But there is another class of regulations made by corporations, as well as by individuals who are common carriers of passengers, which operate upon and affect the rights of others which are not, properly speaking, by-laws of the corporation, and which do not fall within the operation of the principle. Of this character are all regulations touching the comfort and convenience of travelers, or prescribing rules for their conduct to secure the

just rights of the company. It is not perceivable of this class of regulations that they are never unreasonable, unless they are unlawful. On the contrary, they are unlawful because they are unreasonable, or an unnecessary infringement of the rights and liberty of the passengers. The reasonableness and validity of a regulation that passengers by railroad or steamboat should exhibit their tickets when reasonably requested, that they should not smoke or indulge in other filthy or offensive practices, that male passengers should not enter a car or a saloon especially appropriated to females, might be conceded, and the right of the company to enforce them, even by excluding, in case of necessity, the offending passenger from the train. But it would scarcely be contended that a regulation requiring passengers continually, or as often as the caprice or malice of a conductor might require it, to exhibit their tickets; forbidding them to speak, or change their seats from one part of a car or saloon to another, when the right of no other passenger was affected, was a regulation lawful in itself, or which might safely be enforced. This latter class of regulations are no more in violation of the charter of the company, or of any particular statute, than the former. But they would be held unlawful, because they are unreasonable, and an unnecessary infringement of the rights and liberty of travelers. The distinction between such regulations as are necessary and conducive to the comfort and convenience of travelers, or to protect the rights of the company, must from its very nature be a question of fact rather than of law. The reasonableness and unreasonableness of the regulation is properly for the consideration, not of the court, but of the jury.

In *Jenks v. Coleman*, 2 Sumn. 221, the action was brought to recover damages against the defendant for refusing to receive the plaintiff as a passenger on board of a steamboat of which the defendant was commander. The defense was that an agreement has been entered into by the proprietors of the boat with a line of stages to carry their passengers from and to Providence and Boston. That the plaintiff was the agent of another line of stages, and that his object in going on board of the boat was to procure passengers, and thus interfere with the arrangement made by the steamboat proprietors. Justice Story in his charge to the jury said: "The true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself, and not oppressive, and they believe the purpose of Jenks in going

on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant, otherwise to be for the plaintiff." If the question whether a contract entered into by common carriers be reasonable and proper, and one which may be enforced, even by excluding passengers from the conveyance, be a question of fact to be decided by a jury, there is surely no violation of principle in submitting to their decision the necessity or propriety, and consequent validity, of a regulation affecting the comfort or safety of passengers.

But there was in reality no such question involved in the present case. The right to transfer conductors' checks resulted upon a contract which the company had a clear and unquestionable legal right to enforce. The question was improperly submitted to the jury, and the verdict is against law, and contrary to the evidence.

The oyer and terminer should be furnished with the advisory opinion of the court, that the verdict ought to be set aside, and a new trial granted.

OGDEN, J., concurred.

POTTS, J. I concur in advising that the rule to show cause why the verdict in this case should not be set aside be made absolute. Canfield contracted with the Morris and Essex Railroad Company to carry him from Newark to Morristown by the first afternoon train on the eighteenth of February last. He got into the cars and rode as far as Millville, where he left the train. That act was an abandonment of the contract on his part. He got into the next train at Millville for Morristown, and refusing to pay the regular fare from that place to Morristown, the defendant, who was the agent of the company, put him out of the cars, using no more force than was necessary. This he had a right to do; and the verdict finding him guilty of an assault and battery on Canfield for so doing was wrong.

PASSENGER ON RAILROAD TRAIN PURCHASING THROUGH-TICKET must go through to his destination on the same train, and has no right to stop off and resume his journey on the same ticket: *Cheney v. Boston & Maine R. R. Co.*, 45 Am. Dec. 190, note 192, where this subject is discussed at length; *Pullman Palace Car Co. v. Taylor*, 65 Ind. 168, citing the principal case.

REGULATIONS WHICH RAILWAY COMPANY MAY MAKE FOR PASSENGERS and others: *Hall v. Power*, 46 Am. Dec. 696, note 700; *Cheney v. Boston & Maine R. R. Co.*, 45 Id. 190, note 192, where other cases are collected; *Commonwealth v. Power*, 41 Id. 465, note 471, where this subject is fully discussed. A regulation that a railroad ticket shall be subject at any time to inspection

by the conductor is reasonable: *Cresson v. Philadelphia etc. R. R. Co.*, 11 Phila. 600, citing the principal case. An unreasonable rule that affects the convenience and comfort of passengers is unlawful, simply because it is unreasonable: *Chicago & N. W. R'y Co. v. Williams*, 55 Ill. 189, citing the principal case.

PASSENGER WHEN AND WHERE MAY BE EJECTED FOR NON-PAYMENT OF FARE: See note to *Commonwealth v. Power*, 41 Am. Dec. 477. A passenger declining to pay his fare may be ejected from a railroad train in a legal and proper manner: *Cresson v. Philadelphia etc. R. R. Co.*, 11 Phila. 601, citing the principal case.

WINTER v. PETERSON.

[4 ZABRISKIE, 524.]

IN TRESPASS FOR CUTTING TREE IN HIGHWAY, PLAINTIFF'S DEED IS ADMISSIBLE in evidence for the purpose of showing the boundaries of his farm, and that it included the part of the road in which the tree stood. EVIDENCE THAT OVERSEER OF HIGHWAY ACTED FROM IMPROPER MOTIVES in cutting down a tree in the highway is admissible in an action of trespass brought against him by the owner of the adjoining field for cutting down the tree. And it is not error for the court to refuse to permit the defendant to go into the history of the difficulties out of which the bad feeling between the parties originated.

CONVEYANCE OF LAND BOUNDED ON PUBLIC HIGHWAY is presumed by law to carry with it the fee to the center of the road, if nothing appears to the contrary.

TREE GROWING IN HIGHWAY BELONGS TO OWNER OF FEE.

OVERSEER OF HIGHWAY MAY REMOVE THEREFROM WHATEVER OBSTRUCTS or interferes with the public use of it; but if he cuts down a tree which does not obstruct or interfere with such public use, he is a trespasser, and if he acts maliciously in so doing, he is liable to exemplary damages.

WHETHER OR NOT TREE CUT BY OVERSEER OF HIGHWAY OBSTRUCTED the public use thereof, and whether or not he cut it maliciously, are questions of fact.

CERTIORARI. The opinion states the case.

Woodruff, for the plaintiff in certiorari.

Tuttle, for the defendant.

By Court, Potts, J. This was an action of trespass, brought originally in a justice's court by Peterson against Winter, for cutting down a tree standing in the public road. The case was tried without a jury, and a judgment given against the defendant for twenty dollars damages and costs. The defendant appealed, and the trial before the pleas resulted in a judgment for the same amount. From the state of the case agreed upon, it appears that Winter was, at the time he cut the tree, the legal

overseer of the road in which the tree stood; the tree was a thrifty chestnut, eight and a half inches in diameter, and between thirty and forty feet high; the branches were twelve feet long, but trimmed up ten feet from the ground. It stood about one foot from the fence of Peterson's farm, two hundred yards from his house. The road was thirty-two feet wide; the distance from the tree to the center of the road was fourteen feet eleven inches, and from the tree to the outside of the wagon-track was nine feet six inches; the branches, therefore, extended partly over the road, but all the plaintiff's witnesses testified that in their opinion it was no obstruction to travelers, and some of them testified that its branches were too high to interfere with the passage of a load of hay. The stump of the tree left standing was eighteen inches high; stones large enough to obstruct the travel were left, some of them farther in the road than this stump; and other trees, one near Winter's own barn, as far or farther in the road than this, were left standing by the overseer, though he did cut the trees of some other persons out of the road at the same time; and some evidence was admitted to prove that Winter and Peterson were not on good terms, in order to show that the act was done maliciously and from bad motives.

Several reasons were urged by the counsel for the plaintiff in *certiorari* why the judgment of the court of common pleas should be reversed. They may be embraced in four: 1. The admission of Peterson's deed to show the boundaries of his farm, and that it included the part of the road in which the tree stood; 2. The admission of evidence to show that the overseer left trees and stones in the road, and that he and Peterson were not on good terms, and the refusal of the court to receive evidence of the particulars of the difficulties between them; 3. That the court refused to nonsuit the appellee below; 4. That the judgment was for exemplary damages. These grounds, assigned for error, will be examined in their order.

1. As to the admission of the deed: there was no error in this. The object of the evidence was not to show title, but the mere possession, which was all that was necessary in this action; and as the *locus in quo* was occupied as a public road, the production of the deed for the purpose of showing that the boundaries of the farm of which the appellee was in possession embraced it was proper. Besides this, there was other evidence that the tree stood on Peterson's land, and therefore, if the deed had been improperly admitted, we could not reverse for this cause.

2. Evidence was properly admitted to show that the overseer

acted from improper motives; that the act complained of was done maliciously, and was not a mere error in judgment as to his official duty. Where a public ministerial officer acts *mala fide*, as well as without authority of law, he becomes a trespasser *ab initio*: *Ward v. Folly*, 2 South. 485; *Van Brunt v. Schenck*, 13 Johns. 414; *Gardner v. Campbell*, 15 Id. 401; *Campbell v. Stakes*, 2 Wend. 137 [19 Am. Dec. 521]; *Allen v. Crofoot*, 5 Id. 506 [10 Am. Dec. 647]. Proof that the overseer left other trees, etc., in the road, and that he and Peterson were not on friendly terms, was competent upon the question of bad faith; and the court did not err in refusing to permit the appellant to go into the history of the difficulties out of which the bad feeling between the parties originated. The state of feeling between them was the only matter material; how it was caused was of no consequence.

3. The motion to nonsuit raised the question whether the appellee, who, upon the trial of the appeal, was bound to make out a legal cause of action, had done so; and the counsel of the plaintiff in *certiorari* now insists that, taking the case as made by the appellee below, the fact that Winter committed the supposed trespass while acting in the capacity of overseer of the road is, in itself, a sufficient justification. Let us see how this is.

The plaintiff below, Peterson, occupied the farm adjacent to the public road. The inference or presumption of law is, that a conveyance of land bounded on a public highway carries with it the fee to the center of the road, as part and parcel of the grant: 3 Kent's Com. 432; *Peck v. Smith*, 1 Conn. 103 [6 Am. Dec. 216]; unless by the terms of the description the road is necessarily excluded, or at least something appears to rebut the presumption: *Tyler v. Hammond*, 11 Pick. 213, and cases there cited. Besides, in this case, I think the fair construction of the words of description in the deed carried the line of the Peterson farm to the middle of the road; the line is described as commencing to run "along the middle of the road," and as running "along the said road" for the two succeeding courses.

Then the possession of the farm was possession of so much of the road as lay within its boundaries. The law has always been so. "The king has nothing but the passage for himself and his people; the freehold and all the profits belong to the owner of the soil:" 1 Roll. Abr. 392, B, pl. 1, 2. So do all the trees upon it, and mines under it; the owner may carry water-pipes under it; he may have ejectment as well as trespass: *Goodtitle v. Alker*, 1 Burr. 143. The owner of the soil may have trespass against any person who digs up the soil, or cuts

down any trees growing on the side of the road, and left there for shade or ornament: 3 Kent's Com. 433; for the freehold remains, subject only to the easement or right of passage in the public: *Fairfield v. Williams*, 4 Mass. 427; *Perley v. Chandler*, 6 Id. 454 [4 Am. Dec. 159]; *Stackpole v. Healey*, 16 Id. 33 [8 Am. Dec. 121]; *United States v. Harris*, 1 Sumn. 21, 37; *Adams v. Emerson*, 6 Pick. 56. In New Hampshire it is held that the proper officer may cut down trees standing in the public highway only so far as is necessary to do so for the purpose of the easement or right of passage, and the wood belongs to the owner of the soil: *Makepeace v. Worden*, 1 N. H. 16. In South Carolina, trees reserved for ornament or cultivated for use have always been respected as exempted from the operation of their act of 1788, authorizing the commissioners of roads to cut down timber, wood, etc., in or near roads: *Eaves v. Terry*, 4 McCord, 125.

There is nothing in our road act which renders these general principles inapplicable here. Section 21 of the revised statutes, p. 521, makes it the duty of the overseers "to open, clear cut, make, work, amend, repair, and keep in good order the highways within their respective limits and divisions." The twenty-ninth section provides "that no tree shall be girdled or killed on the highways;" and the fifty-second section expressly prohibits the overseer from "cutting down or injuring any fruit, shade, or ornamental tree which may have been or shall be planted or set out by the owner or possessor of any lands adjoining any highway, and which shall not extend more than seven feet from the line of the road toward the center of the same," without an order from the township committee. Those trees are expressly recognized as being in the public highways, and are forbidden to be girdled or killed. To "clear out" a highway means nothing more than to clear it out for all the purposes to which it is dedicated. The public have the easement, the right of free passage; that they have a right to perfect and maintain. All obstructions to it may lawfully be removed; but beyond this the rights of the owner of the soil remain unimpaired. Nothing is more common everywhere in our villages and agricultural districts than for the owners and occupiers of the soil to have fruit, shade, and ornamental trees along the line of the public roads, sometimes in the line of the road, sometimes on each side of the line; and to give the overseer of every section of road the right to cut these down arbitrarily, and according as whim or caprice may dictate, without regard

to public necessity, would be to clothe him with a power which might often be abused, and which a reasonable construction of the statute does not warrant.

If the tree in question was an obstruction to the free enjoyment of the public right—if it interfered with the travel—if it injured the road, the overseer had authority to cut it down; but not otherwise. And if he not only did it without authority, but maliciously, he was liable to exemplary damages. These were questions for the court, no jury being called. They were questions of fact, in reference to which there was some evidence; and we can not interfere with the judgment upon these facts.

This disposes also of the fourth ground assigned for error.

Let the judgment be affirmed.

OGDEN, J., concurred.

OWNER OF LAND TAKEN FOR PUBLIC WAY OWNS TREES UPON IT, subject, however, to the public use for the purposes for which it was taken: *Brainard v. Clapp*, 57 Am. Dec. 74, note 80.

FEE IN HIGHWAY RESIDES IN OWNER OF ADJOINING LAND: See *Nicholson v. New York & N. H. R. R. Co.*, 56 Am. Dec. 390, note 396, where other cases are collected.

GRANT OF LAND BOUNDED BY HIGHWAY GENERALLY CARRIES FEE TO CENTER OF WAY: *Palmer v. Dougherty*, 54 Am. Dec. 636, note 638; *Newhall v. Iveson*, Id. 790, note 793, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Attorney General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 639, to the point that grants of land bounded by rivers carry the title of the grantees to the center of the stream, unless the terms of the grant clearly denote an intention to stop at the edge or margin.

THE PRINCIPAL CASE IS DISTINGUISHED in *Messler v. Fleming*, 41 N. J. L. 112.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

LOONIE v. HOGAN.

[9 NEW YORK (5 SELDEN), 485.]

WHERE OWNER OF TOWN LOT AGREES TO SELL SAME, to make a building loan to the purchaser for the erection of a building thereon, and to take security for the price of the lot and amount of the loan in the form of a mortgage on the lot and building, conveyance to be made and mortgage given on completion of the building, he is not constituted "the owner of the building" within the meaning of the mechanic's lien act, although it was erected on the lands of which he had the legal title.

PERSONS FURNISHING MATERIALS FOR SUCH BUILDING CAN NOT, UNDER SUCH ACT, compel payment for them out of money agreed to be advanced by the seller to the purchaser.

PAROL PROMISE BY SELLER OF TOWN LOT TO PAY FOR MATERIALS FURNISHED TO PURCHASER to be used in the construction of a building thereon, as well as parol promise to accept a bill drawn on him by the purchaser for such materials, is within the statute of frauds, and void.

APPEAL from a judgment of the New York common pleas, dismissing the complaint in a mechanic's lien case. Plaintiffs sued defendant to recover a sum due for materials furnished by them, and used in the erection of a house. Defendant had entered into a written contract with Mullaney and one Peter J. Flinn, by which he agreed to sell them a certain lot in the city of New York, on which the house was subsequently built, and they agreed to purchase the same for a specified sum. Defendant was to advance a certain amount of money by the time of the completion of the building, and when it was inclosed he was to convey the lot to Mullaney and Flinn, who were to mortgage it to him, and give him their bond to secure the purchase money,

together with the sums loaned and agreed to be loaned. Plaintiffs furnished Mullaney and Flinn cut-stone required for the building, which was built for Mullaney himself. There was some evidence tending to show that defendant told plaintiffs that he would accept an order on himself, given by Flinn and Mullaney, for the amount of the stone. But defendant made no other promise to pay for the work, and it did not appear that the order had ever been presented for acceptance. The other facts will appear from the opinion.

Thomas Dartington, for appellants, the claimants of the lien.

J. B. Dillon, for the respondent.

By Court, *DEMIO, J.* The act entitled "An act for the better security of mechanics and others erecting buildings in the city and county of New York" provides that every mechanic doing any work towards the construction of any building in the city of New York "erected under a contract in writing between the owner and builder or other person," "may deliver to the owner of the building an attested account" of such labor, "and thereupon such owner shall retain out of his subsequent payments to the contractor the amount of such work and labor for the benefit of the person so performing the same:" Stat. 1830, 412, sec. 1. The subsequent sections of the act provide for the adjustment of the account between the contractor and the party who rendered it, where it shall be disputed, which is to be brought about by arbitration if the parties can not agree; and when the amount due shall have been determined, if the contractor shall not pay it in ten days, "the owner shall pay the same out of the fund as above provided; and which amount due may be recovered from the said owner by the creditor of the said contractor in an action for money had and received to the use of said creditor, and to the extent in value of any balance due by the owner to his contractor under the contract with him at the time of the notice first given as aforesaid, or subsequently accruing to such contractor under the same, if such amount shall be less than the sum due from the said contractor to his creditor:" *Id.*, sec. 4. If, by collusion or otherwise, the owner of the building shall pay the contractor in advance of the times of payment mentioned in the contract, and there shall not be enough left to pay the party who shall have served the account, the owner shall, notwithstanding, be liable to the party as though such payments in advance had not been made: *Id.*, sec. 5. This is the whole of the act; and the question in this case is, whether

the relation between the defendant of one part, and Mullaney and Flinn of the other, is that of owner and contractors for building, within the true construction of the statute. Assuming that the contract for the sale of the lot was entered into in good faith, and without any view to evade the provisions of the lien law, it certainly presents a different case from the one which was primarily in the contemplation of the legislature. The object of the law was to enable a laborer, mechanic, or subcontractor to attach, in effect, in the hands of the person for whom the building was erected, any debt which the latter might owe to the immediate contractor on his contract for the work. As no lien attaches to the real estate, the title to the lot is not a matter of any importance; and the question would be the same, so far as I can perceive, if one should agree to lend money to the owner of a lot to enable him to build a house thereon, with an agreement to secure the loan by mortgage when the building should be completed. It would not be seriously contended in such a case that a mechanic or laborer employed by the borrower could proceed, under the act, to reach the money agreed to be loaned. The remedy which the statute gives is against money due to the principal contractor for the work which he agreed to do, but which the subcontractor or mechanic has actually performed for him. It does not extend to money payable to the contractor on any other account. It is quite reasonable that the party meritoriously entitled to be paid for the work should be allowed to intervene between the owner for whom the house was built and the person who had contracted to build it, and to divert the course of the payments which would have passed into the hands of such contractor to his own. It is a form of equitable subrogation regulated by statute, but it is limited by the act to the plain case of money due upon a contract for performing the work.

The case is equally without the letter of the statute. It is the "owner of the building" against whom the remedy is given. In this case, although the title of the lot remained in the defendant, Mullaney and Flinn were erecting the building for themselves, and not for the defendant. They, and not the defendant, were to own it when it should be completed. The money which the plaintiffs seek to obtain is money agreed to be loaned, and not a debt agreed to be paid. It is only the latter to which the statute applies. If public policy, or the joint interest of laborers and mechanics, requires that the remedy should be extended so as to embrace the case of money agreed to be advanced oth-

erwise than by a party contracting to have a building erected for himself, it is for the legislature to provide for such cases by new enactments.

I am aware that the supreme court in the first district has arrived at a different conclusion in a similar case; but with every disposition to concur in opinion with so respectable a tribunal, I find myself unable to assent to the judgment in that case: *McDermott v. Palmer*, 11 Barb. 9. I see no reason to doubt but that the parties to the contract for the sale of the lot intended in good faith to make the precise bargain contained in it. It is not an unreasonable, nor, I believe, an unusual, arrangement for the owner of town lots to connect with a contract to sell them an agreement to loan money to the purchaser to be expended in building upon them, taking a lien on the real estate to secure both the purchase price and the money loaned.

There is no ground for holding the defendant liable on the draft. Considering what was said between the parties as an agreement to accept, it is unavailable for two reasons: 1. It was not in writing: 1 R. S. 768, secs. 6-8; and 2. The plaintiffs were to present this bill to the defendant on the same day on which the conversation was had; and it was only on that condition that the defendant agreed to accept. It does not appear to have been presented at all. There was no promise to pay for this work, except what was said about accepting the bill. The ruling in the court below was therefore correct, and the judgment ought to be affirmed.

EDWARDS, J. The plaintiffs in this action claim that they are entitled to recover from the defendant the contract price of certain materials furnished to one James Mullaney, and used by him in the erection of a certain building in the city of New York. The agreement between the plaintiffs and Mullaney was proved upon the trial, and it is not denied that the materials were furnished pursuant to that agreement. The only question which is raised upon this branch of the case is, whether the defendant is liable to the plaintiffs for the price of the materials under the provisions of the "act for the better security of mechanics and others in the city of New York," passed April 20, 1830, amended April 13, 1832: 2 R. S., 3d ed., 648.

The statute of 1830 applied to "every mechanic, workman, or other person doing or performing any work towards the erection, construction, or finishing of any building in the city of New York erected under a contract in writing between the

owner and builder or other person," etc. The amendment of 1832 extended the provisions of the act to "all materials furnished and used in the performance of any work," etc. The object of the statute was to protect the person furnishing work and labor or materials, by giving him a primary claim upon all moneys due upon the contract in the performance of which the work and labor or materials should be furnished. The claim of such person was considered as more meritorious than that of the contractor, and was preferred to it. But such preference was intended to be given only in cases where there was a building contract, and a debt due to the contractor by reason of the work and labor or materials furnished by the mechanic, laborer, or subcontractor, or otherwise. This is clearly the intent and meaning of the statute. The question, then, arises whether the agreement proved in this case contains a building contract. It certainly does not in its terms, and I think that it does not in its spirit.

The principal object contemplated by the parties to it was the sale of the lot described in it. It will be observed that no money was to be paid by the parties of the first part until some time after a deed should be executed. The sale was to be entirely upon credit; and, in addition to this, a loan was to be made to the parties of the second part to enable them to make such improvements upon the property as would render the purchase an advantageous one to them. The money to be advanced was expressed to be a loan to be made to the parties of the second part to aid them in the erection of the building, and not a payment as a consideration for its erection. The parties of the second part were thus to receive the benefit of the capital of the party of the first part, and there was probably a corresponding advantage to the party of the first part in the consideration which he was to retain, and which was to be secured by a mortgage upon the property as enhanced in value by the improvements to be placed upon it by the parties of the second part. Under these circumstances, I think that the relation of builder and contractor did not exist between the parties. It is true that the party of the first part would continue to be owner of the premises until a conveyance of them should be given; but the parties of the second part would not be contractors within the meaning of the statute. The case of *McDermott v. Palmer*, 11 Barb. 9, was referred to by the counsel for the plaintiffs; but it will be observed that in that case there was a building contract, and it was upon that ground that the court based their

decision. In giving their opinion, they say that "the moneys were to be advanced, not as a loan, but, as is expressly stated in the agreement, as a consideration for the finishing of the houses according to the contract."

The plaintiffs next claim that they are entitled to recover upon the orders drawn by Mullaney upon the defendant. It is not pretended that the orders were accepted, and it does not appear that they were drawn in such a manner as to operate as an assignment of any particular fund or claim.

The judgment should be affirmed.

The whole court concurred.

Judgment affirmed.

ESTATES AND INTERESTS AFFECTED BY MECHANICS' LIENS: *Lyon v. McGuffey*, 45 Am. Dec. 675, and extensive note to same 678; *Montandon v. Deas*, 48 Id. 84.

WHAT LIEN OF MECHANIC INCLUDES: See *Bank of Charleston v. Outin*, 46 Am. Dec. 325.

AS TO WHEN MECHANIC'S LIEN WILL ATTACH: See *Rogers v. Phillips*, 47 Am. Dec. 727.

THE POINT IN THE PRINCIPAL CASE, that the owner of a lot who had contracted to sell it and to make a loan to the purchaser to build upon it was not the owner of the building erected by the purchaser, within the lien law of 1830, although, by the agreement of sale, the title was not to be transferred to the vendee until the completion of the building, was referred to in *Rollin v. Cross*, 45 N. Y. 770; *Miller v. Clark*, 2 E. D. Smith, 548. The statements concerning immateriality of title to land upon which the building stands, and the objects of the statute, as given in the principal case, were quoted with approval in *McMahon v. Tenth Ward School Officers of New York*, 12 Abb. Pr. 131. The principal case was cited in *Randolph v. Garvey*, 10 Id. 183, to the point that the object of the act of 1851, as well as that of 1830, was to reach, in the hands of the owner of the building, any balance which he might owe to his immediate contractor in respect thereof, by virtue of a contract between the two for the erection thereof. In *Brinckerhoff v. Board of Education*, 37 How. Pr. 513; S. C., 2 Daly, 444; 6 Abb. Pr., N. S., 432, it was cited to the point that the one for whom the building is erected, and who is to pay for it, though he has not the legal title, but only an equitable interest in the land, is the owner. To the same effect is the principal case cited in *Hallahan v. Herbert*, 4 Daly, 212; S. C., 2 Abb. Pr., N. S., 333. In cases like the principal one, it is said, in *Nellis v. Bellinger*, 6 Hun, 561, that "the rights of the lienor were always subordinate to the interests of the legal owner, for the lien affected only the equitable title of the vendee. The principal case was distinguished in *Hackett v. Badeau*, 63 N. Y. 478. For a case *quatuor pedibus* with the principal one, see *Stuyvesant v. Browning*, 33 N. Y. Sup. Ct. 210, and where the latter is cited. Other citations of the principal case: *Riley v. Watson*, 3 Hun, 570; S. C., 6 N. Y. Sup. Ct. 312; *Weyer v. Beach*, 14 Hun, 238; *Burbridge v. Marcy*, 54 How. Pr. 447; *Ois v. Cusack*, 43 Barb. 549.

WHO HAS SUCH OWNERSHIP IN OR RELATION TO PROPERTY THAT HE CAN ENFORCE IT BY MECHANIC'S LIEN.—In the discussion of this subject it is not per-

posed to allude particularly to the estates and interests affected by mechanics' liens, as that is treated at some length in the note to *Lyon v. McGuffey*, 45 Am. Dec. 678; and the doctrines there announced concerning the interest in the property requisite to create the statutory relation of "owner" should be read in connection with this note, as they are intimately connected with it.

"BUILDING CONTRACTS"—AGREEMENT OF SALE.—The principal case illustrates "a matter of common occurrence, especially in the cities of New York and Brooklyn, that a capitalist, in order to dispose of vacant lots, enters into a written agreement with a builder, whereby he agrees to sell them to him at a certain price within a specified time, and in the mean time loans him money to aid in the erection of buildings thereon. Such agreements are generally termed 'building contracts;' the capitalist being known as the vendor, and the builder the vendee:" Kneeland on Mechanics' Liens, sec. 17. Subcontractors and others, who have performed labor or furnished materials under a contract with the vendee, must, in the absence of an express stipulation to the contrary, look to him and his interest in the property alone for payment. They can not charge the vendor as "owner:" *Loonie v. Hogan*, 9 N. Y. 435; *Hallahan v. Herbert*, 11 Abb. Pr., N. S., 326; S. C., 4 Daly, 269; *Gay v. Brown*, 1 E. D. Smith, 725; *Miller v. Clark*, 2 Id. 543; even though the agreement of sale is in parol, and void under the statute of frauds: *Walker v. Paine*, Id. 662; *contra: Gray v. Carleton*, 35 Mo. 481. A lien filed against one who at the commencement of the work held a contract to purchase, which was afterwards perfected by obtaining the legal title, covers all the time of performance, and charges the fee subsequently acquired: *McGrass v. Godfrey*, 56 N. Y. 610. While possession under a contract of purchase is sometimes held to be sufficient ownership to charge property with a mechanic's lien, *Belmont v. Smith*, 1 Duer, 675, and other New York cases cited above; *Monroe v. West*, 12 Iowa, 119; *Stockwell v. Carpenter*, 27 Id. 119, the rule is not uniform. For converse doctrine, see *Johnson v. Pike*, 35 Mo. 291; *Gray v. Carleton*, Id. 481; *Thaxter v. Williams*, 14 Pick. 49. If the agreement of sale or building contract, however, contains a forfeiting clause, extinguishing vendee's entire interest in the premises for failure to perform his part of the agreement, the vendee's interest is insufficient to charge the estate as owner, in the erection of buildings provided for in the agreement of sale, without he, or some one for him, fully completes the contract: *Randolph v. Garvey*, 10 Abb. Pr. 179. The statute regulating mechanic's liens in the counties of Kings and Queens, in the state of New York, gave a lien for labor and materials furnished for buildings, by virtue of any contract with the owner or any person permitted by the owner of lands to build thereon: *Laws of 1862*, c. 478, p. 947; but even under this provision a lien could not be acquired for work done or materials furnished under contract with the vendee, as against one holding the legal title, unless the building was constructed by permission or consent of the vendor: *Rollin v. Cross*, 45 N. Y. 766; *Hackett v. Badeau*, 63 Id. 476. It was the design of this statute to charge the land with the debts contracted in improving it with the owner's consent, although the contract was made with the vendee: *Rollin v. Cross*, 45 Id. 770. The vendee, however, might, by a consummation of the sale before the filing of the lien, acquire both the legal and equitable title; and in such a case, the lien might be filed, under such statute, against the vendee as owner; he unites in himself the two requisites of ownership, that is, he has contracted for the work to be done, and has an interest capable of sale under execution in the lands or improvements sought to be charged. "And," says Kneeland, "where the contract for labor or materials in such a case is made by the vendor in-

stead of the vendee, and the building contract is consummated by a transfer of the fee to the vendee before the filing of the lien, the claimant may file it against the vendee, as his permission will, by virtue of the contract, be presumed, and the vendor be deemed to have acted as his agent. Under such circumstances, the conveyance to the vendee would, in legal analogy, relate back to the time when the agreement of sale or building contract was executed:" Kneeland on Mechanics' Liens, sec. 19; and see *Rollin v. Cross*, 45 N. Y. 768.

MORTGAGOR AND MORTGAGEE.—In the consideration of equitable ownership, it may be said that one having an equitable interest in lands has an estate generally sufficient to be chargeable with a lien: *McAuley v. Mildrum*, 1 Daly, 396; *Belmont v. Smith*, 1 Duer, 675; *Keller v. Denmead*, 68 Pa. St. 449; *Crowell v. Gilmore*, 13 Cal. 54; *Harah v. Morgan*, 1 Kan. 293; *Brown v. Morrison*, 5 Ark. 217; for the word "owner" includes owner in equity as well as at law: *Rollin v. Cross*, 45 N. Y. 768; *Atkins v. Little*, 17 Minn. 353. So it has been held that the owner of the equity of redemption may, during his possession of the mortgaged premises, be deemed the "owner" within the statutory meaning: *Reid v. Bank of Tennessee*, 1 Sneed, 262; *Otley v. Howland*, 36 Miss. 19. A conveyance of mortgaged property by the owner and builder, made prior to filing of claimant's lien, but which is shown by the execution of a subsequent instrument to be intended merely as a mortgage, will not prevent the lien attaching upon the equitable interest of the vendor at the date of such filing: *McAuley v. Mildrum*, 1 Daly, 396. But the mortgagor can not bind the estate under a lien for work contracted after the decree of foreclosure and sale: *Davis v. Conn. Mut. Life Ins. Co.*, 84 Ill. 508. A change of ownership during the progress of the building does not make a new commencement of the building, nor affect the validity of the incumbrance; nor will the interruption of the work for a short period, and its subsequent resumption without a change of its original design and character, constitute a new commencement, or affect the attaching of the lien when the building was originally commenced: *Gordon v. Torrey*, 2 McCart. 114, and cases there cited. As to the mortgagee's interest, however, it can hardly be doubted that the statute never intended that the mortgagee could bind it by a mechanic's lien, for ordinarily he is not an "owner" within its terms. He has a mere naked legal title without possession, and in equity has only a contingent right to and not in the property, partaking of the nature of a chattel interest as security for a debt. So it is with one temporarily holding the legal title by deed, as security for the payment of moneys advanced for the erection of a building thereon, for the benefit of the equitable owner; he can not be held liable as owner, in a lien proceeding instituted by a subcontractor: *Cox v. Broderick*, 4 E. D. Smith, 721. If, however, the mortgagee is in possession, a different rule prevails. "His chattel interest," says Kneeland in his work on mechanics' liens, section 21, "by occupancy, ripens into a conditional fee. He is an owner of the mortgaged premises, subject, nevertheless, to the right of the mortgagor to redeem by payment of the mortgage." Under such circumstances, he is an "owner," within the statutory meaning, as to all contracts executed by himself: *Ombony v. Jones*, 19 N. Y. 234; and as to those executed by the mortgagor as his agent: *Pride v. Viles*, 3 Sneed, 125. But the mortgagee in possession can not bind the mortgagor as owner for improvements made without his consent: *Quin v. Brittain*, 1 Hoffm. 353. On the other hand, he will be bound if the mortgagee acted as his agent, and a presumptive agency will be created where the work done or materials furnished

were for necessary repairs: *Kneeland on Mechanics' Liens*, sec. 21; *Quin v. Brittain*, 1 Hoffm. 353.

JOINT TENANTS AND TENANTS IN COMMON.—One who owns either a joint or several interest in real estate is an "owner" so far as his separate estate is concerned, and he may bind his interest by a mechanic's lien: *Hillburn v. O'Barr*, 19 Ga. 591; *Van Court v. Bushnell*, 21 Ill. 624; *Roach v. Chapin*, 27 Id. 194; *Johnson v. Wandock*, 31 La. Ann. 698. One tenant in common who is in possession can bind his interest by a mechanic's lien: *Keller v. Denmead*, 68 Pa. St. 449; and the rule that a parol partition between tenants in common, accompanied by separate possession, binds the parties and all those claiming under them, is applicable to a case where the title to vacant lots was vested in one of two persons who verbally agreed upon a partition with the other, who thereupon took separate possession of the portion allotted to him, and erected a building thereon. The latter was held to be the "owner," and his interest of such a nature that he could bind it by a mechanic's lien, notwithstanding the fact that the entire legal title was in his co-tenant: *Otis v. Cusack*, 43 Barb. 546.

DOWER.—It is said that an inchoate right of dower, or a tenancy by curtesy initiate, will not constitute an ownership within the meaning of the lien act; but the widow may bind her estate in dower which has been assigned, and doubtless after the death of the husband, for improvements or alterations ordered by her: *Ermul v. Kullok*, 3 Kan. 500. As the wife can not bind her inchoate right of dower during the life of her husband by a mechanic's lien, it follows *a fortiori* that the husband can not bind the same by such lien for materials furnished under a contract with himself, although the improvements increase the value of her contingent dower interest. The wife is entitled to her dower in all the real estate of which her husband was seized during coverture, unless she has released her dower in the form prescribed by law, except where a lien is created for the purchase money at the time the husband became seized: *Shaeffer v. Weed*, 3 Gilm. 513; *Gove v. Cather*, 23 Ill. 634; *Van Vronker v. Eastman*, 7 Met. 162. The lien of mechanics can not override the widow's dower: *Gove v. Cather*, *supra*. But while the wife's dower is a favorite of the law, it must be recollected that a house erected on lands of the owner is real estate, and difficulties will sometimes arise which must be solved by the application of general principles. Thus, in the case of two inconsistent statutes, the one giving the wife dower in all her husband's real estate, and the other giving a mechanic a lien in the same property to the extent of the work done thereon, the mechanic's lien rests on contract, but the wife's dower results from the marriage relation, and hers is the elder lien: *Bishop v. Boyle*, 9 Ind. 169; unless the right of dower is subordinate to a mechanic's lien perfected by attaching itself to the premises prior to marriage: *Pifer v. Ward*, 8 Blackf. 252; or to the purchase of the property: *Nazareth L. & B. Inst. v. Love*, 1 B. Mon. 258.

HUSBAND MAY BIND ESTATE BY CURTESY. While the husband can not bind the wife's interest in lands by a mechanic's lien, yet he may, under his common-law rights, bind his own interest therein during the wife's life: *McCarty v. Carter*, 49 Ill. 53; and his right by the curtesy after her death: *Fitch v. Baker*, 23 Conn. 569; and when the common-law joint life estate has been enlarged to a tenancy by the curtesy initiate, the husband may bind his increased interest by a mechanic's lien: *Kirby v. Tead*, 13 Met. 156.

GUARDIANS, TRUSTEES, EXECUTORS, and others acting in a representative capacity, can only charge property with a mechanic's lien when the legal title is vested in them. A tangible personal interest in property benefited by im-

provements should be had by persons seeking to charge it with such lien. Were it not for the statute which, in some states, provides for a suit against the executors and administrators of the estate, no suit could be maintained against them for the enforcement of a mechanic's lien, unless it were in proof that the title to the property to be affected thereby had passed to them. *Crystal v. Flannelly*, 2 E. D. Smith, 583; and a guardian can not, without the authority of a competent court, bind the lands of his ward by a mechanic's lien for materials furnished by him in the capacity of guardian: *Hassard v. Rowe*, 11 Barb. 22; *Copley v. O'Neil*, 57 Id. 299; nor will general authority of the statute, "to keep up and sustain the houses, grounds, and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with any other moneys of his ward in his hands," justify a guardian in rebuilding an entire structure destroyed by fire, and binding himself or his ward by a mechanic's lien for work performed thereon: *Copley v. O'Neil*, *supra*; nor can he so bind the property for extensive improvements made without specific authority therefor in the instrument creating the trust: *Herbert v. Herbert*, 57 How. Pr. 333; citing *Perry on Trusts*, sec. 526; *Taylor v. Baldwin*, 10 Barb. 582; *Austin v. Munroe*, 47 N. Y. 360; and see *New v. Nicholl*, 12 Hun. 431; nor can a guardian bind the estate of his wards by a mechanic's lien for materials furnished in the erection of a building upon their lot, which a competent court authorized to be "erected out of the funds of his wards, of such dimensions and quality as may suit their interest," but which was in reality built upon credit, and in such a way as to involve the destruction of that interest: *Payne v. Stone*, 7 Smed. & M. 367. It seems that a mechanic's lien can be enforced against the decedent's administrator, where the owner of real property upon which such lien was claimed sold the property, took a mortgage back, and afterwards died; and it is not necessary in such a case to make his heirs parties, because the mortgage debt and security, being personal property, pass to the hands of the personal representatives: *Shields v. Keys*, 24 Iowa, 298. It must be observed, however, that if the owner has not charged his land with a mechanic's lien prior to his death, it can not be so bound thereafter: *Meyers v. Bennett*, 7 Daly, 471; *Brown v. Zeiss*, 9 Id. 240; *sed contra*: *Maryatt v. Riley*, 2 Abb. N. C. 119. But if the property is bound by the lien during the life of the owner, the estate passes by devise or descent, subject to all the rights of the original parties, and may be enforced against them the same as against subsequent grantees: *Crystal v. Flannelly*, 2 E. D. Smith, 583. Unless some special power is conferred by statute or the courts, the trustee of an express trust can not bind the trust estate by a mechanic's lien, and one contracting with him must, to protect himself, ascertain the extent of such authority, because if he relies upon an invalid contract, even equity can not relieve him, however meritorious his claim may be: *Guy v. Du Uprey*, 16 Cal. 196; *see dicta*, however, in *Miller v. Hollingsworth*, 33 Iowa, 224; *Copley v. O'Neil*, 57 Barb. 299. But the guardian, executor, or trustee of an express trust having title to premises may, for necessary repairs, or for such erections, alterations, or improvements as come within their power to construct on credit, bind the estate by a mechanic's lien: *Anderson v. Dillaye*, 47 N. Y. 678; *Crystal v. Flannelly*, *supra*, *see Noyes v. Blakeman*, 6 N. Y. 567; and an administrator may by such lien bind a house for mechanical labor or materials furnished in its erection, and which is built upon the lands of his intestate; but he can not, by such a building contract, bind the real estate of decedent: *Weatherby v. Sinclair*, 43 Miss. 189.

MINORS AND OTHERS UNDER PERSONAL DISABILITY can not bind property by a mechanic's lien. An infant is not bound by his contract except in certain cases, and those arising under the mechanic's lien law do not come within the exceptions. A party performing work or furnishing materials for the improvement of property must know with whom he contracts, and if it is made with one not having reached his majority, it is not obligatory upon the minor, and the lien of the contractor fails, for a mechanic's lien is founded upon the existence of a valid contract with the owner: *McCarty v. Carter*, 49 Ill. 53; *Price v. Jennings*, 62 Ind. 111. So it is with the contract of a *feme covert* under the common law: *Johnson v. Parker*, 3 Dutch. 241. But while a guardian without competent authority can not by a mechanic's lien bind the property of his infant ward by erecting a house thereon: *Copley v. O'Neil*, 57 Barb. 299; or the husband so bind the property of his wife shielded by her common-law privileges, for a building erected for her: *Miller v. Hollingsworth*, 33 Iowa, 224; the builder is not prevented from securing his remedy in equity. If the estate has been benefited by such improvements, it would seem to be an equitable charge upon the land of which a court of chancery will take cognizance: *Miller v. Hollingsworth*, *supra*. The question may sometimes arise whether an adult, by a ratification of his contract made during infancy, can bind his property by a mechanic's lien upon the premises. The court in *McCarty v. Carter*, 49 Ill. 56, on this point said: "Ratification by an adult of a contract made by him when a minor is a question of intention. It can be inferred only from his free and voluntary acts or words. But it would be unreasonable to compel a minor to choose between the utter abandonment of his property and the creation of a lien upon it under a contract made during his minority, and to say if he retains the property he ratifies the lien. If we were to hold that the mere receipt of rents amounted to a ratification, we should be taking from the minor the protection which the law designs to give him, for the builder might safely assume the minor would continue in the possession of his own property, and thus, by ratification, create a lien which the statute had not given when the contract was made. The builder might thus make what contract he could with the minor, under the assurance that, though the contract was not binding and the statute gave him no lien, one would nevertheless be worked out for him by a necessary ratification."

HUSBAND AND WIFE.—It is a frequent source of inquiry and of litigation in connection with this subject as to what extent the wife may bind her separate estate, or subject it to a mechanic's lien under a contract which has been made wholly with the husband. The lien is a creature of the statute. And under the fiction of the common law, that a married woman's legal existence is merged in that of her husband, she is presumed to be incapable of binding herself by any executory contract. As she can then make no contract for herself, there can be no lien. But the personal disabilities of married women have, under the more enlightened legislation of recent times, been removed, and the wife's right to make contracts in all things pertaining to the management, sale, purchase, control, and disposition of her separate estate is now generally recognized and sustained as fully as if she were a *feme sole*. The husband, as such, can not bind the property of the wife: *Garnett v. Berry*, 3 Mo. App. 197. To bind it he must have some authority from her, or he must show such conduct on her part as will fairly supply the presumption of such authority: *Id.* A contract, therefore, made with him solely will not bind her property: *Knott v. Carpenter*, 40 Tenn. 543; *Hughes v. Peters*, 1 Coldw. 67; *Miller v. Hollingsworth*, 33 Iowa, 224; *Gilman v. Diebrr*, 5 Conn. 563; nor,

where lands are conveyed to husband and wife, will a contract made with him alone bind her interest: *Johnson v. Parker*, 3 Dutch. 239, cited and approved in *Washburn v. Burns*, 34 N. J. L. 21. In short, the husband can not bind the wife's separate real property, by any contract he makes himself only, and to which she has not in any manner given her assent: *Esslinger v. Huebner*, 22 Wis. 632; *Webster v. Hildreth*, 33 Vt. 457; *Corning v. Fowler*, 24 Iowa, 584; *Miller v. Hollingsworth*, 33 Id. 224. But under the recent legislation above mentioned, married women may now, in many of the states, bind their separate property by a mechanic's lien for work ordered by them, or by any other person as their agent, and by their husbands as well as a stranger: *Kidd v. Wilson*, 23 Id. 464; *Burdick v. Moon*, 24 Id. 418; *Lez v. Holmes*, 4 Phila. 10; *Hauptman v. Callin*, 20 N. Y. 247. If the husband be the direct agent of the wife, duly appointed and authorized by her to contract, then she can bind her separate property by a mechanic's lien under his contract with a mechanic to perform labor and supply materials upon her land, for her use and benefit, and with her knowledge and consent. See cases last cited, and *Taylor v. Gilsdorf*, 74 Ill. 354. And the husband's agency may be implied from the wife's conduct. Thus a mechanic's lien was enforced in such a case, when it was shown that she had personal knowledge that the work was going on, and gave some personal directions respecting the manner of doing it: *Collins v. Megraw*, 47 Mo. 495; *Forrester v. Preston*, 2 Pittsb. 298; *Schwartz v. Saunders*, 46 Ill. 18; *Husted v. Matthes*, 77 N. Y. 388, distinguishing *Jones v. Walker*, 63 Id. 612; *Yale v. Dederer*, 68 Id. 329; *Ainsley v. Mead*, 3 Lans. 116; *Leise v. Schwartz*, 6 Mo. App. 413. But there must be some foundation for the agency, as it will not be presumed without any evidence: *Jones v. Walker*, 63 N. Y. 612; *Gilman v. Disbrow*, 45 Conn. 563.

In *Cameron v. McCullough*, 11 R. I. 173, the wife's consent in writing to improvements upon her estate was declared to be necessary to bind it by a mechanic's lien; and in *Garnett v. Berry*, 3 Mo. App. 197, it was held that the mere knowledge and approbation of the owner do not amount to either appointment or ratification, and that an authorization or ratification of a contract to build a house on the wife's lot will not be presumed from the fact that the house was to be a residence for the wife and children, with the husband. Where the wife is the owner, the mere fact that she knew of the improvement, and subsequently signed a note with her husband for the work, is not proof of a contract on her part; and in such a case, the question to be tried in an action to charge her property with a lien is not whether the contract was made with the wife's knowledge, but whether it was made with her consent and in her behalf: *Hughes v. Anslin*, 7 Id. 400. A mechanic's lien to bind the estate of a married woman must show on its face every requisite to make it a valid claim against her, and one of these is to show that the work is necessary for the improvement of her separate estate: *Kukas v. Turney*, 87 Pa. St. 497; *Loomis v. Fry*, 91 Id. 396; *Shilling v. Templeton*, 66 Ind. 585. Under a married woman's contract for improvements, it is not necessary to the validity of a mechanic's lien upon her property that she should intend to create a charge thereon, but the law itself gives such lien when the work has been done or the materials furnished under a contract with her, express or implied: *Vail v. Meyer*, 71 Id. 159, distinguishing *Kantrowitz v. Prather*, 31 Id. 92. But for a contrary doctrine, that in the absence of a contract or fraud on her part a married woman is not liable to pay for the erection of a house built on her land, under a contract with her husband in his own name, and not as her agent, although the erection progressed with her knowledge, consent, and approbation, see *Flannery v. Rohr-*

mayer, 46 Conn. 558; S. C., 33 Am. Rep. 36; and this, although after completion, she resided in the house with her husband, and claimed it as a homestead: *Lauer v. Bandow*, 43 Wis. 556; S. C., 28 Am. Rep. 571. See also, to the same effect, *Corning v. Fowler*, 24 Iowa, 584; *Hughes v. Peters*, 1 Coldw. 67, that the wife's estate can not be made liable by implication: *Fetter v. Wilson*, 12 B. Mon. 90, where Marshall, C. J., said: "To say that the wife may be regarded as the employer, whenever it shall appear or may be inferred that although the work done or materials furnished for a building on her land may have been directed by the husband and done or furnished for him, the wife knew of and assented to, or did not dissent from, his acts in the premises, would in effect be placing the interest of the wife under the control and at the mercy of the husband. This would be to extend the operation of the statute further than is authorized by its terms, or by its object and interest." It has been held that the performance of work on the wife's estate is of itself sufficient to establish the agency where it was done with her knowledge, and actually benefited her separate property; and that where the labor performed and materials were for the benefit of her separate estate, it establishes a claim resting in contract, which a court of equity will enforce: *Dyett v. North American Coal Co.*, 20 Wend. 570. And it is said that the proceeding to enforce a lien is of an equitable character, and embraces such a claim: *Hauptman v. Catlin*, 3 E. D. Smith, 666, affirmed in court of appeals, 20 N. Y. 247; *sed contra*: *Webster v. Hildreth*, 33 Vt. 457. But again, it is said in another state that the husband's agency will not be presumed from the marital relations alone, nor from the fact of the materials being used on the wife's property: *Miller v. Hollingsworth*, 33 Iowa, 224; nor will the mere acceptance of rent by the wife ratify the agency where the husband erected the building on the wife's estate without her knowledge at the time: *McCarty v. Carter*, 49 Ill. 53. It is thus evident that the amount of proof necessary to establish an agency between the husband and wife is a subject not well settled by judicial decision, but the better rule seems to be the one first stated. Where the statute gives the wife full and free powers and privileges to make contracts, it is a question for the jury to determine, from the evidence adduced on the trial, whether or not the husband, in contracting for work to be done upon her property, acted as her agent: *Kneeland on Mechanics' Liens*, sec. 33. But even in states where the wife may, by contract, legitimately bind her property by a mechanic's lien, she can not, by collusion with her husband, act to the injury of his creditors, and encourage him to invest his property in improving hers, for in such a case a court of equity may either decree a sale, appropriate the proceeds between the creditor and the wife, or lease it and apportion the rent until the debt be paid: *Bartos' Appeal*, 55 Pa. St. 386. If, however, both husband and wife spent money in the improvement of her separate property while the husband was in debt, and there was no fraud or collusion on her part, although she knew that he voluntarily expended his own moneys thereon, the judgment creditors of the husband can not enforce the lien of their several judgments against her property to the extent of the amount invested by him therein: *Webster v. Hildreth*, *supra*; *Corning v. Fowler*, 24 Iowa, 584. Neither can an improvident husband, or one who is a spendthrift, bind his wife's estate by a mechanic's lien for improvements upon her separate property, unless she authorizes them and consents thereto; much less where they are made against her consent: *Bartos' Appeal*, *supra*.

AGENTS.—The statutory right of lien for labor performed or materials furnished arises from a contract, express or implied, with the owner or his

agent. "There can be no doubt that a contract, such as creates a mechanic's or materialman's lien, may be made by the agent of the owner of the premises to be improved or repaired. To do so, however, he must have authority for the purpose. A general agency to take care of the property, or an agency for other purposes, will not be sufficient. And in this there is no hardship, as the title being on record, the mechanic is chargeable with notice that the agent is not the owner; and having that notice, while dealing with a person not having the title, or being clothed with the evidences of title, he should ascertain the source and extent of the authority before contracting; and failing to do so, he should bear the consequences of his negligence:" *Baxter v. Hutchings*, 49 Ill. 119. So the mere fact of possession will not prove authority; and while a party in possession as a tenant, an intruder, or otherwise, of property of another may, by a contract for building, bind his own interest, he can not bind that of the owner in the premises unless the authority to do so has been conferred: *Garrett v. Stevenson*, 3 Gilm. 261; *Steigleman v. McBride*, 17 Ill. 300; *Baxter v. Hutchings*, *supra*. If such were the law, it is said in the case last cited a tenant or mere occupant could do great wrong to the owner. But in Illinois, it is said that in a proceeding to enforce a mechanic's lien against one in possession of land, and for whom the work was done or materials furnished, the land may be sold, and his interest, whatever it may be, will vest in the purchaser. The holder of the legal title ought not to stand by and see a contract made for work upon it, and then attempt to set up his title to defeat a mechanic's lien, when he gives no notice to the mechanic of the state of the title; for in such a case equity will estop the owner from setting up his legal title against the lien: *Donaldson v. Holmes*, 23 Ill. 85; *Higgins v. Ferguson*, 14 Id. 269; see *Wendell v. Rensselaer*, 1 Johns. Ch. 344; *Storrs v. Barker*, 6 Id. 166. The contractor with the owner for the erection of a building is so far the agent of the owner that he can bind the property by all contracts for materials and labor necessary to complete the building: *Morrison v. Hancock*, 40 Mo. 561; but a special agent, employed for a particular object only, and not connected with the subject of building, can not bind a building by a mechanic's lien for materials furnished in its construction. In instructions to the jury, a distinction must be made between matters within the scope of an agent's authority and those entirely outside of it: *McDonnell v. Dodge*, 10 Wis. 106. A lien was fastened upon a building under the following circumstances: The owner of a house in the course of erection contracted to sell it to B., and to have it completed like one adjoining. B. deposited a sum of money as a forfeit for non-compliance with his contract. Pending the contract, B. purchased of A. a range, furnace, and other articles, which were delivered upon the premises with the knowledge of the owner, the furnace and range being bricked up in the cellar. Subsequently B. abandoned the contract, and refused to take the house. The owner retained the forfeit money, and also the house and fixtures in question. On proceedings by A. to enforce a mechanic's lien, it was held that B. was the agent of the owner of the property. The owner of the house to be constructed and finished by him permitted B., after the contract with him, and during its pendency, to intervene and assist in the construction of the building, and to this extent at least accepted his agency, and recognized his acts by interposing no objection thereto. The owner's adoption of B.'s acts, permitting the fixtures to be attached without notice of objection, makes the house answerable for the same, and creates the lien on the property for its payment: *Weber v. Weatherby*, 34 Md. 656.

LESSEE AND LESSOR.—The owner is the party to whom the property belongs at the time the suit is commenced for the enforcement of a mechanic's lien; but an owner is not necessarily a proprietor in fee simple; he is the person who is entitled to and receives the use and benefit of the realty. A lessee or tenant for life or years has a full dominion and use of the land for the time being. Usually, therefore, statutes granting this lien make provision for its enforcement against the interest of the party with whom the contract is made: *Alley v. Lanier*, 1 Coldw. 540; *Choteau v. Thompson*, 2 Ohio St. 114; *Butler v. Rivers*, 4 R. I. 38; *Harman v. Allen*, 11 Ga. 45; *Littlejohn v. Millirons*, 7 Ind. 125; *Montandon v. Deas*, 14 Ala. 33; *Barber v. Reynolds*, 33 Cal. 497; *Dutro v. Wilson*, 4 Ohio St. 101; *Ombony v. Jones*, 19 N. Y. 234. But while the lessee may by a mechanic's lien bind his interest to the extent of his unexpired term, he can go no further; in other words, he can not so bind the reversion: *Harman v. Allen*, *supra*. A mechanic's lien for the purchase money of the machinery of a mill, upon the machinery and leasehold interest of the purchasers in the mill property, which was occupied by them under a verbal lease for the term of five years, has been held to be valid as against subsequent incumbrancers: *Nordyke v. Haskrye Woolen Mills Co.*, 53 Iowa, 521. The lessee can not bind the interest of his lessor by a mechanic's lien upon property without the lessor has by some act made his estate liable. The legislature may well assume that a tenant for a short term would not be likely to make improvements for the benefit of the reversion at his own expense, and there would seem to be no necessity for a statutory provision to meet such a contingency. The rule is the same where the improvements are made by the undertenant of the lessee: *Francis v. Sayles*, 101 Mass. 435. But the lessor, by permission or contract, may bind his own estate for work done by the lessee. For facts of such a case, see *Burkitt v. Harper*, 79 N. Y. 273, distinguishing *Knapp v. Brown*, 45 Id. 207; *Muldoon v. Pitt*, 54 Id. 269; *Conklin v. Bauer*, 62 Id. 620. After the lessee has once bound his interest by a mechanic's lien for improvements thereto, the voluntary surrender of his lease to his landlord before the expiration of its term will not affect the lien which attached while he was owner. In such a case, if the owner of the fee should neglect to discharge the lien, he would, upon the consummation of a sale under the decree establishing it, be compelled to accept another tenant; and a decree establishing the lien against the lessee's interest alone may properly order that, in default of the payment of the amount of the lien by the lessee, or the owner to whom he has surrendered, the interest of all the parties therein be sold. Such a decree would be construed as applying to the interests of the parties in the leasehold estate, including the improvements for which the lien is established: *Dobeckuets v. Holliday*, 82 Ill. 371; *Koenig v. Mueller*, 39 Mo. 165; see *Gaskill v. Trainer*, 3 Cal. 268; *Kidder v. Aholtz*, 36 Ill. 478, stating the better practice in directing sales; *Cheney v. Bonnell*, 58 Id. 268.

A mechanic's lien attaches to the land and to the building to the extent of the interest of the owner of the building in them respectively; and if the land is owned by one person and the building by another, it is the interest only of the latter which can be subjected to the lien: *Ombony v. Jones*, 19 N. Y. 234. There being no restriction in the lease, the tenant may remove improvements which can be detached and taken away without injury to the reversion: *Id.*; and it seems that such improvements may sometimes be the subjects of a mechanic's lien: *Koenig v. Mueller*, *supra*; explained in *Collins v. Mott*, 45 Mo. 100. In the case last cited it was held that the leasehold estate does not extend to boilers or engines erected by the lessee on leased

premises; but in *Dobachuetz v. Holliday*, *supra*, it was decided that a mechanic's lien attaches to the leasehold estate for work on machinery, such as an engine and other necessary apparatus, which the lessee, under his lease, has a right to remove. The mere right of occupancy in the land, with a right to remove a building, will both pass by a sale under a mechanic's lien; but if the owner of the building, as between himself and others having rights in the land, has no power to remove it, a purchaser under the lien will acquire no right to remove it: *Jessup v. Stone*, 13 Wis. 466. The purchaser acquires no greater right than the lessee himself; and when such property can, by the contract of lease, be removed by the lessee only upon the performance of certain conditions, the removal before such performance by a purchaser will be enjoined: *Oswold v. Buckholz*, 13 Iowa, 506. So the lienor, under such circumstances, will be entitled to an injunction to restrain a judgment creditor of the lessee, whose judgment is younger than the lien, from removing the building from a lot when the security is insufficient without such building: *Barber v. Reynolds*, 33 Cal. 497. The lessee in possession simply under an agreement to lease may bind his interest by a mechanic's lien for improvements made before terms of the agreement are reduced to writing. In fact, it matters not whether it is ever reduced to writing; in that event the lien will attach, because the contract will be regarded as obligatory from its date: *Montandon v. Deas*, 14 Ala. 45; 8 C., 48 Am. Dec. 84. But if the person who afterwards secured a lease was at the time when the materials were furnished to him a mere occupier of the property, without any arrangement for a future lease, this rule is inapplicable: *Dame's Appeal*, 62 Pa. St. 417.

POWER OF TENANT TO BIND FEE.—The lessee is not the owner of the realty to the extent that any contract made by him will bind the realty against the owner of the title; and statutes generally impose the lien "upon the building or structure" erected for the tenant, to the extent of his interest therein. But it is only by consent of the owner that any service to the tenant can be enforced as a lien against the owner of the realty: *Francis v. Sayles*, 101 Mass. 435; *Harman v. Allen*, 11 Ga. 45. The owner of the realty is not bound from the mere fact that the erections are for the permanent improvement of the property: *Knapp v. Brown*, 45 N. Y. 207; or that the work was done under the supervision of the owners of the fee: *Muldoon v. Pitt*, 54 N. Y. 269; *Wilkerson v. Rust*, 57 Ind. 172; or that the lessor advanced money towards the construction of the buildings: *Stuyvesant v. Browning*, 33 N. Y. Sup. Ct. 203; or, under a statute securing a lien against the person causing the work to be done, that the owner gave an extension of the lease and advanced a sum of money on condition that the tenant would make certain improvements and erections on the demised property, the tenant having contracted with the mechanics for the performance of the work: *Johnson v. Dewey*, 36 Cal. 623; or a covenant in the lease requiring the tenant to make the alterations and repairs for which the lien is sought: *Francis v. Sayles*, *supra*; or that the owner paid some of the bills contracted by the lessee for the improvements, and gave him a certain sum towards the completion of the work: *Trustees v. Young*, 2 Duv. 582. No lien can be created upon the interest of any person as owner of the land, except such person has either himself or by his agent entered into a contract for doing the work, either express or implied: *Burkitt v. Harper*, 79 N. Y. 277; *De Ronde v. Olmsted*, 47 How. Pr. 175; *Knapp v. Brown*, 45 N. Y. 211; *Muldoon v. Pitt*, 54 Id. 272; *Lynam v. King*, 9 Ind. 3; *Baylies v. Sinec*, 21 Id. 45; *Wilkerson v. Rust*, 57 Id. 178. In conclusion, it may be said that where there is

no evidence at the trial to show that the defendant had an interest in the leasehold premises upon which a lien was claimed and judgment demanded, until after the contracts with the claimants were made, the defendant can not be made liable: *De Ronde v. Olmstead*, *supra*. And, contrary to the general rule, it is held in Pennsylvania that the lessor may bind his land by a mechanic's lien for materials furnished at the instance of the lessee, holding under an improvement lease: *Barclay v. Wainwright*, 86 Pa. St. 191.

GRANTEE OF CONTRACTING OWNER.—Where the statute provides that the claimant shall, upon filing notice, have a lien to the extent of the right, title, and interest of the owner at that time existing in the property, a sale of it in good faith before the notice of lien is filed prevents the acquisition of any lien: *Sinclair v. Fitch*, 3 E. D. Smith, 677; *Cox v. Broderick*, 4 Id. 721; *Noyes v. Burton*, 29 Barb. 631; *Ernst v. Reed*, 49 Id. 367; *De Ronde v. Olmsted*, 47 How. Pr. 175; and even though the purchaser had notice of the amount of the claim, and the conveyance was made subject to its payment, his interest is not bound, unless the notice of lien was filed prior to the grant: *Sinclair v. Fitch*, *supra*. Where work is done and materials furnished toward the improvement of property, and it is afterwards sold during the continuance of the work, and after the conveyance a mechanic's lien is filed against the purchaser, he is not bound for such materials and labor as were furnished and performed before he acquired title: *Tiley v. Thousand Island Hotel Co.*, 9 Hun, 424, following *Spencer v. Barnett*, 35 N. Y. 94; *Meyers v. Bennett*, 7 Daly, 471. The owner of a building can not defeat the lien or relieve himself from contingent liability, by a subsequent conveyance of the property to a third party; but when one purchases property to which a valid lien has attached, it is to be presumed that the price was fixed with reference to the incumbrance, or that he secured himself from loss by appropriate covenants: *Blauvelt v. Woodworth*, 31 N. Y. 285.

The conveyance of premises made in fraud of a mechanic's lien will not have the effect of barring or precluding the foreclosure of such lien, although the notice of lien is filed subsequent to such conveyance, but within the statutory limit: *Meehan v. Williams*, 36 How. Pr. 73; *Quimby v. Sloan*, 2 E. D. Smith, 594; *Shafer v. Reilly*, 50 N. Y. 61. If the court in which the lien is attempted to be enforced has no equity jurisdiction, or the lienor does not elect in the lien proceeding to try the validity and good faith of the transfer, he may obtain a judgment against the contracting owner, and sell all his right, title, and interest in the property when the lien was filed, and then in an action of ejectment contest the legality of the grantee's title: *Quimby v. Sloan*, *supra*; *Ernst v. Reed*, 49 Barb. 367; *Randolph v. Garvey*, 10 Abb. Pr. 179; *Meehan v. Williams*, *supra*. Fraud may be shown at the trial for the purpose of defeating the transfer, although the fraudulent grantee is described in the notice of claim as the owner: *Amidon v. Benjamin*, 126 Mass. 273; and whenever the title of the purchaser is to be tested, a *lis pendens* should be filed, as an innocent purchaser from a person obtaining his title and having his deed recorded previous to the filing of a notice of lien is not bound to take notice of any lien filed after his grantor's deed was recorded: *Noyes v. Burton*, 29 Barb. 631. An assignment for the benefit of creditors vests the legal title in the assignee, who stands in the same position as a purchaser for value in respect to subsequent liens against the assignor; and if the lien is not perfected by filing, prior to such an assignment, the interest of the assignee is not bound: *Quimby v. Sloan*, *supra*; *Noyes v. Burton*, 29 Barb. 631. And if the assignment was executed before the lien was filed, the subsequent recording of the assignment will not affect the case: *Id.*; *Oates v.*

Haley, 1 Daly, 338. But the assignment of the contractor does not prevent the filing of a lien by a subcontractor: *Murray v. Hutcheson*, 8 Abb. N. C. 423; *Mandeville v. Rerd*, 13 Abb. Pr. 173; *Henderson v. Sturgis*, 1 Daly, 336; *Oates v. Haley*, Id. 338; *Smith v. Baily*, 8 Id. 128.

We apprehend that it may be possible, by statutes containing apt words for that purpose, to charge the interest of the owner of the fee with a lien for buildings erected by others, but with his assent, express or implied, and that such statutes may make it necessary for him to do some affirmative act to rebut the presumption of his assent. Section 1192 of the code of civil procedure of California is at follows: "Every building or other improvement mentioned in section 1183 of this code, constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect in some conspicuous place upon said land, or upon the building or other improvement situated thereon." In construing this section, it has been held not to apply to mortgages existing against the property, prior to the inception of the lien, nor to require mortgagees to give any notice in order to retain the priority of their mortgages: *Preston v. Sonoma Lodge*, 39 Cal. 117; *Williams v. Santa Clara Mining Co.*, 4 West Coast Rep. 616. Where, however, to secure a loan, a trust deed was given on an uncompleted building, it was held to be subordinate to a lien for work done and materials furnished in completing the building, the persons interested in the loan having knowledge of the intention to proceed with the building, and giving no notice to reserve their interest from the operation of the lien: *Fuguey v. Stickney*, 41 Cal. 583. The validity of the statute has been assumed in subsequent cases, both in California and Nevada, where liens have been adjudged to charge the interest of the owner of the fee, where he had notice of the work done on his property, in the construction or repair of buildings thereon: *Moore v. Jackson*, 49 Cal. 109; *Phelps v. M. O. G. M. Co.* Id. 336; *Gould v. Wise*, 2 West Coast Rep. 405.

GRIFFIN v. MAYOR ETC. OF NEW YORK.

[9 NEW YORK (5 SELDEN), 456.]

MUNICIPAL CORPORATION IS NOT LIABLE IN DAMAGES to a person injured in consequence of driving against rubbish in a city street, where the rubbish was left there by private persons, without license or authority from the city, and there is no proof that the city officers had notice to remove it.

APPEAL from a judgment of the New York superior court, dismissing complaint. The opinion sufficiently states the facts.

John Fowler, jun., for the appellant.

R. J. Dillon, for the respondents.

By Court, DENIO, J. In the case of *Hutson v. Mayor etc. of New York*, 9 N. Y. 163, we decided, at the last term, that the corporation of the city of New York were liable for injuries sustained by a passenger in consequence of a street being out of repair. In that case, an excavation had been made in the Fourth avenue by the Harlem Railroad Company, by constructing the track of their road upon it, pursuant to an act of the legislature, and with the assent of the common council. In doing this, a deep excavation had been made in the traveled part of the street, leaving only a narrow space for passage, which had become very dangerous in consequence of the wearing away of the earth by the rains. It was suffered to remain in this state by the city authorities; and the plaintiff, who was driving past it in a carriage, was overturned and injured. We held the city corporation liable, for the reason that we conceived it to be its duty, under section 175 of the act of 1813, 2 Rev. Laws, 407, to have amended and put in repair the portion of the street in question. The provision expressly authorizes the corporation to order and direct the altering and amending of the streets, and to collect the expense by an equitable assessment. The same principle had been held in effect by the former supreme court, in *Mayor etc. of New York v. Furze*, 3 Hill (N. Y.), 612.

The present case is not within the statute or the principle of these decisions. Chambers street is not shown to have been out of repair. It is one of the old paved streets of the city, and, for aught that appeared, the pavement was unbroken and in perfect order. The difficulty was, that certain persons, in violation of the city ordinances, had placed encroachments upon this street, rendering its use inconvenient and to a certain extent dangerous. It did not appear that either the common council or any of its officers had notice of the existence of the nuisance, nor was it shown to what extent or under what restrictions individuals engaged in building may make use of portions of the street for a temporary deposit of the materials and rubbish. That subject is provided for in the city ordinances. It is improbable that any ordinance would have justified these piles of rubbish to have remained in the street for the length of time mentioned, if indeed it was not the duty of the parties concerned to have removed them individually. By section 195 of the act just referred to, it is made penal for any person to put or

leave any unnecessary obstructions in any of the roads of the city; and although this provision does not embrace the streets, strictly so called, there is no doubt but that the authority which the corporation possesses, to make all needful by-laws and ordinances for the good government of the city, confers upon it ample power to adopt suitable regulations upon this subject, nor but that the power has been exercised by the enacting of a series of rules deemed adequate to the exigencies of the case. The functions of a common council, as applied to this subject, are those of a local legislature, within certain limits, and are not of a character to render the city responsible for the manner in which the authority is exercised, or in which the ordinances are executed, any more than the state would be liable for the want of adequate administrative laws, or for any imperfections in the manner of carrying them out. The wrong complained of in this case arose either from the want of suitable municipal regulations or from some negligence in the city officers in ascertaining the existence of the obstruction or seasonably applying the proper remedy. A doctrine which should hold the city pecuniarily liable in such a case would oblige its treasury to make good to every citizen any loss which he might sustain for the want of adequate laws upon every subject of municipal jurisdiction, and on account of every failure in the perfect and infallible execution of those laws. There is no authority for such a doctrine, and we are satisfied that it does not exist. A similar question came before the superior court in *Levy v. Mayor etc.*, 1 Sandf. 465, where it was attempted to make the city liable for an injury committed by swine running at large in one of the streets, on the assumption that the corporation are bound to provide for such a perfect execution of its ordinance upon that subject that no injury should ever occur. I entirely concur in the opinion of the court in that case, which was delivered by the late Justice Sandford, and was adverse to the plaintiff. "It is the duty of the government," said the learned judge, "to protect and preserve the rights of the citizens of this state, both in person and property, and it should provide and enforce wholesome laws for that object. But injuries to both person and property will occur, which no legislation can prevent, and which no system of laws can adequately redress. The government does not guarantee its citizens against all the casualties incident to humanity and to civil society; and we believe it has never been called upon to make good by way of damages its inability to protect against such misfortunes."

The foregoing considerations are sufficient to dispose of this case, without considering the further question whether there was not sufficient evidence of negligence on the part of the plaintiff in attempting what it was impossible for him safely to do, to pass a place not wide enough for two vehicles when one was already passing through it.

The judgment of the superior court ought to be affirmed.

ALLEN, J. There are two insuperable objections to the right of the plaintiff to recover in this action: 1. The immediate and direct cause of the injury to the plaintiff was his own imprudent and negligent driving upon the pile of rubbish by which his carriage was overturned. If the street was so obstructed from any cause that two vehicles could not pass each other at that point, he should, in the exercise of that care and caution which is required of every one, have waited until the way was clear. In attempting to pass another carriage at that place, in daylight, with the nature and extent of the encroachments upon the street fully visible, by driving over the obstruction, he did so at his peril. The defendants should not be held responsible for his want of judgment or recklessness. In actions of this kind, a party seeking redress for injuries should be held to the exercise of ordinary care and skill, even if not required to be entirely without fault. 2. The defendants are not chargeable for any injury resulting from an obstruction of a public street not caused by their own act or the acts of their authorized agents, especially when notice of the obstruction is not brought home to the city authorities. A duty is devolved upon the common council of New York in their legislative capacity to prevent by adequate laws all improper encroachments upon the highways, and to provide for the removal of all obstructions, as also to prevent other nuisances which might injuriously affect the health, property, or rights of the citizen. This obligation is an imperfect obligation, and for its non-performance an action will not lie at the suit of an individual who may sustain injury by the omission. A municipal corporation, in the exercise of its functions and the performance of the duties imposed upon it by law, is responsible for the performance of those duties in a proper manner and with due skill and care; and if, by the improper, unskillful, or negligent manner in which it performs an act lawful in itself, an injury ensues to an individual, an action will lie against the corporation for such injury. A corporation is held to the exercise of that degree of skill and care in the performance of any act within the limiti-

mate scope of its duties which would be exacted from an individual; and in the use and occupation of its property it is bound by the same maxim, *Sic utere tuo ut alienum non lædas*, and is liable for any improper use by which individuals are injured: *Brower v. City of New York*, 3 Barb. 254. Hence in *Mayor etc. of New York v. Furze*, 3 Hill (N. Y.), 612, the corporation, having constructed sewers, were held liable for an injury sustained by an individual, occasioned by the improper and insufficient manner of their construction and their want of repair. The duty of keeping in repair resulted from their construction, and was absolute. No other person was authorized to interfere, and the omission to repair was the neglect of a positive duty. But I do not understand that an action could have been sustained for not constructing the sewers originally. So the omission of some positive duty imposed upon a corporation in respect to their own property, and which is solely the duty of the corporation, may authorize an action at the suit of an individual who has sustained some injury peculiar to himself; and so in *Henly v. Mayor and Burgesses of Lyme*, 5 Bing. 91; S. C., 1 Bing. N. C. 222, the defendants were made liable for the non-repair of a sea-wall according to the terms of a grant. But in the case before us, the placing and continuing the obstruction in the street was the act of a third person, a stranger to the defendants, and for whose acts they were not chargeable. The primary duty of removing the encroachment was upon him who placed it there, and not upon the defendants. The duty of the defendants in the premises was rather executive, to compel an observance of the ordinances of the city by the wrong-doer than themselves to remove the obstruction. If the encroachment upon the street was unlawful, it was a nuisance, and the remedy palpable and easy: 1. Any citizen might lawfully abate it by his own act: Bac. Abr., tit. Nuisance, C; *Wetmore v. Tracy*, 14 Wend. 250 [28 Am. Dec. 525]; 2. The individual who created and continued the nuisance was liable to indictment; 3. An action would lie against the wrong-doer at the suit of any individual who should sustain any damage peculiar to himself and which was not common to the public: *Pierce v. Dart*, 7 Cow. 609.

There is no precedent for the action, and no principle upon which it can be sustained. The judgment of the superior court should be affirmed.

All the judges concurred in the opinion of DENIO, J.

SELDEN, J., said that if the corporation had had notice of the obstruction, he would have held them liable.

Judgment affirmed.

LIABILITY OF MUNICIPAL CORPORATIONS FOR DEFECTIVE STREETS: *Mower v. Inhabitants of Leicester*, 6 Am. Dec. 63; *Lowell v. Boston & L. R. R. Corp.*, 34 Id. 33, and note on negligence of person, by which a public street is left in an unsafe and dangerous condition, 40; *Ross v. City of Madison*, 48 Id. 361; *Meares v. Commissioners of Wilmington*, 49 Id. 412, and note 421; note to *City of Lowell v. Spaulding*, 50 Id. 776; *Town Council of Akron v. McComb*, 51 Id. 453; *City of Tallahassee v. Fortune*, 52 Id. 358, and note 364; *Walling v. Mayor etc. of Shreveport*, Id. 608; *Raymond v. City of Lowell*, 53 Id. 57, and note 67, concerning non-repair of streets and highways, and obstructions therein; *Troy v. Cheshire R. R. Co.*, 55 Id. 177; notes to *City of Buffalo v. Holloway*, 57 Id. 553; *Hutson v. Mayor etc. of New York*, 59 Id. 528, and notes thereto 529.

DECLARATION WHICH CHARGES MUNICIPALITY WITH NOTICE through its officers should show when, how, and to what officers the notice was given: *Prather v. City of Lexington*, 56 Am. Dec. 585.

NOTICE TO COMPTROLLER OF CITY OF NEW YORK of a demand against the city is notice to the corporation: *Field v. Mayor etc. of New York*, 57 Am. Dec. 435.

THE DOCTRINE OF THE PRINCIPAL CASE, that it is no part of the duty of municipal corporations to the public to remove obstructions placed upon the street by third persons, and of which they had no notice, express or implied, was affirmed in *Seaman v. Mayor etc. of New York*, 3 Daly, 150; *Hutson v. City of New York*, 5 Sandf. 304; *Wendell v. Mayor etc. of Troy*, 4 Keyes, 267; S. C., 4 Abb. App. Dec. 569; *Hickok v. Trustees of Plattsburgh*, 15 Barb. 443; *Hume v. Mayor etc. of New York*, 47 N. Y. 647; *Ploedteril v. Mayor etc. of New York*, 55 Id. 666, all citing the principal case. In all cases where neither the municipality itself nor any of its officers has had any agency in creating the obstruction producing the injury, the common-law rule is applied, requiring neglect or want of proper care to be shown in guarding or removing dangerous obstructions in the public streets, after actual or constructive notice of their existence, before the municipality can be held liable for personal injuries sustained by means of them: *Hume v. Mayor etc. of New York*, 9 Hun, 685, citing the principal case. In *Kunz v. Stuart*, 1 Daly, 431, the principal case is cited to the proposition that the government does not guarantee its citizens against all the casualties incident to humanity or civil society.

THE PRINCIPAL CASE WAS CITED BUT DISTINGUISHED in *Wallace v. Mayor etc. of New York*, 18 How. Pr. 175; S. C., 2 Hilt. 451; 9 Abb. Pr. 43, where it is said that the liability for neglect to keep public streets in repair, a duty imposed by statute, is distinguishable from cases where the streets are obstructed by the acts of third persons. The principal case is distinguishable from those where the injury results from an omission of duty: See *Barton v. City of Syracuse*, 36 N. Y. 58; S. C., 37 Barb. 299; *Wendell v. Mayor etc. of Troy*, 4 Keyes, 267; S. C., 4 Abb. App. Dec. 569; *Smith v. Mayor etc. of New York*, 66 N. Y. 297, all citing the principal case. A municipal corporation, in the use and occupancy of its property, is held to the skill and care which would be required of an individual: *Parker v. City of Cohoes*, 10 Hun, 535,

citing the principal case. The principal case was cited in *Regua v. City of Rochester*, 45 N. Y. 135, and reference made to the distinction between the case of a street out of repair by the act of a third party and an obstruction placed in the street by such party in violation of an ordinance. The principal case was also cited but distinguished in *Worcester v. Forty-second Street etc. R. R. Co.*, 50 Id. 205. Other citations of the principal case: *Delafield v. Union Ferry Co.*, 5 Robt. 216; *Welling v. Judge*, 40 Barb. 207; *Theall v. Yonkers*, 21 Hun, 267; *Lorillard v. Town of Monroe*, 11 N. Y. 396.

LEWIS v. SMITH.

[9 NEW YORK (5 SELDEN), 502.]

DEVISE OF ALL TESTATOR'S PROPERTY TO HIS WIDOW operates only upon such interest as is his to dispose of. She is not bound to elect between the devise and her dower, but may claim dower, as such, in his lands, and take the benefit of the devise besides.

LANDS DEVISED TO TESTATOR'S WIDOW FOR LIFE, WITH REMAINDERS OVER, had been sold under foreclosure of a mortgage made by testator during his life-time, in which she did not join: *held*, that her claim as dowress was not barred.

DECREE AGAINST DEFENDANT MADE PARTY TO FORECLOSURE SUIT, UNDER GENERAL ALLEGATION that he claimed some interest in the premises "as subsequent purchaser or incumbrancer, or otherwise," bars rights and interests in the equity of redemption, but not those which are paramount to the title of both mortgagor and mortgagee.

POWER OF SALE CONTAINED IN WILL, AUTHORIZING EXECUTORS TO SELL ALL TESTATOR'S "FAST ESTATE," does not embrace lands sold under contract by the testator, purchase money being unpaid, and the title still remaining in him. Vendor's interest in such a case is a right to the money due on the contract, which is not "fast estate," but personal.

APPEAL from a judgment of the supreme court in favor of plaintiff in a suit for dower. The plaintiff's husband devised all his property, real and personal, to the plaintiff for life; directed a division of it after death among legatees named; and in order to carry the will into effect, gave his executors, of whom plaintiff was one, a power of sale. Plaintiff availed herself of the general benefit of the devise. There was, however, a tract of land formerly belonging to the testator, which he had mortgaged without her releasing her inchoate right of dower. This mortgage had been foreclosed after the testator's death (the widow, now plaintiff, being made defendant; but only in the ordinary way for foreclosing claims of subsequent purchasers or incumbrancers), and the premises sold. This sale being doubtless good as against any claims of devisees under the will, the widow now sued, not as devisee, but as dowress; claiming

that her dower, as a right paramount to the mortgage, be assigned to her.

J. M. Parker, for the appellant, the purchaser under the foreclosure sale.

H. H. Burlock, for the respondent, the widow seeking dower.

By Court, *DEXIO, J.* The real estate out of which dower is claimed in this case was not embraced in the power of sale conferred upon the executors. The land had been sold by the testator in his life-time, and his interest at the time of his death was the right to the money due upon the contracts, and was personal estate. The authority to sell the "fast estate" contained in the will has, therefore, no operation upon the premises out of which dower is now claimed. But if the premises had been included in the power of sale, it would not, according to the authorities, have been a provision in lieu of dower, notwithstanding that by the will the widow was entitled to the income of the proceeds during her life: *French v. Davies*, 2 Ves. jun. 572; *Birmingham v. Kirwan*, 2 Sch. & Lef. 440; *Wood v. Wood*, 5 Paige, 596 [28 Am. Dec. 451]; *Fuller v. Yates*, 8 Id. 325. The direction to sell in this class of cases is considered to be limited to the interest which the husband could control, and not to include the estate in dower, which was not his to dispose of. The reasoning is somewhat artificial, as it is nearly in all the adjudications upon this subject. It is, however, a rule of property, and should not be departed from upon any notions we may entertain of its abstract propriety.

The devise to the plaintiff for life, of all the testator's real and personal property, would seem, on a superficial view, to be inconsistent with the right of dower; and it would be clearly so if she was dowable only of the lands of which her husband died seised, after all liens and incumbrances thereon had been satisfied. But as her interest as dowress extends to all the lands of which he was seised during coverture, and is not subject to his debts nor to any liens which he may have created without her joining in them, it is obvious that such a provision would, in many cases, be quite illusory as a compensation for dower. In this case, the husband had sold by executory contracts a large portion of the land which he owned in this state, and the broad gift of all his real and personal estate to his wife for life would, as to these lands, only give her the balance of the purchase money due on the contracts, which, for anything which appears, may be less than the value of her dower. The courts, however, do

not inquire whether the testamentary provision is adequate, or reasonably proportionate to the value of the dower, for the widow has a right to receive or reject it at her pleasure. Where there is no direct expression of intention that the provision shall be in lieu of dower, the question always is, whether the will contains any provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds: 1 Roper on H. & W. 576. The devise in the will must be so repugnant to the claim of dower that they can not stand together: 4 Kent's Com. 58; *Adsit v. Adsit*, 2 Johns. Ch. 448 [7 Am. Dec. 539]; *Wood v. Wood*, *supra*; *Fuller v. Yates*, *supra*; *Sanford v. Jackson*, 10 Paige, 266; *Bull v. Church*, 5 Hill, 206; S. C. in error, 2 Denio, 430. Applying this test to the will under consideration, there is no difficulty in giving the plaintiff the provision made for her in it, and her dower also. There is no person who takes an interest under the will during her life-time with which the claim of dower will conflict; and as to herself, there is no incongruity in her taking one third of the unsold land as doweress and two thirds as devisee. The former she will hold by a title paramount to the mortgage, and the other is subject to that incumbrance. The mortgagee, it is true, may be disappointed in finding his lien less extensive than that which the instrument professed to confer on him; but that consequence does not arise out of the will, but from an act not testamentary, and by which the wife can not be affected. So of the parties holding contracts. Their interests, though hostile to her claim of dower, are not given by the will. If that instrument had directed the executrix to convey to them a title which should be free from all incumbrances, it would present a case of plain repugnance, which would put the widow to her election. The case of *Bull v. Church*, *supra*, was a stronger one against the widow than the present. The husband's will gave all his property, real and personal, to his wife during her widowhood, and then to his children. She claimed dower after her second marriage, after having taken and enjoyed the provision made by the will. There was the same apparent incongruity which exists here, of giving the entirety where the title to dower would embrace but a third, and the further one of the apparent conflict between the estates of the devisees in remainder and the right to dower. This was, however, reconciled by holding that the devise in remainder was to be understood as subject to the right of dower. The judgment having been affirmed in the court of errors, the case must be considered as a controlling one. The precise question now pre-

sented is discussed by an able elementary writer, whose conclusions seem to me to embody the fair result of the cases. He remarks that the adjudged cases "say nothing as to the question whether, when the whole of the lands are devised to the widow, she may take two thirds of them as a purchaser under the will, and the remaining one third under her title to dower. The principle, however, upon which the cases last mentioned and referred to were decided appears equally to apply to this subject. There is no more inconsistency between the widow's right to dower in the lands devised to her and her interest in them under the devise than in the above cases. The husband might intend that she should take no other interest in the lands bequeathed to her than under his will, or he might mean to pass to her his interest, subject to her title to dower. His intention is dubious; which is not rendered more clear from any inconsistency between the concurrent enjoyment of her two rights, the one under the will and the other by the provision of the law. For want, therefore, of this clear implication of intention from the contents of the will that the testator intended what he had given to his widow should be held and enjoyed under his will and by no other title, it would seem that she may in general elect to take the lands devised to her both under the will and her title to endowment. This may be of great advantage to her where her husband dies in embarrassed circumstances, for, as to one third of the estate, she would enjoy it under a paramount title free from his incumbrances during the marriage; and for the other two thirds, she would be liable to contribute, with the owners of the remainder of the lands in discharge of the incumbrances:" 1 Roper on H. & W. 582. I think the plaintiff was not bound to elect between the testamentary provision and the right to dower.

It is conceded by the defendant's counsel that a foreclosure suit is not an appropriate proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor. This court has recently determined that where a party setting up such a claim is made a defendant in a bill to foreclose a mortgage, the decree will be held erroneous, and will be reversed, though made after a hearing upon pleadings and proofs: *Corning v. Smith*, 6 N. Y. 82. But all claimants whose title is derived from the mortgagor subsequent to the mortgage are not only proper but necessary parties. It follows that a party claiming dower by a title paramount to the mortgage can not be brought into court in such a suit to con-

test the validity of her dower; but if she signed the mortgage, or if it was executed prior to the marriage, she must, like any other party having a claim upon the equity of redemption, be made a party to the bill of foreclosure. The plaintiff was married to the mortgagor long before the execution of the mortgage, and she did not join in it. But it is argued that the owner of the mortgage had a right to allege that her title was not paramount but subject to the mortgage, that she was married after it was executed, or signed and acknowledged it, or the like; that the bill which was filed against her, properly construed in connection with the rule of the court on the subject of foreclosure bills, does so allege in effect; and as she has suffered it to be taken as confessed, the decree and the sale under it has extinguished her title. It is argued that inasmuch as the rule forbids the complainant to set out the rights and interests of the defendants who hold under the mortgagor subsequent to the mortgage, and prescribes the general form of averment in respect to all such parties, which is contained in this bill, it should be taken to embrace everything which it would have been necessary to allege in such a bill prior to the rule, and that thus the plaintiff in this suit was called upon to assert the claim which she now sets up as a widow entitled to dower against the mortgage. The terms of the one hundred and thirty-second rule of the late court of chancery, which is the one referred to, do not, I think, sustain this argument. It provides that "in a bill for the foreclosure or satisfaction of a mortgage, it shall not be necessary or allowable to set out at length the rights and interests of the several defendants who are purchasers of, or who have liens on, the equity of redemption in the mortgaged premises subsequent to the registry or recording of the complainant's mortgage, and who claim no right in opposition thereto." It then goes on to prescribe the form of an averment in such cases, which was literally followed in the bill under examination. It does not appear that the plaintiff in this suit ever conceded the priority of the mortgage, or made any claim of her right of dower inconsistent with the one now set up; or that the complainant in the foreclosure suit ever supposed that she had a dower right in the equity of redemption alone. On the contrary, the averment referred to is followed by the allegation that the complainant is not informed what particular interest the defendants who are charged in it claim. This is not, therefore, a case within the rule. The plaintiff in this action was not a person who claimed no right in opposi-

tion to the mortgage. In the special case of a title to mortgaged premises, and a *bona fide* controversy as to priority between it and the mortgage, the complainant in the foreclosure bill must state the facts upon which the question arises, as he insists they exist, according to the rules of equity pleading which prevailed antecedently to the rule referred to. If he omit to do this, it will be under the pain of being obliged to show, when the decree is relied upon collaterally, that the title alleged to be foreclosed was in fact subordinate to the mortgage. The statute declaring the effect of a foreclosure in chancery provides that the deed to be executed by the master "shall vest in the purchaser the same estate (and no other or greater) that would have vested in the mortgagee if the equity of redemption had been foreclosed, and such deeds shall be as valid as if the same were executed by the mortgagor and mortgagee, and shall be an entire bar against each of them, and against all parties to the suit in which such sale was made, and against their heirs respectively, and all claiming under such heirs:" 2 R. S. 192, sec. 158. Taking all the expressions of the section together, it is obvious that the "entire bar" which is spoken of refers to rights and interests in the equity of redemption, and does not embrace interests which are paramount to the title of both mortgagor and mortgagee. Such interests would be other and greater than would have vested in the mortgagee if the equity of redemption had been foreclosed. It is not intended to decide that if a party claiming a title prior to the mortgage should be made a defendant, and should answer and litigate the question, and should have a decree against him, it would not conclude him in a collateral action. In this case, the title of the present plaintiff as dowress is not alluded to in the bill. She is only spoken of as the wife of the mortgagor incidentally, in repeating the language of the will, where the testator, calling her his wife, bequeaths to her his property, and makes her his executrix. As a devisee of the mortgaged premises, and an executrix of the mortgagor, the plaintiff was a necessary party to the bill; but in her character of his widow, entitled to dower by virtue of her coverture before the mortgage was given, she had nothing to do with the foreclosure. Having no defense to make as to her interest as devisee of the equity of redemption, and being unable to resist the claim to a decree against her for any ultimate deficiency, she had no motive for answering the bill. It made no claim and prayed for no relief which she could defend against. She therefore lost

nothing in suffering it to be taken as confessed, and it presents no impediment to the recovery of her dower.

The judgment of the supreme court should be affirmed.

EDWARDS, J. The mortgage executed by George Lewis, the late husband of the plaintiff, was of all his right, title, and interest of, in, and to the premises in which she now claims her right of dower. The plaintiff did not join in the execution of the mortgage, and of course her dower right, as such, could not be cut off by the decree of foreclosure. But it is contended that at the time of the foreclosure and sale of the mortgaged premises the right of dower of the plaintiff was barred by a devise to her contained in the last will and testament of her husband; not by any express provision to that effect, but by implication. In the case of *Adsit v. Adsit*, 2 Johns. Ch. 448 [7 Am. Dec. 539], Chancellor Kent, after an elaborate review of all the authorities, lays down the rule that in order to warrant the implication from the provisions of the will that the testator intended a devise or legacy to be in lieu of dower, the claim of dower must be inconsistent with the will, and repugnant to its dispositions, or some of them. In the case of *Sanford v. Jackson*, 10 Paige, 266, Chancellor Walworth says that to bar the wife of her dower by implication, the provisions of the will or some of them must be absolutely inconsistent with her claim of dower, so that the intention of the testator will be defeated as to some part of the property devised or bequeathed to others, if she takes dower as well as the provision made for her in the will. The rule as laid down in these two cases, though somewhat differently expressed, is the same in substance in each, and is unquestionably sustained by the authorities. If, then, we apply this rule to the present case, the question arises, How is the claim of dower of the plaintiff inconsistent with any of the provisions contained in the will of the testator? If she takes a life estate in one third of the real estate of which the testator died seised by way of dower, and in the other two thirds by way of devise, she will have the whole of the real estate for life, as much as if she took the whole as devisee. The intention of the testator as to the estate which she should have will be fully carried out, and it will not be defeated as to any other disposition which he has made of his property. The will gives the real estate and the proceeds thereof, in case of sale, to the wife during her life, and after her death to her two nephews and the brother-in-law of the testator. It will not be pretended that this last provision will be defeated by sustaining the plaintiff's

claim. In the case of *Sanford v. Jackson*, *supra*, the testator devised and bequeathed all his property, real and personal, to his wife and to two other persons, to be kept for her use and support as long as she should continue his widow, and until his youngest child should become of age, and then directed that all his property should be equally divided amongst his children. The wife survived the testator, and afterwards married again; and the question arose whether her acceptance of the devise was a bar to her claim of dower in the testator's real estate after his youngest child arrived at the age of twenty-one years. Upon this state of facts, the chancellor sustained the wife's claim, and in giving his opinion, said that no question of conflicting claims could arise until the children became of age, and that until then it was wholly immaterial whether the wife took the whole real estate under the will discharged of dower, or took two thirds under the devise and the residue under her common-law right of dower. But in the case before us no question of conflicting claims can arise at any time, no matter whether the wife claims the whole as devisee, or a part by way of devise and a part by way of dower. Neither is there anything in the provision authorizing the executors to sell the real estate which is inconsistent with the plaintiff's claim. It simply gives a power to the executors, to be exercised, if necessary, for the purpose of enabling them to carry out more effectually the intention of the testator that the plaintiff should have the benefit of the real estate during her life; and this she would have equally, whether the executors should have the power to sell the whole of the real estate, including her dower right, for her benefit, or whether they should only have the power to sell the real estate subject to her right of dower, and she should have the power to sell her dower interest.

The next question which arises is, whether the decree in the foreclosure suit is such an adjudication as to the plaintiff's right of dower as to bar her from claiming it in this suit. It will be observed that the bill of complaint in the foreclosure suit made no allusion to the claim of dower. It stated the substance of the will of the mortgagor, and then alleged generally that the plaintiff and the other devisees in the will had, or claimed to have, some interest in the mortgaged premises as subsequent purchasers or incumbrancers, or otherwise. In the case of *Eagle Fire Co. v. Lent*, 6 Paige, 635, it is said that the mortgagee has no right to make one who claims adversely to the title of the mortgagor and prior to his mortgage a party defendant in a

foreclosure suit for the purpose of trying the validity of his adverse claim of title. And the person who filed the bill in the suit brought for the foreclosure of the mortgage executed by the testator, acting in the spirit of this rule, whether intentionally or not, has omitted to allege that any claim of dower was set up by the present plaintiff, or that any such claim had been barred by her non-election of dower. The plaintiff, however, was made a party to that suit for all the purposes for which she could be, and that was to cut off her claim to the equity of redemption as one of the devisees of the testator, and to that extent she is barred. But it is said that even if she was not made a party to the foreclosure suit in such a way as to cut off her claim of dower by virtue of the general allegation that she and the other devisees claimed as subsequent purchasers or incumbrancers, yet she was made such party by virtue of the allegation that she claimed in those capacities or otherwise. This is an allegation which was made under one of the existing rules of the court of chancery, and applied, as the rule intended that it should, to persons who had some claim which arose subsequent to the execution of the mortgage, and to no others. The word "otherwise," according to the rule of construction adopted in all analogous cases, means "in some other like capacity," and does not embrace a claim like that which is set up in this case. The conclusion, then, to which I have arrived is, that the question of the plaintiff's right of dower was neither raised nor decided, nor was it the proper subject of adjudication in the foreclosure suit; and that the provision of the statute which declares that the master's deed shall be a bar to all parties to the suit in which the decree of foreclosure and sale is made (2 R. S. 192, sec. 158) does not cut off a right in reference to which a person neither is nor can be properly made a party to the suit, although he may have been properly made such party, and may be barred in reference to some other interest.

I think that the judgment should be affirmed.

The whole court concurred.

Judgment affirmed.

NO ONE NEED BE MADE PARTY TO SUIT IN EQUITY AGAINST WHOM NO DECREE CAN BE MADE: *Bowden v. Schatzell*, 23 Am. Dec. 170.

EQUITABLE CONVERSION: *Evans v. Kingsbury*, 14 Am. Dec. 779; *Burr v. Sim*, 29 Id. 48; *Kane v. Gott*, 35 Id. 641, and note 651; *Proctor v. Ferebee*, 36 Id. 34; *Baker v. Copenburger*, 58 Id. 600, and note 604.

DOWER PROVIDED BY LAW IN BEHALF OF WIDOW IS PARAMOUNT to all conveyances, contracts, incumbrances, debts, or liabilities of the husband

executed or incurred by him during coverture: *Higginbotham v. Cornwell*, 58 Am. Dec. 130.

WHEN DEVISE OR LEGACY WILL BE REGARDED AS IN LIEU OF DOWER: *Adsit v. Adsit*, 7 Am. Dec. 539; *Hall's Case*, 17 Id. 275, and note 277; *Gordon v. Stevens*, 27 Id. 445, and note 448; *White v. White*, 31 Id. 232.

DOWER, WHEN BARRED AND WHEN NOT BY PROVISION IN WILL: *Evans v. Webb*, 1 Am. Dec. 308; note to *Gelzer v. Gelzer*, 23 Id. 182; note discussing the subject, *Borland v. Nichols*, 51 Id. 579; *Brazton v. Freeman*, 57 Id. 775.

WHEN WIDOW WILL BE FORCED TO ELECT BETWEEN HER RIGHT TO DOWER AND TESTAMENTARY DISPOSITION IN HER FAVOR, AND WHEN NOT: Note to *Theall v. Theall*, 28 Am. Dec. 503, discussing the subject; *Wood v. Wood*, 28 Id. 451, and note 459; *Church v. Bull*, 43 Id. 754, and notes 757; *Meliet's Appeal*, 55 Id. 573, and note 577.

THE PRINCIPAL CASE WAS CITED in *Bond v. McNiff*, 38 N. Y. Sup. Ct. 94; *Tobias v. Ketchum*, 32 N. Y. 328; S. C., 36 Barb. 305; *Vernon v. Vernon*, 7 Lans. 504; *Mills v. Mills*, 28 Barb. 480, to the point that in order to compel the widow's election, the devise in the will must be so repugnant to the claim of dower that they can not stand together. The intention to give both is presumed, unless the other provisions of the will are such as to manifest an intention to put her to her election: *Vernon v. Vernon*, 7 Lans. 504; *Dodge v. Dodge*, 21 How. Pr. 65; S. C., 31 Barb. 417; 10 Abb. Pr. 405, all citing the principal case. It is also cited in *Vedder v. Saxton*, 46 Barb. 193, where it is said "that the devise by a husband to his wife, of all his real property for her life, does not show an intent to deprive her of her dower; but her taking of the whole will be deemed a taking of one third as dower and two thirds as devisee." Parties claiming in hostility to a mortgage, or by title prior or paramount, are not proper parties to a foreclosure of such mortgage, and can not be affected by the decree, unless they come in and voluntarily submit to litigate their rights in such action, and such parties can not be affected by a *lis pendens* filed in such action: *Becker v. Howard*, 4 Hun, 361; S. C., 6 Thomp. & C. 604; *Barker v. Burton*, 67 Barb. 459; *Mathews v. Duryee*, 3 Abb. App. Dec. 227; S. C., 4 Keyes, 541; in other words, a person claiming dower by title paramount to the mortgage can not be brought into court in such a suit to contest the validity of her dower: *Merchants' Bank v. Thompson*, 55 N. Y. 11; *Payn v. Grant*, 23 Hun, 136; *Lee v. Parker*, 43 Barb. 614; the scope of a foreclosure suit simply being to bar interests in the equity of redemption: *Rathbone v. Hooney*, 58 N. Y. 467; *Emigrant Industrial Savings Bank v. Goldman*, 75 Id. 132. The principal case was cited in *Thompson v. Smith*, 63 Id. 303; *Baldwin v. Humphrey*, 44 Id. 616; *Adams v. Green*, 34 Barb. 180; *Smith v. Gage*, 41 Id. 65, to the point that "the law presumes the property shall assume the very character of the thing into which it is to be converted, whatever may be the manner in which that direction is given." Other citations of the principal case will be found in *Potter v. Ellice*, 48 N. Y. 323; *Malloney v. Horan*, 49 Id. 117; S. C., 12 Abb. Pr., N. S., 294.

COTHEAL v. TALMAGE.

[9 NEW YORK (5 SELDEN), 551.]

STIPULATION IN CONTRACT LIQUIDATING DAMAGES FOR BREACH THEREOF should be sustained and enforced where it is manifest that ascertaining the actual damages would be difficult, and that parties agreed on the amount named for the purpose of avoiding the expense and difficulty of doing so.

ABOVE RULE MAY BE APPLIED, notwithstanding the contract bound the promisor to do several things of different degrees of importance, and did not discriminate between them in specifying the damages, if all the covenants were of uncertain nature in respect to the amount of injury a breach would cause.

WHERE CONDITION OF PENAL BOND CONTAINS PROVISION FOR PAYMENT OF FIXED SUM ON BREACH OF AGREEMENT, the presumption is that the sum named in the condition was not designed as a penalty.

APPEAL from a judgment of the New York common pleas for damages for breach of contract. The contract out of which the action arose was to the effect that plaintiff should furnish subsistence, tools, etc., for a gold-mining expedition to California, to be conducted by one De Forest, who upon his part agreed to perform a number of different services in aid of the enterprise; and stipulated to pay five hundred dollars liquidated damages for any breach. Defendant was surety for performance by De Forest. That plaintiff performed on his part, and that De Forest broke the agreement in some particulars, were established on the trial; but defendant claimed that he could only be held liable upon proof of actual damages resulting from the specific breaches shown. The judge charged the jury "that if they should find for the plaintiff, they should find a verdict in his favor for five hundred dollars as stipulated damages, and the interest thereon." This charge, and the verdict thereon, a majority of the general term sustained: See 1 E. D. Smith, 573.

Nicholas Hill, jun., for the appellant, the surety cast in damages.

Andrew Thompson, for the respondent.

By Court, RUGGLES, J. The only question necessary to be considered in this case is, whether the sum of five hundred dollars mentioned in the condition of the defendant's bond is a penalty to cover such damages as might be proved on the trial, or an amount liquidated and settled between the parties as the compensation to be paid upon the breach of the contract. The ablest judges have declared that they felt them-

selves embarrassed in ascertaining the principle on which the decisions upon questions like the present were founded: *Asley v. Weldon*, 2 Bos. & Pul. 350. They have said that the law relative to liquidated damages has always been in a state of great uncertainty; and that this has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves: *Crisbee v. Bolton*, 3 Car. & P. 240. Best, C. J., says in that case that parties to contracts, from knowing exactly their own situation and objects, can better appreciate the consequences of their failing to obtain those objects than either judges or juries; and that if a contract clearly state what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach should be for the stipulated sum; that a court of justice has no more authority to put a different construction on the part of an instrument ascertaining the amount of damages than it has to decide contrary to any other of its clauses. It is conceded by all that courts are to be governed by the intention of the parties, to be gathered from the language of the contract and from the nature and circumstances of the case. Where there is a contract to pay money, the damages for its breach are fixed and liquidated by law, and require no liquidation by the parties. An agreement to pay greater damages is therefore regarded as a penalty. But when the damages resulting from the breach are uncertain in amount, as they are in all other cases, the parties have the right to say how much shall be paid by way of compensation to the party injured; and when they have settled that compensation, neither a court of law nor a court of equity will diminish its amount, unless it be so grossly disproportionate to the actual injury that a man would start at the bare mention of it: *Asley v. Weldon*, *supra*. Where there is a manifest difficulty in ascertaining damages arising from the breach of the contract, and the fair conclusion is that the amount is specified and agreed on for the purpose of saving the expense or avoiding the difficulty of proving the actual damages, the parties should be held to their bargain; and especially where the amount fixed and liquidated is not far beyond what might probably be expected to arise from a breach of the contract. I am of opinion that the present is such a case. The parties had agreed to co-operate in a hazardous adventure, to be executed at a great distance from the place where the contract was made, in a country unsettled and without a regular government. The plaintiff was to make large advances for the

transportation and supply of the company, of which De Forest (for whom the defendant was surety) was one. The success of the adventure depended on a strict and faithful performance of the contract by those who were engaged in it. The loss occasioned by the desertion or disobedience of any one of the company could not be supplied without great expense and delay, if at all. Great gains were undoubtedly expected by all parties from the enterprise, and great loss to the plaintiff was certain from its failure. United action, subordination, and obedience were indispensable to its success. The temptations to desertion and disobedience in California were many and strong. We know from the history of the country that military and naval subordination were broken up by those temptations. Without stern and stringent provisions in the articles which bound the company, no reasonable expectation could be entertained that they would remain united. It was necessary for the interest of each that all should be bound by such provisions. From the nature and object of the adventure, the amount of gain by a strict performance of the contract could not be foretold, and the amount of loss by a breach could not be ascertained by proof; and if it had been susceptible of proof in that country, the expense and difficulty of obtaining it here would have rendered a contract to pay unliquidated damages of no value. The liquidation of the damages by contract between the parties was therefore prudent and reasonable on all sides. Without such a provision, the plaintiff would have had no real or substantial security for his advances; and without it the contract would probably never have been made. There is nothing in the case to authorize us to say that the probable damages were unreasonably estimated at five hundred dollars. It is probably less than all parties expected the plaintiff would gain by the adventure from the services of each individual, provided the enterprise was faithfully prosecuted by all; and whether the payment of this sum by each delinquent of the company will indemnify him for his loss we have no means of ascertaining from the case. Under these circumstances, it seems to me that the intention of the parties to the bond was to bind themselves to the payment of the sum mentioned in its condition in case of a breach of the agreement.

But it is contended that because the contract referred to in the bond bound the defendant to do several things of different degrees of importance, and the sum of five hundred dollars was made payable for the non-performance of any or either, it must

be a penalty, and not liquidated damages. This doctrine, in the cases in which it is asserted, is traced to the cases of *Asley v. Weldon*, 2 Bos. & Pul. 346, and *Kemble v. Farren*, 6 Bing. 141. But I do not understand either of these cases as establishing any such rule. The principle to be deduced from them is, that where a party agrees to do several things, one of which is to pay a sum of money, and in case of a failure to perform any or either of the stipulations, agrees to pay a larger sum as liquidated damages, the larger sum is to be regarded in the nature of a penalty; and being a penalty in regard to one of the stipulations to be performed, is a penalty as to all. In *Kemble v. Farren*, *supra*, Tindal, C. J., says that if the clause fixing the sum for liquidated damages "had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have the effect of ascertaining the damages upon any such breach;" thus rejecting the doctrine contended for by the defendant's counsel in the present case. It is true that the doctrine thus contended for has been adopted in some English and in several American cases: hastily, I should think, and without a careful examination of the cases from which it is supposed to be derived. But if it should be considered as having any solid foundation in principle, it should be applied only in subordination to the general rule, which requires the courts in these, as in all other cases, to carry into effect the true intent of the parties. It should never be applied to cases like the present, where the amount of damages is uncertain from the nature of the subject itself; and incapable of proof, not only from that uncertainty, but from the circumstances of the case already stated, and where for these reasons there was a necessity for ascertaining them by estimate, by the parties in their contract. The only plausible ground for withholding the doctrine in any case is, that the party might be made responsible for the whole amount of damages for the breach of an unimportant part of his contract, and so be made to pay a sum by way of damages grossly disproportionate to the injury sustained by the other party. Without undertaking to deny that this rule may be properly applied to some cases, I can not think it ought to be applied to the present. The injustice which it professes to avoid is no greater than that which is tolerated in many other cases for the purpose of enforcing a faithful performance of contracts. A laborer, for instance, who agrees to work by the month or by the year, his wages to be paid at the end of the term, loses by our law the fruits of his toil if he fails in his last day's work; and a farmer

who contracts to deliver to a merchant one hundred tons of hay, for which he is to be paid when the whole is delivered, and delivers ninety-nine tons, but fails in delivering the last load to make up the quantity, can recover for no part of what he has delivered. If the rigor and severity of this rule can be justified, we shall have no difficulty in reconciling our minds to the propriety of holding that the surety for De Forest is responsible in the specified amount of damages for the non-performance of his contract, and in declining to relieve him from the consequences of a breach to which he made himself liable by his bond.

Again: this is an action upon a bond in the penalty of one thousand dollars, conditioned to pay five hundred dollars in a certain event therein mentioned. In *Fletcher v. Dyche*, 2 T. R. 82, Buller, J., says: "Where there is a penalty in a bond, it is strange that the sum mentioned in the condition should be called a penalty." And Lord Eldon, in *Asley v. Weldon*, *supra*, says it would have been absurd to say that the sum mentioned in the condition of a bond and secured by a penalty should itself be regarded as a penal sum. See *Smith v. Smith*, 4 Wend. 468. Whether we look to the form of the defendant's contract, to the nature of his engagement, or to the circumstances in relation to which it was made, we find the intention of the parties was that the sum expressed in the condition of the bond should be paid for a breach of De Forest's contract. The jury having found it broken, we think the judgment of the court below should be affirmed.

ALLEN, J., concurred in the above opinion, but thought a new trial should be granted on the ground that the court below erred in holding that the breach was admitted.

All the other judges concurred.

Judgment affirmed.

WHAT ARE LIQUIDATED DAMAGES: Note to *Hamilton v. Overton*, 38 Am. Dec. 138, containing collected cases.

WHETHER STIPULATED SUM IS LIQUIDATED DAMAGES OR MERE PENALTY: See exhaustive note to *Graham v. Bickham*, 1 Am. Dec. 331; note to *Curry v. Larer*, 49 Id. 489.

WHEN DAMAGES BEYOND PENALTY MAY BE RECOVERED: *Graham v. Bickham*, 1 Am. Dec. 328.

CASES SHOWING STIPULATED SUM TO BE MEASURE OF REPARATION FOR FAILURE TO PERFORM CONTRACT, AND NOT MERE PENALTY: *Tardeveau v. Smith*, 3 Am. Dec. 727; *Pierce v. Fuller*, 5 Id. 102; *Brooks v. Hubbard*, 8 Id. 154; *Hamilton v. Overton*, 38 Id. 136; *Miller v. Elliott*, 50 Id. 475; *Fumes v. Burke*, 55 Id. 519.

CASES SHOWING STIPULATED SUM TO BE PENALTY, AND NOT LIQUIDATED DAMAGES: *Dennis v. Cummins*, 2 Am. Dec. 160; *Perkins v. Lyman*, 6 Id. 158; *Stearns v. Barrett*, 11 Id. 223; *Baird v. Tolliver*, 44 Id. 298; *Curry v. Larer*, 49 Id. 486.

THE PRINCIPAL CASE WAS CITED IN *Noyes v. Phillips*, 60 N. Y. 412; S. C., 16 Abb. Pr., N. S., 405; *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 58; S. C., 51 How. Pr. 37; *Colwell v. Lawrence*, 24 Id. 326; S. C., 38 Barb. 647; 38 N. Y. 74, to the point that one of the rules of construction established by cases similar to the principal one is, that the courts are to be governed by the intention of the parties, to be gathered from the language of the contract itself, and from the nature and circumstances of the case; but Church, C. J., in *Noyes v. Phillips*, *supra*, refers to a few of the numerous authorities to illustrate the difficulties experienced in this respect. See also *Manice v. Brady*, 15 Abb. Pr. 176; *Shute v. Hamilton*, 3 Daly, 467; *Clement v. Cash*, 21 N. Y. 256; *Parsons v. Taylor*, 12 Hun, 253; *Colwell v. Foulks*, 36 How. Pr. 320, all citing the principal case; which is also cited in *Lampman v. Cochran*, 16 N. Y. 278; *Giles v. Spaulding*, 5 Hun, 458. Prior to the principal case it was supposed to have been a settled principle in New York, that when a sum was stipulated to be paid for the non-performance of any or either of several distinct acts which a party had agreed to perform, it was to be construed as a penalty; but the fixed sum will now be considered as damages: *Staples v. Parker*, 41 Barb. 652.

HENDRICKSON v. PEOPLE.

[10 NEW YORK (6 SELDEN), 18.]

GENERAL RULE IS THAT ALL PARTY HAS SAID WHICH IS RELEVANT TO QUESTIONS INVOLVED in the trial is admissible in evidence against him. The exceptions to this rule are where the confession has been drawn from the prisoner by means of a threat or a promise, or where it is not voluntary because obtained compulsorily or by improper influence.

ANSWERS OF WITNESS EXAMINED AT CORONER'S INQUEST, before any criminal charge has been made or process issued against the witness, may be proved against him on his subsequent trial for having killed the deceased.

MOTIVE—EVIDENCE THAT WILL MADE BY WOMAN'S FATHER WAS SUCH as greatly to disappoint her husband's expectations of pecuniary benefit from his marriage to her is competent against him on a trial for murdering her. Such evidence may tend to show a motive in him for the killing.

WRIT of error to review a conviction of murder. The facts appear from the opinions.

John K. Porter, for the plaintiff in error.

Hamilton Harris, for the defendants in error.

By Court, PARKER, J. The general rule is, that all a party has said which is relevant to the questions involved in the trial is admissible in evidence against him. The exceptions to this rule are where the confession has been drawn from the prisoner

by means of a threat or a promise, or where it is not voluntary because obtained compulsorily or by improper influence. It is not claimed in this case that the statement in question was obtained by means of any promise or threat, or by any inducement whatever; nor is it supposed that there was any compulsion or any influence affirmatively exercised upon the mind of the prisoner, beyond what is sought to be inferred from the fact that he was required to testify as a witness. But it is contended that because he was so required to testify, upon a general inquiry into the cause of the death of his wife, his statement was not voluntary, and should have been excluded. The record shows that the objection at the trial was placed only on the ground that the statement was not voluntary. Hendrickson was not in custody. He made no objection to being sworn as a witness or to answering any question that was put to him. He was treated in every respect like the other witnesses. At the time of his examination, no circumstances had been developed warranting a suspicion against him. The *post-mortem* examination did not take place till the next day, and it was not until the second day after his testimony before the coroner's inquest that he was arrested under a warrant issued, not by the coroner, but by a police justice of the city of Albany. His statement as a witness was in no respect an admission of guilt. On the contrary, it was a denial of material facts attempted, on his trial, to be established by other witnesses. His testimony was calculated to ward off suspicion from himself, not to attract it towards him. The question presented, therefore, is whether, under the circumstances, the statement of a witness is to be excluded on the ground that it was not voluntarily made. Several English *nisi prius* decisions were cited on the argument, which it is necessary to examine.

Merceron's Case, 2 Stark. 366, decided in 1818, was an indictment against a magistrate for having corruptly and improperly granted licenses to public houses, which were his own property. Abbott, J., permitted the prosecution to prove what the defendant had said in the course of his examination before a committee of the house of commons, appointed for the purpose of inquiring into the police of the metropolis, though it was objected that the statement had been made under a compulsory process from the house of commons, and that the declarations were not voluntary. In the case of *Haworth*, 4 Car. & P. 254, decided in 1830, it appeared that before the prisoner was charged or suspected, a person named Shearer had been examined on the charge of

forgery, and that the prisoner was called as a witness and his deposition taken. The counsel for the prosecution proposed to read this deposition as evidence against Haworth, which was objected to. Parke, J., said: "I think that I ought to receive this evidence. The prisoner was not, when he made this deposition, charged with any offense, and he might, on that as well as on any other occasion when called as a witness, have objected to answer any question which might have a tendency to expose him to a criminal charge; and not having done so, his deposition is evidence against him."

In a note by the reporter to this case, it is said that in a case tried at Worcester, where it appeared that a coroner's inquest had been held on the body of A., and it not being suspected that B. was at all concerned in the murder of A., the coroner had examined B. upon oath as a witness, Parke, J., would not allow the deposition of B., so taken on oath on the coroner's inquest, to be read in evidence on the trial of an indictment afterwards found against B. for the same murder. I can not find that this anonymous case is anywhere reported more fully. It would be much more satisfactory to know the particular circumstances of the case, and the grounds for the decision. Without them, it is entitled to but little weight as authority. And so it seems to have been viewed by Littledale, J., in the case of *Rex v. Clewer*, tried before him during the same year, and reported, as to other points, in 4 Car. & P. 221. In Mr. Greaves' note *w*, 2 Russ. on Crimes, 7th Am. ed., 860, on the authority of his manuscript notes, he says the grand jury asked Littledale, J., "Can evidence of a prisoner who was examined on oath before the coroner as a witness be admitted as evidence against the same person when subsequently indicted for the murder of the person on whose body the inquest was held?" Littledale, J., answered in the affirmative; when the case referred to in the anonymous note being mentioned, the judge (Littledale) directed the grand jury to receive the evidence, and leave the point for discussion on the trial.

Tubby's Case, 5 Car. & P. 530, tried in 1833, was an indictment for burglary. Andrews, for the prosecution, proposed to read a statement made upon oath by the prisoner at a time when he was not under any suspicion. Prendergast objected that it was a violation of the rule of law which held that a prisoner could not be sworn. Vaughan, B., said: "I do not see any objection to its being read, as no suspicion attached to the party at the time. The question is, Is it the statement of the pris-

oner under oath? Clearly it is not; for he was not a prisoner at the time he made it." In *Rex v. Lewis*, 6 Id. 161, decided also in 1833, several persons, one of whom was the prisoner, were summoned before the committing magistrate touching the poisoning of C. No person was then specifically charged with the offense. The prisoner was sworn, and made a statement, and at the conclusion of the examination she was committed for trial. It was held that this statement was not receivable in evidence against the prisoner. Gurney, B., said this case was quite distinguishable from that of *Rex v. Tubby*, *supra*, and that under the circumstances he should have agreed with his brother Vaughan; "but," he said, "this being a deposition made by the prisoner at the same time as all the other depositions on which she was committed, and on the very same day on which she was committed, I think it was not receivable. I do not think this examination perfectly voluntary." It has been supposed the prisoner was brought before the magistrate on a charge or suspicion of guilt, but Mr. Greaves says in his note, 2 Russ. on Crimes, 7th Am. ed., 857, note n, that he was counsel in this case, and that the prisoner was summoned in the ordinary way, as a person who could give some evidence touching the matter, and not because any suspicion attached to her.

In *Rex v. Davis*, 6 Car. & P. 177, also decided in 1833, the daughter had been examined as a witness before the committing magistrate against her father, and was then committed as a joint receiver of stolen goods with him. Her statement was excluded as evidence against her on her trial, by Gurney, B., on the same ground as in *Rex v. Lewis*, *supra*. In regard to this case, Mr. Greaves says, 2 Russ. on Crimes, 7th Am. ed., 857, note n, that the ground of the decision was, not that there was a suspicion in the mind of the magistrate, nor even that the prisoner might be aware that there was such a suspicion, but that the prisoner had been examined on oath as a witness; and says that, after the decision in the late case of *Regina v. Wheeler*, 2 Moo. Cr. Cas. 45, to which I shall refer hereafter, it may be doubted whether that was a sufficient reason for rejecting the deposition. In *Regina v. Wheeley*, 8 Car. & P. 250, decided in 1838, a party who was charged with murder made a statement before the coroner at the inquest, which was taken down. The paper purported that the statement was made on oath. Alderson, B., held, on the trial of the party for murder, that the statement was not receivable, and that parol evidence was not admissible to show that no oath had in fact been administered to the prisoner. If

this was a case of the examination of a prisoner, and not of a witness, as it has been understood to be by commentators, 2 Russ. on Crimes, 855, 860, and notes, its correctness will not be questioned, and it can have no bearing upon the question now before us. The next case in order of time was *Regina v. Wheeler*, *supra*, decided in 1838, which was an indictment for forgery. On the trial, before Coleridge, J., the examination of the prisoner, previously taken on oath, as a witness, before the commissioners of bankruptcy, concerning the bills alleged to be forged, was held admissible as evidence against him. The opinion of all the judges was desired on this point, and the case was argued before all the judges except Parke, J., and Gurney, B., who held that the evidence had been properly received. In *Regina v. Owen*, 9 Car. & P. 83, tried in 1839, the defendants were indicted for rape. The prosecution offered to prove the statements made by Owen on oath, at the inquest held on the body of the person ravished, while the defendants were in custody. The counsel for the prisoner admitted that, where witnesses had been examined voluntarily, their depositions might afterwards be read against them, but objected that these defendants were in custody, and cited the case of *Wheley*, where Baron Alderson rejected the deposition because it was on oath and taken while in custody. But Williams, J., said: "I know that my brother Alderson did so, but I also know that there has been a reaction in opinion, if I may be allowed the expression. I shall therefore receive the evidence, and reserve the point, if it shall become necessary." It is said that Baron Alderson, who had tried *Wheley's* case, was in the next court at this time, and that Williams, J., had consulted with him in an earlier part of the case: *Joy on Confessions*, 62.

In *Regina v. Owen*, 9 Car. & P. 238, the same defendants were tried in 1840 for the murder of the person ravished; and Gurney, B., refused to receive in evidence the depositions, on oath, of the prisoners taken before the coroner's inquest, though it must have been known they had been received on the previous trial of the same prisoners for rape. Baron Gurney, however, cited *Whester's* case, then recently tried before Coleridge, and admitted he could not, on principle, see the distinction between that and some of the other cases. In the late case of *Regina v. Sandys*, 1 Car. & M. 345, decided in 1841, the prisoner was tried for murder, and Erskine, J., admitted in evidence her deposition taken at the coroner's inquest, and reserved the points for the consideration of the fifteen judges. All the de-

cisions to which I have referred, except that in the case of Wheater, were made at *nisi prius*, and their general current is certainly in favor of the admissibility of the evidence in question; but to give them or any of them much weight as authority, it is necessary to understand the reasons that governed, and to see on what principles they are based. Without that, decisions made at the assizes, necessarily without time for consultation and examination, can avail but little in deciding a controverted question of law. So far as the evidence was rejected on the ground that the statement was on oath, as in the case of Davis and others, it must now be regarded as settled by the decision of all the judges in Wheater's case, above cited, that that, of itself, constitutes no objection. Mr. Joy, in his treatise on the admissibility of confessions, reviews all the decisions at *nisi prius* apparently conflicting, and comes to the conclusion that the decision, by all the judges, in Wheater's case, establishes the principle that a statement, not compulsory, made by a party not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath: Joy on Confessions, secs. 8, 62.

It is now regarded as a well-settled rule, and recognized in the elementary books, that where a witness answers questions upon examination on a trial tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes: 2 Stark. Ev. 50; Roscoe's Cr. Ev. 45. Such answers are deemed voluntary, because the witness may refuse to answer any question tending to criminate him: 1 Greenl. Ev., sec. 225. If, however, he should be compelled to answer, after claiming his privilege, his answer will be deemed compulsory, and can not be given in evidence against him. When the evidence offered has been rejected on the ground that the statement was made when the prisoner was in custody charged with crime, as in Wheeley's case and Owen's case, it seems to me clear that it was properly excluded, because these were cases of the examination of a prisoner, not of a witness. In such cases it is a judicial examination, and it should not be on oath, and certain precautions for the protection of the accused are always to be observed. In this state such examinations are regulated by statute: 2 R. S., 2d ed., 794. But neither is the statute, nor were the common-law rules of which it is declaratory, applicable to any examination except that of a person brought before a magistrate on a charge of crime. All other examinations are classified as extrajudicial: 1 Greenl. Ev., sec. 216, and are to be

conducted like other cases of the examination of witnesses. It is evident that in deciding the case of Lewis, above cited, the mind of the presiding judge was influenced, to some extent, by the supposition that the facts peculiar to it gave to the testimony the character of a judicial examination; for Baron Gurney lays stress upon the facts that the deposition was made at the same time as all the other depositions on which she was committed. In both these resemblances to a judicial examination, the case of Lewis differs from that now before us; for Hendrickson was arrested on a complaint made before a different magistrate and on a subsequent day. It is unnecessary, therefore, to express an opinion as to the soundness of the reasons given by Baron Gurney for his decision in the case of Lewis. The examination of a witness before a coroner's inquest bears even less resemblance to a judicial examination than that taken before a committing magistrate or a grand jury. A coroner's inquest may be held in all cases of sudden death; but an examination before a committing magistrate or a grand jury takes place on complaint made that a crime has been committed. It is only where a person is charged with crime, and is examined with regard to the truth of such charge, that his examination can be considered judicial.

In the case of the *State v. Broughton*, 7 Ired. 96 [45 Am. Dec. 189], decided in North Carolina in 1846, where the grand jury were investigating an offense with a view to discover the perpetrator, and the person who was subsequently indicted was examined before them on oath, and charged another with the commission of the offense, it was held that the examination might be given in evidence against the prisoner on the trial of his indictment. Ruffin, C. J., said, however, that if the evidence given by the prisoner had been a confession of his guilt, and the grand jury had found a presentment on it, the court would have held that it could not be given in evidence against him. It is not material to the decision of this case to inquire whether the chief justice was right or not in the distinction he made between a confession and a statement not a confession, because neither in that case nor in the one now before us was there any confession. Both statements tended to turn attention away from the witness. I am inclined, however, to think the chief justice erred in the case of *Broughton*, in the reason assigned for his decision; for the law seems to be, that the rule as to confessions applies not only to direct confessions, but to every other declaration tending to implicate the prisoner in the

crime charged, even though in terms it is an accusation of another, or a refusal to confess: 1 Greenl. Ev., sec. 219, note 2, and cases cited. But while the decision in the case of Broughton is in accordance with the ruling in the case before us, the reason given for that decision, if it be erroneous, does not conflict with such ruling. Independent of any supposed authority, I do not see how, upon principle, the evidence of a witness, not in custody and not charged with crime, taken either on a coroner's inquest or before a committing magistrate or a grand jury, could be rejected. It ought not to be excluded on the ground that it was taken on oath. That reason would exclude also the statements of witnesses on the trials of issues. The evidence is certainly none the less reliable because taken under the solemnity of an oath. No injustice is done to the witness, for he was not bound to criminate himself, nor to answer in regard to any circumstance tending to do so. If it is a good ground of exclusion, that the statement was made as a witness on oath, then the rule of law that protects a witness from criminating himself is of no value, and may at once be abrogated. The rule was adopted upon the supposition that the answer might be introduced in evidence against the witness. If it can not be, the witness has no longer any reason for claiming his privilege. Nor can the exclusion of the evidence depend on the question whether there was any suspicion of the guilt of the witness lurking in the heart of any person at the time the testimony was taken. That would be the most dangerous of all tests, as well because of the readiness with which proof of such suspicion might be procured as of the impossibility of refuting it. Besides, the witness might have no knowledge of the existence of any suspicion, so that his mind could not be affected or his testimony influenced by it. It is only when he is charged with crime, and examined on such charge, that there is good reason for treating him as a party to the proceeding. The common law has been as tender of the rights of witnesses as of parties. It is the policy of the common law never to compel a person to criminate himself. That policy secures as well to a witness as to a party the privilege of declining to answer. The former is supposed to know his rights; the latter is to be specially instructed in regard to them by the presiding magistrate. But if either fail to avail himself of the privilege, his answer is deemed voluntary, and may be used as evidence. It is only upon a judicial examination, viz., in the case provided for by statute, when the prisoner is brought before a magistrate, charged with crime,

that the preliminaries required by the statute are to be observed and the examination taken without oath. All other examinations are extrajudicial. The former is the examination of a party; the latter, of a witness. In all cases, as well before coroners' inquests as on the trial of issues in court, when the witness is not under arrest, or is not before the officer on a charge of crime, he stands on the same footing as other witnesses. He may refuse to answer, and his answers are to be deemed voluntary, unless he is compelled to answer after having declined to do so; in the latter case only will they be deemed compulsory, and excluded. Applying these rules to the case before us, Hendrickson's answers before the coroner's inquest were voluntary, and were properly received as evidence against him.

The second ground on which the prisoner asks a reversal of the judgment is, that the will of Lawrence Van Deusen, the father of the deceased, was improperly admitted in evidence. This evidence was received as bearing upon the question of motive. If it tended in the least to show that the prisoner had been disappointed in the pecuniary expectations he had entertained from his alliance with the family in not being able to realize them till after the death of his wife's mother, and then not in an equal proportion with the brother; or if it tended to show how little property he might expect from his wife if she lived: in either case, whether the supposed motive was resentment or avarice, it was properly received. It was competent to show whether the prisoner would gain or lose by the death of the deceased, and to compare the small amount expected to be realized at a distant day with the intermediate burden of her maintenance. Taken in connection with the previous testimony, tending to show a want of affection on the part of the prisoner towards his wife, this evidence was clearly admissible. Considerable latitude is allowed on the question of motive. Just in proportion to the depravity of the mind would a motive be trifling and insignificant which might prompt to the commission of a great crime. We can never say the motive was adequate to the offense; for human minds would differ in their ideas of adequacy, according to their own estimate of the enormity of crime, and a virtuous mind would find no motive sufficient to justify the felonious taking of human life. I think the evidence of the will was properly received. It was the province of the jury to determine the weight to which it was entitled. My conclusion is, that there was no error committed on

the trial, and that the judgment of the supreme court should be affirmed.

RUGGLES, JOHNSON, DENIO, and EDWARDS, JJ., concurred.

GARDINER, C. J., and SELDEN, J., delivered dissenting opinions.

ALLEN, J., dissented.

Judgment affirmed.

CONFESSION INDUCED BY DELUSIVE HOPE OF IMMUNITY FROM PUNISHMENT will not be received in evidence: *State v. Guild*, 18 Am. Dec. 404; *Commonwealth v. Knapp*, 20 Id. 491; nor is one extorted by pain or made under the influence of hope or fear: *Hector v. State*, 22 Id. 454; *Findley v. State*, 36 Id. 557; *State v. Phelps*, 34 Id. 672. But a promise or threat proceeding from one who had no authority to execute it, and who had no control over the prisoner, will not prevent a confession made under such circumstances from being received in evidence: *State v. Soper*, 33 Id. 685.

IT IS IMPORTANT TO INQUIRE WHETHER PARTY ACCUSED of crime had any motive for its commission. The fact that a person accused of taking a sum of money had purchased a number of lottery tickets before the money was taken is admissible in evidence against him, as tending to show a motive for the taking: *Bullock v. State*, 54 Am. Dec. 369. See cases in note to this case.

MOTIVE.—Evidence that the accused at the time of the killing proposed soon buying some land is, in connection with other testimony, admissible as tending to show a motive for the killing, to wit, to get money: *Kennedy v. People*, 5 Abb. Pr., N. S., 148; S. C., 39 N. Y. 254. It is also competent for the prosecution to prove that some time before the murder was committed the deceased had complained against the accused, her husband, for assault and battery; this upon the question of motive: *People v. McCann*, 3 Park. Cr. 272-295. In each of the above cases the principal case was cited.

STATEMENTS MADE BY PRISONER UNDER OATH AT CORONER'S INQUEST upon the body are admissible against him upon his trial for the murder, although he knew at the time he was sworn that it was suspected that the deceased was poisoned, and that he himself would probably be arrested for the crime, and was informed by the coroner that rumors implicated him and that he had a right to refuse to testify: *Teachout v. People*, 41 N. Y. 7. In the case of *People v. McMahon*, 15 Id. 384, an exhaustive consideration of the principal case is made, and a conclusion reached which is hardly consistent with its doctrine, but the subsequent case of *Teachout v. People*, *supra*, explains away the reasoning of *People v. McMahon*, *supra*, and settles the law as at first stated. The doctrine of the principal case is again reaffirmed, and said to be the settled law of the state, in *People v. Montgomery*, 13 Abb. Pr. 207-251. In this case the court held that the statements of the prisoner in reference to the crime are not deprived of a voluntary character by the fact that they were made while he was in custody, under arrest for the offense. A similar ruling was made in *Murphy v. People*, 63 N. Y. 590. Where the existence of a corrupt intent is material, it is proper to prove the antecedent acts and declarations of the accused in connection with the *res gesta*: *Tuttle v. People*, 36 Id. 431. The principal case is cited in all of the above cases.

WEISSER v. DENISON.

[10 NEW YORK (6 SELDEN), 68.]

NOTICE TO AGENT TO BE NOTICE TO PRINCIPAL MUST BE GIVEN TO HIM while acting in the course of his employment.

BANKERS ARE PRESUMED TO BE FAMILIAR WITH SIGNATURES of their customers or depositors, and are responsible for paying forged checks purporting to be signed by them.

DEPOSITOR IS NOT BOUND TO EXAMINE CHECKS when returned by the bank on the periodical balancing of his book; nor does his neglect to do so, or his confiding the duty to a clerk who conceals the true state of facts from him and the bank officers, render the balance as returned by the bank obligatory on him, or estop him from afterwards proving that some of the checks returned by the bank as paid were forgeries.

APPEAL from a judgment of the New York superior court. A clerk who had charge of his employer's bank account perpetrated a series of forgeries of checks, which he was able to conceal from both his employer and the bank officers by reason of the fact that the pass-book and the checks returned whenever the account was balanced were in his own charge. On the death of his employer the forgeries were discovered. The representatives then demanded payment of the sums that had been deposited, less the true checks only. The bank claimed to charge the false checks also, chiefly on the ground that the depositor was in fault for not examining his pass-book and returned checks from time to time, the doing which would have given him knowledge of the forgeries. The representatives then brought this suit against the bank, in the name of its president. Under instructions from the presiding judge that the bank was not entitled to charge false checks, whether paid before and returned with the first balancing of the book or afterward, the jury returned a verdict for the full amount claimed. The general term, distinguishing between the two classes of checks, directed that defendant should have a new trial unless plaintiff should consent to reduce the amount of the verdict. He did so, and entered judgment for the reduced amount; but as the court of appeals held that the reduction rested merely upon his consent, the details as to that branch of the case are unimportant.

Nicholas Hill, jun., for the appellants, the bank president.

Edward Sanford, for the respondents, the representatives of the depositor.

By Court, **ALLEN, J.** The jury, by their verdict, pronounced the checks upon which the money in dispute was paid to be

forgeries, and it is not claimed that the intestate, Weisser, after he had personal knowledge of the facts, did any act by which he made them his own. After the forgeries were discovered by him he did not in any manner recognize Harlin, the forger, as his agent for drawing the checks. The original payment of the checks by the bank was in their own wrong, and if paid to an innocent holder, the money could not be recovered back: *Price v. Neale*, 3 Burr. 1354; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *Bank of Commerce v. Union Bank*, 3 Id. 230. The defense in the action is based upon the alleged negligence of Weisser in omitting to examine his bank-book after it had been settled and balanced by the bank and returned with the canceled vouchers, and to compare them with his check-book, by which the forgeries might have been earlier detected. But I can find no principle upon which this defense can be sustained.

1. The intestate was not, within any rule of law, estopped from alleging that the signatures of the checks were unauthorized: 1. He did no act to give currency to the checks; 2. He did no act with a view to influence the conduct of the defendants, or by which they were influenced and induced to part with their property or change their position: *Desell v. Odell*, 3 Hill (N. Y.), 215 [38 Am. Dec. 628]; *Pickard v. Sears*, 6 Ad. & El. 469; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287.

2. The most that can be claimed is, that the "writing up" of the bank-book, debiting in it the forged checks and returning the book with the vouchers, was the statement of an account by the bank, and that Weisser, by retaining the account after a reasonable time for its examination had elapsed, without objection, must be deemed to have acquiesced in it and admitted it to be correct, and is equally bound by it as by an account stated. This is undoubtedly the result of his omission personally to examine his account and take seasonable objections to improper items. Still, inasmuch as the defendant has not, by the silence of Weisser, been induced to take any action or lost any rights, the only effect of this is to cast the burden of proof upon Weisser and his representatives to show fraud, error, or mistake in the account. It is not conclusive, but merely *prima facie* evidence of the dealings between the parties: *Manhattan Company v. Lydig*, 4 Johns. 377 [4 Am. Dec. 289]; *Sherman v. Sherman*, 2 Vern. 276; *Philips v. Belden*, 1 Edw. Ch. 1; *Kinsman v. Barker*, 14 Ves. 579; *Bullock v. Boyd*, 2 Edw. Ch. 293; *Barrow v. Rhineland*, 1 Johns. Ch. 550. At law, as well as in equity, a settled account may be impeached by proof of un-

fairness or mistakes in law or fact: *Perkins v. Hart*, 11 Wheat. 237; 1 Story's Eq. Jur., secs. 523, 528, 529. The acquiescence in the account as stated can be of no more binding force than an express admission of the genuineness of the signatures to the forged checks would have been; and yet such admission, made in good faith, would not have concluded the party, unless third persons had been induced to give credit to the checks and part with value upon the faith of such admission: *Hall v. Huse*, 10 Mass. 40; *Salem Bank v. Gloucester Bank*, 17 Id. 1 [9 Am. Dec. 111].

3. It is said that Harlin settled the account with the bank as the agent of Weisser, and that the agent having knowledge of the forgeries, and that the charges in dispute were based upon such forgeries, the principal was affected by the knowledge of the agent, and must be deemed to have acted in person, with full knowledge of all the facts, and thus to have acquiesced in the payment of the forged checks from his funds. The principle that notice to an agent is notice to the principal is quite familiar, but is only applicable to cases in which the agent is acting in the course of his employment. Were it otherwise, and did it extend to acts unauthorized and outside of the employment, whether trespasses or even felonies, the master might be made responsible for all acts, whether tortious or otherwise, done by his servant while in his employ or acting professedly in his behalf, if he did not act at once by disclaiming the authority. The servant would necessarily have knowledge of his own wrongful act, and within the rule sought to be applied, the knowledge of the servant would be that of his master; and if the latter, having knowledge, should not object, he might be deemed to acquiesce. He would thus, by a legal fiction, be charged with the tortious, fraudulent, or even felonious act of his servant. This is not the law: *Foster v. Essex Bank*, 17 Mass. 478 [9 Am. Dec. 168]; *Lewis v. Read*, 13 Mee. & W. 834; *Lyons v. Martin*, 8 Ad. & El. 512; *Schmidt v. Blood*, 9 Wend. 268 [24 Am. Dec. 143]; *Vanderbilt v. Richmond Turnpike Company*, 2 N. Y. 479 [51 Am. Dec. 315]. Had Harlin in fact settled with the bank, his acts in respect to the forged papers would not have bound Weisser. The allowance of the amounts would have been unauthorized, and but a continuation and carrying out of his first offense, and no more obligatory upon his employer than the receipt of the money in the first instance at the counter of the bank. Bankers are presumed to know the signatures of their customers, and they pay checks purporting to be drawn by them

at their peril. If they do not know them to be genuine, they must take time to ascertain. The debit of the amounts of these checks, not being authorized by the checks themselves, can not be sustained upon the authority of Harlin in the settlement of the account. There being no drafts or authority from Weisser, the bank had but the verbal assent of Harlin to charge upon settlement these amounts to the account of Weisser, and there is no pretense that Harlin was supposed to have authority to bind Weisser to that extent or in that manner.

But there was no settlement with the bank except such as resulted from the acquiescence of the plaintiffs' intestate in the account by his silence. The examination of the account by Harlin was not a transaction with the bank, or in which they had any interest or of which they had any knowledge. It was a matter between Weisser and his clerk for the information of the former, and whether faithfully or honestly done is not material to the defendant. Weisser did not obtain the desired information, but is in no worse situation; and the defendant is in no better, than if no examination had been attempted, and in such case it would not have been claimed that he would have been concluded by the account and his omission to examine it. The business was, in truth, transacted in the usual and ordinary way, and no negligence can attach to Weisser in the premises. In *Manhattan Company v. Lydig*, 4 Johns. 377 [4 Am. Dec. 289], a book-keeper in the bank, having charge of the ledger and whose business it was to copy entries from the teller's cash-book, received money from a customer to deposit, entered the account in the ledger and afterwards in the dealer's cash-book, but embezzled the money. The bank-book of the dealer was balanced and settled three times, twice by the dishonest book-keeper and once by another clerk, after the credits had been entered therein and before the fraud was discovered, although a critical examination of the books of the bank would have disclosed the fraud at any time. It was held that the bank was not liable, but that the depositor must suffer the loss, and that there was no want of diligence on the part of the bank. If a settlement with the defendant can be predicated upon the act of Harlin in examining the bank-book of Weisser, then the bank, in the case cited, should have been concluded by the acts of its clerks in stating the account with its customers. Mere lapse of time in the abstract, however long, will not bar the right of the party to allege the forgery, provided he does it within a reasonable time after it is discovered: *Canal Bank v. Bank of Albany*,

1 Hill (N. Y.), 287. Lapse of time between the payment of the checks and the discovery of the forgeries is all there is upon which the defendant can rely in this action, and that can not avail him as a defense to the action. I see no reason why the judgment of the supreme court at the trial term, for the full amount of the verdict, should not have been affirmed; and as the relinquishment of a part of the verdict by the plaintiffs, the whole of which they were entitled to retain, whether done upon their own motion or otherwise, can not prejudice the defendant, the judgment below should be affirmed

JOHNSON, J. The plaintiffs had a verdict on the trial for one thousand eight hundred and ninety-six dollars and ninety-nine cents. Upon the defendant's appeal to the general term of the superior court, in which the suit was pending, a new trial was ordered unless the plaintiffs would consent that the damages should be reduced to one thousand three hundred and eighty-five dollars and fifty cents; upon such consent, a new trial was to be denied, without costs of the appeal. The plaintiffs consented to the deduction, and a new trial was accordingly denied. The defendant has appealed to this court, and now insists that, as the general term decided that an error had been committed upon the trial, and the case was there upon a bill of exceptions, and the damages were assessed generally, the court were bound to grant a new trial absolutely. The record affords no means by which we could determine what grounds or what *data* were adopted by the court below in fixing the amount of the deduction to which the plaintiffs were required to consent to avoid a new trial; and we should probably feel compelled on this ground alone to order a new trial, had not the plaintiffs furnished a complete answer to the objection, by maintaining, as we think they have successfully maintained, that the ruling of the court below, at the trial, was correct. Weisser, the plaintiffs' intestate, had for a long period kept a bank account with the defendant. Between the twenty-eighth of January, 1838, and the time of his death, the twenty-eighth of August, 1849, he had deposited with the bank, to his own credit, and received credit for two hundred and ninety-six thousand six hundred and one dollars and eighty-six cents. During the same period the bank had paid out, upon checks purporting to be signed by him, two hundred and ninety-five thousand four hundred and fifty-one dollars and thirty-six cents. Of these checks, which were several hundred in num-

ber, fifty-one, amounting in all to five hundred and eighty-nine dollars and twenty cents, were not signed by Weisser or by his procuration, but were forgeries of his name. If the case stopped here, the plaintiffs would clearly be entitled to recover the whole amount claimed: *Hall v. Fuller*, 5 Barn. & Cress. 750. It, however, further appears that during the period above mentioned Weisser's bank-book was several times written up and balanced by the bank; that on each of these occasions all the checks which the bank had paid, as drawn by Weisser, were charged to him in his bank-book, and that all such checks, as well the forged checks as the genuine, were returned with the balanced bank-book. All Weisser's bank business was transacted by his clerk, one Harlin, who, on each of the occasions referred to, received the balanced bank-book, and the returned checks from the bank. It likewise appeared that Weisser did not examine the returned checks and the statement of the accounts, as shown in the balanced bank-book, but directed Harlin to make such examination, and that attending to that part of Weisser's business was in the course of Harlin's regular employment. It appeared that twelve of the forged checks were paid to other banks, by which they were presented, and it did not appear to whom any of the other forged checks were paid. The forgeries were committed by Harlin, in whom Weisser reposed entire confidence. As soon as Weisser discovered that there was something wrong about his bank account, he communicated it to the bank, as he did also the fact that forgeries had been committed, as soon as he discovered them. Upon the discovery of the forgeries, Harlin absconded, and the fifty-one forged checks were found in his trunk at his rooms. None of them were entered in Weisser's check-book. Upon this state of facts, the defendant insisted at the trial that Weisser, by neglecting to examine the checks and bank account upon the return of the bank-book, written up and balanced by the bank, had adopted the checks as his own, and that by reason of his negligence in that respect the plaintiffs could not recover from the bank the amount of the forged checks.

The plaintiffs' case may be considered: 1. As to those checks which were paid prior to the first balancing of the bank-book and return of checks; and 2. As to the checks afterwards presented and paid. As to the first class of checks, the plaintiffs have shown the money of their intestate in the defendant's hands; and the defendant, in discharge of that liability, wholly fails to show any order or authority of Weisser to make pay-

ment upon the checks in question. They were not instruments upon which, even if genuine, the bank could ever have maintained any action against Weisser. They did not, upon their face, import any obligation from Weisser to the bank. When they were returned to him they were not presented to him for payment, for they did not import any promise by him to pay, but as vouchers for payments already made and charged to Weisser in the bank-book. The entry of debits for payments made in a bank-book, and striking a balance, is undoubtedly a statement of the account, and the delivery of it to the dealer, and his retention of it without objection, as in other cases of accounts rendered, gives to this statement of accounts the character of a stated account. But a stated account is liable to be opened by evidence of fraud or of mistake; and when the payments represented by the checks in question were sworn by Weisser's representatives not to have been made to him or by his order or authority, the proof of payment afforded by the stated account was overthrown, and Weisser's right to the money remained unaffected. The second class of checks are subject to precisely the same observations; and as to the amount claimed by the defendant on account of the payment of them, the defendant can not retain it unless a right has accrued to the defendant from Weisser's not having detected the forged checks returned upon the earlier balancings of his bank-book under the circumstances before stated. That these do not amount to a ratification of Harlin's forging his name is plain, for there can, ordinarily, be no ratification of that of which a party is ignorant. Ratification implies at least a knowledge that there is or may be something to ratify. The circumstances must then have effect, if they have any effect, upon the ground of negligence in a duty which he owed to the bank, whereby they have been misled and induced to pay the checks in question. The most which can reasonably be said is, that if Weisser had detected the forgeries and communicated the fact to the bank upon the return of the checks upon the first balance of his bank-book, the bank would have been stimulated to increased vigilance in the discharge of a duty which they owed, not to Weisser, but to themselves, for it was not Weisser's money which they paid out, but their own. They were indebted to Weisser generally for money in their hands, and they could only discharge that indebtedness by payment to him or by his authority. The duty and the risk of ascertaining when they were about to pay out money, that it was being paid upon competent authority, was upon them, just

as in all other cases it is upon a debtor to see to it that he pays his creditor, and not some one else without the creditor's authority. Upon the mere ground of the forgery there was no more propriety in charging the money paid to Weisser than if anybody else's name had been forged, or than if payments on some one else's genuine checks had been charged to him.

The defendant's proposition, when closely examined, is not that Weisser has done anything which facilitated or contributed to a fraud upon the bank, but that he has omitted to do that which, if he had done it, would have enabled him to put them on their guard against frauds with which the connection of his name was only an accidental circumstance, to which no act of his had in any degree contributed, and against which he was under no peculiar obligation to guard them. Whatever loss the bank has sustained, it has suffered from its own negligence or want of skill in a matter as to which, in the first instance, it and it only was bound to exercise skill and diligence. To this loss no act of Weisser has contributed. He was guilty of no bad faith. He has violated no duty which he owed to the bank, and is in no way responsible: *Manhattan Company v. Lydig*, 4 Johns. 377 [4 Am. Dec. 289]; *Smith v. Mercer*, 6 Taunt. 76; *Young v. Grote*, 4 Bing. 253; *Johnson v. Windle*, 3 Bing. N. C. 225; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287. He had a right to assume that the bank had discharged its own duty to itself (if indeed he was bound to make any assumption upon the subject), and was not bound to conceive it possible that the bank had charged him with money which had not been paid upon his order. He was under no contract with the bank to examine with diligence his returned checks and bank-book. In contemplation of law, the book was balanced and the checks returned for his protection, not for theirs; and when he failed to examine it, the whole consequence was that the burden of proof was shifted. He became bound to show that the account was wrongly stated. This right he preserved so long as his claim was not barred by the statute of limitations. The case completely negatives any imputation of participation by Weisser, in the fraud perpetrated upon the bank. That would have introduced a new element into the case, and would have led to a different result.

All the judges concurred.

Judgment affirmed.

NOTICE TO AGENT IS NOTICE TO HIS PRINCIPAL: *Doe ex dem. Reynolds v. Ingersoll*, 49 Am. Dec. 57. This rule with all its limitations is discussed in the note to *Bank of Pittsburgh v. Whitehead*, 36 Id. 188. Notice to an agent given to him during the progress of the very transaction about which he is employed is notice to the principal: *Ross v. Houston*, 59 Id. 231, and note. This decision also affords a very nice illustration of a case in which this rule does not apply.

SIGNATURE—FORGERIES.—By accepting a bill of exchange, the acceptor admits the genuineness of the signature of the drawer, and if such signature turns out to be a forgery, the acceptor will nevertheless have to pay it in favor of a *bona fide* holder for value, and without notice: *Salt Springs Bank v. Syracuse Savings Inst.*, 62 Barb. 101. So in an action by a depositor against a bank for the amount of a deposit, it is no defense on the part of the bank to produce a paid check, drawn by plaintiff to the order of a certain firm, and indorsed by them, if such indorsement is a forgery: *Morgan v. Bank of State of New York*, 11 N. Y. 404; *Welsh v. German Am. Bank*, 73 Id. 424. A depositor owes no duty to a bank requiring him to examine his pass-book or return checks with a view to the detection of forgeries in the indorsements; he has a right to assume that the bank before paying his checks will ascertain the genuineness of the indorsements: *Welsh v. German Am. Bank*, *supra*; *Frank v. Chemical Nat. Bank*, 45 N. Y. Sup. Ct. 452. All of the above cases cite the principal case.

SETTLEMENT OF ACCOUNT—PASS-BOOK—ESTOPPEL.—The rule of the principal case, that the only effect of a bank's balancing a depositor's pass-book, and then returning it balanced with the paid checks of the depositor, and of the depositor not questioning the accuracy of the balance until a long time afterwards, when he discovers an error in addition, or that the bank charged him with forged checks, would be, unless the bank has by his silence been induced to take any action, or lost any right, to cast on the depositor the burden of proving fraud, error, or mistake in the account, and if he establishes the same he will be entitled to recover the balance which the correction thereof shows to be due him, has been adopted in *Frank v. Chemical Nat. Bank*, 37 N. Y. Sup. Ct. 26; S. C., 45 Id. 452; and *Welsh v. German Am. Bank*, 73 Id. 424; all relying upon the authority of *Weisser v. Denison*.

AGENCY.—A principal is bound by the acts of his agent or clerk, and is affected by notice to said agent or clerk only so far as he was acting in the course of his employment and not exceeding his authority: *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 316; *Frank v. Chemical Nat. Bank*, 45 N. Y. Sup. Ct. 452; *Manning v. Keenan*, 9 Hun, 692; *Spadone v. Manoel*, 2 Daly, 265; *Getman v. Second Nat. Bank*, 23 Hun, 503.

HATHAWAY v. BENNETT.

[10 NEW YORK (6 SELDEN), 108.]

ORDINARY CONTRACT BETWEEN PUBLISHER AND PAPER-CARRIER, by which the publisher of a newspaper, in consideration of a carrier's efforts to sell the paper, engages to furnish him exclusively with copies to sell over a certain route, if it does not stipulate for any definite term, may be terminated by either party without notice unless one is required by the contract. The publisher is not liable to an action on behalf of the carrier for refusing to furnish copies further, and supplying them to another person.

APPEAL from a judgment of dismissal of complaint. Plaintiff bought from one Winyates the good will of his route as a carrier of the New York Herald, and served it until he was prevented from continuing to do so by the refusal of defendant, the proprietor, to furnish him with copies of the paper. He brought this action for damages for the refusal. Other facts appear by the opinion.

Dudley Field, for the appellant, the carrier.

Edward Sanford, for the respondent, the publisher.

By Court, GARDINER, C. J. The only question is whether the evidence in connection with the pleadings established a case proper for the consideration of a jury. The contract stated in the complaint is somewhat peculiar in its character. It binds the defendant for an indefinite period to supply the plaintiff exclusively with newspapers for a particular district, for a stipulated sum, and of course to withhold them from all others during the existence of the agreement; while the carrier was at liberty to abandon the contract at pleasure, without subjecting himself to any liability to the editor for his non-performance. The defendant was obliged to keep up his establishment and continue the paper, although his own interest and that of the public might require its discontinuance, while the plaintiff could treat the privilege of distributing the newspaper as property, and dispose of it at will, and transfer all his rights to an assignee, without the assent and against the will of the proprietor. It must be concluded that there was no mutuality in such an arrangement. No express contract to that effect is pretended, and it is to be implied, if made, from the fact that the supposed privilege of vending or serving the paper in a particular district was the subject of sale and purchase among the carriers themselves, to the knowledge of the defendant. These sales, it is obvious from the circumstances disclosed, were of the probability or chance that the business of the establishment would continue to be conducted as theretofore, and that the assignee would stand upon the same footing as the previous carrier, because it was indifferent to the defendant what person purchased his paper and supplied a given district, provided the number of copies disposed of was the same. There was nothing in all this resembling a contract for an exclusive privilege between the proprietor and the carrier. The nature of the business repels any such presumption. It was conducted upon the cash system. The paper was sold, as the witnesses inform us, to whoever would

purchase, and the vendor had the right to give or sell his property, like an article of merchandise, whenever or wherever he could find a purchaser. That one carrier would abstain from encroaching on the district of another is probable, for such was their interest; but that no such respect was paid to their supposed rights by others is apparent from the fact that boys were in the practice of vending the papers all over the city. No complaint on this account was ever made to the proprietor of the paper. This would have been the natural course had the carriers supposed that their privileges rested in contract. But the only method of ridding themselves of this interference which seems to have occurred to them was, as one of them stated, to "scare them off." There can be no doubt that these boys had as perfect a right to sell their papers in the fifteenth ward as the carrier or the proprietor of the Herald himself.

On the whole, I agree fully with the learned judge who presided at the trial, that there was no fact established by the answer or the evidence from which a contract could be implied according to the allegations of the plaintiff. The complaint was therefore properly dismissed, and the judgment of the superior court should be affirmed.

PARKER, J. It is not claimed that there was any express agreement with the defendant, nor does it even appear that he had any personal knowledge of the transaction between Winyates and the plaintiff. But a contract is sought to be implied from the fact that the defendant's agents at the office continued to deliver papers to the plaintiff as the carrier for the fifteenth ward, on the same terms as to his predecessor, for more than two years after the route was purchased from Winyates. It is insisted that this was a recognition of a right in the plaintiff to the route, and that it was a violation of that right to employ another carrier upon the route in the place of the plaintiff. The fact that the plaintiff paid five hundred and seventy-five dollars for the route imposed no obligation upon the defendant. The defendant was in no respect a party to that contract, but was in fact entirely ignorant of it; and unless Winyates himself had some right as against the defendant, which is not shown, he could transfer none to the plaintiff. If it was in Winyates a mere privilege or expectation, or if it was even a contract, terminable at the pleasure of the defendant, it could certainly be no more in the plaintiff. It established nothing as against the defendant to show that there was a usage, as between car-

riers, by which the routes were sold by one carrier to another. A mere privilege may be the subject of sale, if the purchaser is willing to run the risk of failing to enjoy it. Nor can such a mere privilege be transformed into a legal right for a fixed term of time, because it was the practice at the defendant's office to book the purchaser as the carrier, and to continue thereafter to deliver to him the papers for the route. That shows a recognition of a person as carrier for the time being, but nothing more. It implies no intention to continue him, except at the pleasure of the publisher.

There could be no contract in such case without mutuality. Suppose the plaintiff had refused to carry any longer, will it be contended that he would have been liable in damages to the defendant for such refusal? If there was an agreement, it was as binding upon the plaintiff to receive and distribute papers as it was upon the defendant to supply them. Or suppose the defendant had concluded to stop the publication of his newspaper, will it be contended that the plaintiff could have had an action against him for not continuing to furnish him papers? His loss in that case would be as great as in this, and would be equally the breach of an agreement, if there was in fact any agreement to continue to supply the plaintiff with newspapers. If there was an agreement, when was it to end? The plaintiff had enjoyed the profits of the place for two years. Is it claimed there was no limit to the extent of its duration? If there was any agreement proved, we should look to the contract itself for its terms, or if a general contract was established, we might look to usage to limit its duration. But when there is no contract proved, nor any usage implying one, we need hardly inquire what would have been the terms and limit of a contract, if one had been made.

The plaintiff's counsel has referred us to the English law, by which a servant is entitled to one month's notice before he is discharged. But that rule rests entirely upon custom. Little-dale, J., said, in *Williams v. Byrne*, 2 Nev. & P. 139: "The case of a menial servant has been put, who may be discharged at a month's notice, but that is not a matter of law. It is a custom that might be put on the record as a fact, and the jury would find that it existed." And in that case the court held that the month's notice was not applicable to a reporter for a newspaper, no such custom being proved applicable to reporters. And in *Fawcett v. Cash*, 5 Barn. & Adol. 904, the court held it was not applicable to a warehouseman who was dismissed

from his employment; and in *Beeston v. Collyer*, 4 Bing. 309, it was held not to be applicable to clerks or servants in husbandry. All these decisions were made on the ground that no custom as to such classes of persons had been proved. But these cases can have no possible application; for conceding even that a contract of hiring was in this case established, the plaintiff has failed to prove any custom as to its extent, or as to the notice to which the plaintiff would have been entitled.

Whether the plaintiff is to be regarded merely as a daily and favored wholesale purchaser of papers for distribution among his subscribers, or as the agent of the defendant for the purpose of such distribution, is, I think, entirely immaterial. In neither case had the plaintiff any legal right to continue to act in such capacity against the will of the defendant, and in either case I think it was the right of the defendant, as well as of the plaintiff, to terminate their business relations at pleasure.

The judgment of the supreme court must be affirmed.

The whole court concurred.

Judgment affirmed.

BALDWIN v. PALMER.

[10 NEW YORK (6 SELDEN), 232.]

CONTRACT TO PURCHASE LAND, WHICH IS VOID BY STATUTE OF FRAUDS, is not rendered valid by payment of part of the price in such sense that *assumpsit* can be maintained for the balance.

PART PERFORMANCE OF PAROL CONTRACT IS ALLOWED by a court of equity to dispense with the requirements of the statute of frauds, upon the principle of preventing a fraud. A court of law has no such dispensing power.

ACTION brought upon an oral agreement by which defendant, in consideration of the payment by plaintiff of eight thousand two hundred and fifty dollars, engaged to convey in fee, free of incumbrance, a house and land in New York city. The title was not in the defendant, but he held a contract for the purchase of it for eight thousand dollars. This sum of eight thousand dollars the plaintiff paid to the owners of the property, and the balance, or two hundred and fifty dollars, he paid to defendant. The land was, however, subject to an assessment for paving Sixth avenue, which plaintiff was compelled to pay. He then brought this action to recover the sum thus paid from defendant, his declaration embracing a count on the special

promise to convey free of incumbrances, and common counts for money lent, money paid, and money due on account; it also alleged a special promise to repay the assessment. The proof showed that at the time of defendant's engaging to procure the conveyance to plaintiff, he stated that the two hundred and fifty dollars was wanted for discharging taxes and assessments; he also said to plaintiff's agent afterward, "You should not pay it [the assessment in question], but you had better see E.," the managing owner. The judge who tried the cause granted a motion for a nonsuit made on the ground that the contract, being oral, was void by the statute of frauds, and this ruling being sustained by the full bench, the plaintiff carried the case up to this court.

Barnard and Parsons, for the plaintiff.

A. Crist, for the defendant.

By Court, McCOUR, J. The several objections taken on the trial below, and upon which the nonsuit was granted and afterwards sustained, are reducible to this one, viz., that the agreement on which the plaintiff relies for the reimbursement of the money expended by him in the payment of an assessment was a part of the agreement for the sale to him of the land, and was by parol, not reduced to writing, and therefore void by the statute: 2 R. S. 134, sec. 8. Although the agreement has been executed between the parties, so far as to consummate the sale by a conveyance and the payment of the purchase money, yet a voluntary part performance of a contract originally void is not a ground for a compulsory performance of the residue of the same contract. The party sought to be charged is still at liberty to raise the objection in a court of law. Part performance, without more, is not a waiver of the objection. There are cases where a part performance of a parol contract is allowed by a court of equity to dispense with the requirement of the statute. This, however, is upon the principle of preventing a fraud. A court of law has no such dispensing power.

The demand in question appears to be a very meritorious one, and such, according to the contract proved, as the defendant ought to pay; but it is founded upon or grows out of a contract so made as to be of no force or validity whatever in law. *Van Alstine v. Wimple*, 5 Cow. 162, was quite as strong if not a stronger case for the plaintiff, and there it was held as settled law, upon the authority of *Lexington v. Clarke*, 2 Vent. 228, and *Chater v. Beckett*, 7 T. R. 197, and *Crawford v. Morrell*, 8 Johns. 253,

that though a part of a contract, which was void by the statute of frauds, had been actually performed, yet another part of the same contract, forming one entire agreement, could not be separated from the rest and be the subject of an action, either on the agreement or the money counts. I am unable to perceive any distinction in principle between those cases and the present. The cases to which we have been referred by the counsel for the plaintiff were cases of actions brought to recover back money paid, or for services performed upon contracts which had been afterwards rescinded by consent of parties, or disavowed by the party sued because not binding in law. In all such cases the money is to be refunded, and the services rendered in part performance are to be paid for, because the contract is at an end, and the action brought for the purpose is in disaffirmance of the void contract, and not in affirmance, and with a view of enforcing it, as in the present case. *Gillet v. Maynard*, 5 Johns. 85 [4 Am. Dec. 329]; *Rice v. Peet*, 15 Id. 503; *Burlingame v. Burlingame*, 7 Cow. 92; *King v. Brown*, 2 Hill (N. Y.), 485; and *Lockwood v. Barnes*, 3 Id. 128 [38 Am. Dec. 620], are all to that effect.

The nonsuit was properly granted, and the judgment below must be affirmed.

Judgment affirmed.

COURTS HAVE NO DISPENSING POWER OVER STATUTES; where they contain no exceptions, the court can make none. The distinct ground upon which equity interposes at any time to take a case out of the statute is to prevent a fraud by one party upon the other: *Box v. Stanford*, 51 Am. Dec. 142. In the note to this case the authorities are collected upon the point as to when part performance dispenses with the requirements of the statute of frauds. In *Houston v. Townsend*, 12 Id. 109, it was held the payment of part of the purchase price is sufficient to take a case out of the statute, provided such payment be clearly made in execution of the contract; to the same effect, *Townsend v. Houston*, 27 Id. 732. But in *Allen v. Booker*, 19 Id. 33, the court hold that the payment of part or the whole of the purchase price is insufficient. The same doctrine is maintained in *Johnson v. Glancey*, 23 Id. 45; and *Pinnock v. Clough*, 42 Id. 521.

PART PAYMENT ON PAROL CONTRACT for the sale of an interest in lands does not take the case out of the statute of frauds, so as to enable the vendor to sue for the balance: *Cagger v. Lansing*, 43 N. Y. 550; *Morrill v. Cooper*, 65 Barb. 517. "A voluntary performance of a part of a contract, void by the statute of frauds, will not give an action to compel the performance of the residue; and this is true, although there has been a performance of all that part of the contract which is within the statute, and the residue upon which the action is brought is void only from its connection with the part already performed." *Harsha v. Reid*, 45 N. Y. 420; to the same effect, *Dow v. Way*, 64 Barb. 255; *Toole v. Jones*, 1 Robt. 95; *Fuller v. Reed*, 33 Cal. 110. In each of the above cases the principal case is cited.

DUNLOP v. GREGORY.

(10 NEW YORK (6 SELDEN), 241.)

CONTRACTS NOT TO CARRY ON BUSINESS OR TRADE, made upon good consideration, may be sustained, where there are special circumstances rendering the restriction reasonable and useful, and the promisor is not restrained more than is needful for the protection of the promisee in the enjoyment of the promisor's good will.

COVENANT BY PURCHASERS OF STEAMBOAT that she should never be run on the upper Hudson, held obligatory so long as any of the sellers should be interested in Hudson-river steamboat business.

LIQUIDATED DAMAGES.—Where a contract not to run a boat above a certain point provides that for every violation thereof two hundred dollars shall be the liquidated damages, such sum will be so considered and decreed.

APPEAL from a judgment on a verdict for damages for breach of covenant. The covenant was embraced in a contract for the sale of a steamboat, and was designed to protect the sellers, who were an association prosecuting steamboat business on the North or Hudson river, against competition from her being employed in opposition to their lines. It was in these words: "That in no event whatever, nor any circumstances whatever, shall the said steamboat Robert L. Stevens be run as a passage boat above the village of Saugerties on the North river, by any person or persons whatever; and that in the sale of said steamboat, or the sale of the different third parts of the said steamboat, it is distinctly understood at (*sic*) all the parties to the agreement, that it is an essential and important consideration that the said steamboat shall not be run above the village of Saugerties aforesaid as a passage boat at any time hereafter, by any person or persons whatever." Stipulated damages, two hundred dollars for every trip made by the said boat above the village of Saugerties. The boat was run contrary to this stipulation, but after most, though not all, of the sellers had withdrawn from river steamboat business. The action was brought to recover damages for this as a breach of the covenant. The plaintiffs had a verdict, which the supreme court sustained, holding that the covenants were not against public policy, being only partially in restraint of trade, with adequate consideration; that the suit was rightfully brought in the name of all the covenantees; that the covenant was intended to protect each of them against a breach by any of the covenantors; and that the parties could, foreseeing the difficulty of proving the amount of damages, fix them. The covenantors, the buyers of the boat, appealed. The appeal was submitted.

Thompson, for the appellants.

Buell, jun., and Pierson, for the respondents.

By Court, PARSE, J. It is contended, on the part of the appellants, that the agreement on which this suit is brought is in restraint of trade, prejudicial to the public interests, and against public policy; and that if valid at the time of its execution, it was invalid at the time of its breach, because the partnership, for whose benefit it was made, had expired without assigning it. Contracts, upon whatever consideration made, which go to the total restraint of trade, such as obligate a man not to pursue his occupation or exercise his trade anywhere in the state, are void. Such contracts are injurious to the public, and operate oppressively upon one party without being beneficial to the other. But a contract not to exercise a trade or carry on business in a particular place, made upon good consideration, may be upheld where sufficient reasons are shown for entering into it. The contract, to be upheld, must appear from special circumstances to be reasonable and useful, and the restraint of the covenantor must not be larger than is necessary for the protection of the covenantee in the enjoyment of his trade or business: *Chappel v. Brockway*, 21 Wend. 157; *Nobles v. Bates*, 7 Cow. 309; 2 Saund. 156, note 1; *Hitchcock v. Coker*, 6 Ad. & El. 488; *Mitchel v. Reynolds*, 1 P. Wms. 181. Within the principles of these cases, I think the agreement in question was valid and binding on the defendants.

Because a part of the covenantees sold out their interests in the steamboats running on the Hudson river, between the making of the agreement and its breach by the defendants, the remaining covenantees, who retained their interest in such boats, ought not to be deprived of their remedy on the agreement, to recover the damages sustained by them by means of such breach. The obligation of the defendants was an obligation to all the covenantees jointly. This suit having been commenced before the adoption of the code, it was necessarily brought in the names of all the covenantees. The action can be sustained if any one of the plaintiffs has a beneficial interest in the suit. The covenant inured to the benefit of those covenantees who retained their interest in the steamboats running on the river. The other covenantees, who had sold out and therefore could not be injured by the breach of the agreement, are merely nominal parties to the suit.

The dissolution of the Hudson-river steamboat association is

no defense to the suit. The agreement was not made with the plaintiffs as members of that association or as copartners, but as individuals; and was intended to protect their interest, whatever that might be, in the steamboats running between New York and Albany and Troy. The obligation of the agreement is not at an end because the steamboat association has become dissolved, or because the partnership, of which the plaintiffs were members at the time of the making of the agreement, has expired by the efflux of time. The agreement makes no reference to the steamboat association, or to any copartnership. Its obligation continues as long as any one of the covenantees has an interest in the steamboats running on the Hudson river between New York and Albany and Troy; especially in any of those of which they were owners, in whole or in part, when the agreement was made.

The sums agreed upon by the parties, as the measure of damages for the violation of the agreement, must be considered as liquidated damages. How these damages are to be apportioned among the plaintiffs is not a question which arises in this suit.

The judgment of the supreme court must be affirmed.

All the judges concurred.

Judgment affirmed.

AGREEMENTS IN PARTIAL OR LIMITED RESTRAINT OF TRADE ARE VALID when founded upon a sufficient consideration: *Kellogg v. Larkin*, 56 Am. Dec. 164. The subject of "contracts in restraint of trade" is treated of at length in the note to *Pike v. Thomas*, 7 Id. 741. This subject is further discussed in *Boisier v. Bliss*, 43 Id. 93, and the cases cited in the note thereto.

AGREEMENT NOT TO ENGAGE IN PARTICULAR BUSINESS, unless it be restricted as to time and place, is void: *Maier v. Homan*, 4 Daly, 168; but an agreement "that one should not engage in a particular business within a limited territory and for a specified period of time, or so long as the other should have an interest in the observance of such an undertaking, and should be capable of serving and ready to serve the public in that business," is not in restraint of trade, and is valid: *Curtis v. Gokey*, 68 N. Y. 304; *Ewing v. Johnson*, 34 How. Pr. 205, both citing the principal case. It is again cited among a very large number of others in *Kemp v. Knickerbocker Ice Co.*, 51 Id. 37, as being one of the cases expressing the correct principle of liquidated damages.

POOR v. GUILFORD.

[10 NEW YORK (6 SELDEN), 273.]

AGENT WHO HOLDS LEGAL TITLE TO DEMAND, though he may have acquired it as agent and hold it for the benefit of his principal, may sue upon it in his own name.

WHERE THERE IS LEGAL RIGHT TO DEMAND SUM OF MONEY, and there is no other remedy, the law will, for all the purposes of a remedy, imply a promise of payment.

APPEAL from a judgment in favor of plaintiff in an action for moneys received on a promissory note, an interest in which was assigned to the plaintiff as security for the payment of a demand held by him for collection. The action was *assumpsit*, commenced before the code, and the declaration contained the old fictitious counts; but the substantial facts were as follows: T. M. Poor was the owner of a negotiable promissory note, given by Oliver L. Poor, payable to E. M. Poor or bearer, for about three hundred and thirty-five dollars. He placed said note in the hands of Franklin Poor, the plaintiff, for collection or to be secured. Oliver L. Poor was the owner of a note given by Fanny and Alfred Hull to him for about nine hundred and thirty dollars, which was in the hands of Wilkes Angel, an attorney, for collection. Oliver L. Poor, for the purpose of securing the payment of the note belonging to E. M. Poor, made the following assignment to the plaintiff, which the plaintiff left with Angel and took the accompanying receipt: "Cuba, 24th, 1843. For value received I hereby transfer and assign to Franklin Poor an interest to the amount of three hundred and thirty-four dollars and forty-eight cents in a certain note owned by me and signed by Fanny and Alfred Hull, now in the hands of W. Angel, of Cuba, for collection, as collateral security for the payment of a certain promissory note of that amount and interest, now held by said Franklin against me. Oliver L. Poor. Cuba, April 7, 1843. Received of F. Poor an instrument, of which the above is a copy, money to be retained for him when collected of F. and A. Hull. Wilkes Angel." Afterwards a judgment of over nine hundred dollars was recovered against the Hulls upon said note of O. L. Poor, and O. L. Poor assigned to the defendant three hundred and forty-five dollars and sixty-two cents of the judgment. Subsequently O. L. Poor made a further assignment of the said judgment to defendant, to cover any demand which defendant should obtain against him. Defendant then took charge of the collection of the judgment, and

made a settlement with the Hulls, in which he received the full amount of said judgment. At the time of the assignment of the judgment to defendant by O. L. Poor, defendant had notice of the assignment of the note on which it was founded to Franklin Poor, the plaintiff, and of his interest therein. The cause was referred, and on the referee's report in favor of plaintiff for the full amount of the note, judgment was rendered in his favor, which the supreme court sustained, holding that plaintiff need not sue in equity, but could maintain an action at law in his own name, as being owner and holder of the note.

George F. Comstock, for the appellant.

A. Taber, for the respondent.

By Court, Poor, J. In this case there is no doubt of the justice of the judgment of the supreme court, nor of its being a full protection to the appellant against a second claim for the same demand, and it ought not to be reversed unless some well-established principle of law has been violated. The beneficial interest in the demand, for which the judgment was rendered belongs to one E. M. Poor; and the question is, whether the respondent has such a title, and stands in such a relation to the beneficial owner as to authorize a judgment in his favor.

The respondent having the legal title to the interest in the note of the Hulls, on which the appellant received the money, and upon receiving which arose the implied *assumpsit* to pay, the question is, whether this *assumpsit* may not be held to have arisen in favor of the holder of the legal title, although he holds it as attorney and trustee for the beneficial owner. There is no doubt that on the receipt of the money, a right of action arose against the appellant in favor of the respondent, or of E. M. Poor. The money did not belong to the appellant, and the respondent was the legal, and E. M. Poor the beneficial, owner of it: *Seaman v. Whitney*, 24 Wend. 263 [35 Am. Dec. 618], and cases there cited.

When an express contract is made with an agent by a third person, the agent may maintain an action upon it, though he may be known to act as agent, and though his principal may or may not be entitled to a like action on the same contract. This is a well-settled proposition: Story on Agency, sec. 393, and cases there cited; Paley on Agency, by Lloyd, c. 4. The fact that the legal title to the money in question is held by the respondent as agent would seem, therefore, to furnish no obstacle to his recovery; and why should it? For if the real owner is

also entitled to an action, the present recovery would certainly be a good bar to it, as the respondent is clearly acting within the scope of his authority in prosecuting this suit and collecting the money for his principal.

The implied promise which the law raises is always auxiliary to the title, and is only a legal mode of enforcing it. Chief Justice Bronson, in delivering the opinion of the supreme court in *Norton v. Coons*, 3 Denio, 134, states the principle correctly. He says: "Where there is a legal right to demand a sum of money, and there is no other remedy, the law will, for all the purposes of a remedy, imply a promise of payment." See also *Chit. Cont.* 609.

On the whole, the recovery in this case does not appear to me to have violated any rule of law, but on the contrary, to be in accordance with well-established principles.

The counsel for the appellant referred to the case of *Gunn v. Cantine*, 10 Johns. 387, as precisely in point. But the difference between that case and this is very great. Here the appellant has the legal title; there the attorney in fact had not: he merely handed the security of his principal over to Cantine to collect.

Judgment affirmed.

WHERE NOTE IS MADE TO AGENT OR TREASURER of a private association by name, with the addition of his agency or office, he may sue upon it in his own name, the description being merely *descriptio personæ*: *Clap v. Day*, 11 Am. Dec. 99. In the note to this case this subject is discussed at some length. A note payable to A., agent of the executors of B., vests the legal interest in A., by whom alone an action at law can be sustained on the note: *Cocke v. Dickens*, 26 Id. 214. An agent may sue in his own name upon negotiable paper indorsed in blank: *Pearce v. Austin*, 34 Id. 523. But an agent can not maintain an action in his own name except in exceptional cases: *Taintor v. Prendergast*, 38 Id. 618. See also *Elkins v. Boston and Maine R. R.*, 51 Id. 184; *Violette v. Powell's Adm'rs*, 52 Id. 548.

WHERE THERE IS LEGAL RIGHT TO DEMAND SUM OF MONEY, and there is no other remedy, the law will imply a promise of payment: *Sheldon v. Sherman*, 42 N. Y. 488, citing the principal case. The principal case is again cited *arguendo* in *Pickersgill v. Read*, 7 Hun, 639, as showing that the plaintiff in that case held the legal title to a certain mortgage.

JEWETT v. MILLER.

[10 NEW YORK (§ SELDEN), 402.]

RULE THAT TRUSTEE CAN NOT PURCHASE TRUST PROPERTY FOR HIS OWN ACCOUNT forbids that a receiver, who has bought in on foreclosure of a mortgage property of which he held the equity of redemption as re-

ceiver, should be allowed to hold the property as against a *cestui que trust* who elects to claim the benefit of the purchase.

EQUITABLE ESTOPPEL NEVER TAKES PLACE unless the party seeking to avail himself of it has been actually misled.

APPEAL from a judgment affirming a vice-chancellor's decree dismissing a bill filed to redeem property from sale on foreclosure. The facts appear in the opinion.

Nicholas Hill, jun., for the appellant, claiming to redeem.

B. Davis Noxon, for the respondent, the purchaser.

By Court, JOHNSON, J. When Miller purchased the premises in question at the master's sale, December 1, 1842, he was receiver of the Wayne County Bank. The sale was made on the foreclosure of a mortgage made by one Williams, then the owner of the premises, to Minot C. Morgan and others, dated October 15, 1838, which mortgage was assigned, first to the Wayne County Bank by Morgan and others, and afterwards by the bank to the people of the state of New York, as collateral security for moneys borrowed by the bank from the canal fund. After this last assignment, Williams sold the premises to the defendant Cook, who gave his mortgage for the purchase money, and this mortgage was assigned by Williams to the bank as security for a debt due by him to the bank. On the twenty-eighth of August, 1841, as receiver of the Wayne County Bank, Miller procured a quitclaim deed of the premises from Cook and wife. Miller then, as receiver, had the right to redeem the mortgage assigned as security to the state, and also the general equity of redemption by the quitclaim from Cook and wife. Thus situated upon the foreclosure by the state, he became the purchaser of the premises. It is contended on the part of the defendant Miller that his case is out of the general rule which forbids a trustee to purchase on his own account the trust property, upon the ground that the sale in this case was a judicial sale, made under a decree against the trustee, and based upon a title paramount to the title of the trustee, and to the interest of the *cestuis que trust*. That this is not the rule was adjudged in the case of *Van Epps v. Van Epps*, 9 Paige, 237; *Iddings v. Bruen*, 4 Sandf. Ch. 263. It is hardly possible to state the rule of equity too broadly or too strongly. It will not permit a trustee to subject himself to the temptation which arises out of the conflict between the interest of a purchaser and the duty of a trustee. It was Miller's duty as receiver to make the property bring the largest possible price; but as purchaser this was not

his interest. The rule is entirely independent of the question whether in point of fact any fraud has intervened. It is to avoid the necessity of any such inquiry, in which justice might be balked, that the rule takes so general a form. After the purchase by Miller, it follows that his *cestuis que trust* had the right either to demand a resale of the property or to adopt his purchase as made for their benefit, subject of course in the latter case to his lien for advances: *Slade v. Van Vechten*, 11 Paige, 21.

The next question which arises is, whether the plaintiff is in such a position as to have acquired the rights which belonged to Miller's *cestuis que trust*, the Wayne County Bank and its creditors. It is quite plain that by Miller's assent and the assent of the *cestuis que trust*, this purchase, however originally intended by him, might become a purchase on account of the *cestuis que trust*. I think there can be no better evidence of such an assent in favor of a purchaser who has been led to rely upon his acts than is to be found in the fact that Miller himself, acting on behalf of the other parties whose assent was necessary, offered for sale at public auction, on formal notice, a bond and mortgage which had no efficient existence, and was not a lien upon the property which it professed to bind, unless such assent had been given. To suppose any other intent in Miller as to a purchaser so situated is to assume that he intended to be guilty of a fraud; and this the law will never suppose when the conduct of a party can be explained consistently with innocent intentions.

Unless, therefore, the complainant became a purchaser of the bond and mortgage under such circumstances of notice as to be unable to invoke the aid of the principle of equitable estoppel, I see nothing in the other facts of the case which can hinder its application: *Heard v. Hall*, 16 Pick. 457. It is Miller alone who sets up the former purchase as having inured to his private benefit, and against him the complainant's case is complete, provided he was actually defrauded. It is hardly necessary to say that equitable estoppel never takes place, unless the party seeking to avail himself of the estoppel has been actually misled. It is not sufficient that he might have been misled if in point of fact he has not relied upon the acts or representations of the other party. The doctrine is highly equitable in its nature, and is never available to enable a party to gain an advantage upon the unfounded ground that he has been defrauded. It is upon this ground of equitable estoppel that the plaintiff must succeed if he succeeds at all; for clearly the legal

right is with the defendant, apart from the effect of the estoppel. Now, it may be conceded that if the transaction at this sale had come in question in an action at law, for not completing the contract of sale, the printed particular or terms of sale could not have been varied by any declaration of the auctioneer after the biddings were begun, according to *Shelton v. Livius*, 2 Crompt. & J. 411; though the case of *Gunnis v. Erhart*, 1 H. Black. 289, does not go quite so far, the court there holding such evidence to be inadmissible where the offer did not extend so far as to bring home to the party any particular personal information. The case of *Livingston v. Byrne*, 11 Johns. 555, decides nothing upon the point; for neither was the fact of notice in issue in the cause, nor did the evidence bring home any notice to the party; but on the contrary, had the question been material, the court must have determined upon the evidence that no notice was given. The question in this case seems to me more nearly to resemble that which would arise on a bill for a specific performance, where the bidder had been misled by parol declarations of the auctioneer variant from the printed particulars, and a performance was sought against him according to the printed particulars. In such a case, parol evidence, though confessedly inadmissible at law, would be admissible in equity as a defense against the performance asked for: *Thornhead v. Stangroom*, 6 Ves. 328; *Gillespie v. Moon*, 2 Johns. Ch. 585 [7 Am. Dec. 559].

Now, the written assignment under which the plaintiff makes title is not of itself sufficient to maintain the right which he seeks to enforce, because it does not of itself serve to counter-vail the title of the defendant. The plaintiff needs the aid of the principle of estoppel *in pais* to enable him to succeed. What, then, is his position in point of fact as to the question whether he was in any way misled by what took place upon the sale? In my judgment, he was as well aware of the facts in the case at the time when his bids were made as he was when he wrote the letter to Miller which was given in evidence. It is not entirely easy to say what Miller's precise purpose was in describing the security in question, as he did in the notice of sale. That it was not fraudulent in fact appears plainly in every part of the case. The general mirth which prevailed at the sale when this item came to be offered; the fact that after being struck off at less than five dollars, and being refused by the bidder, it was again put up; the entire frankness of Miller's declarations when interrogated at the sale as to the

facts connected with his purchase—irresistibly compel my mind to the conclusion not only that Miller intended no fraud, but that the company present at the sale universally understood that whatever Miller's purpose was in making the sale, it was not to give to the purchaser a mortgage of ten thousand dollars on the property. He probably meant merely to close his account as receiver with this security, by the sale, giving to the purchaser the title to the bond of Cook; and this, I think, was understood to be his purpose. That the plaintiff was aware of the facts and did not suppose that Miller intended to abandon his own purchase in favor of the purchaser of the bond and mortgage is, I think, satisfactorily shown by his own conversation at the sale. Before the property was struck off, in the banter of the auction-room, while the company were seemingly highly amused at his being a bidder, his language conveyed the idea that he was bidding upon the probability of some technical error in the process of foreclosure, committed by the attorney general. When the property was struck off he at once took the ground that Miller could not at the time be the purchaser. It is plain from the evidence that the complainant became the purchaser on this very ground, and for the express purpose of acquiring the right to overhaul Miller's purchase. This he might lawfully do. He had a right, if he chose, to buy for that purpose. He was right as to Miller's purchase being impeachable, but he was wrong in supposing that he could, by buying the bond and mortgage at the sale, acquire the right to impeach Miller's purchase. That he could only acquire by being misled, so as to be able to avail himself of an estoppel *in pais* against Miller. That he was not misled, and has no case for such an estoppel against Miller, is apparent from the fact that he became the purchaser with the purpose of availing himself of such an estoppel. In conclusion, I think it apparent that Miller intended to deceive no one, and did not intend either to hold his own title for the benefit of the purchaser of the bond and mortgage at the sale, or to have any one suppose that he so intended, and that the plaintiff bought with full knowledge of the facts, and was in no particular misled, except in the idea that so purchasing he could acquire the right to overhaul Miller's purchase.

The judgment below should be affirmed, with costs.

RUGGLES, C. J., WELLS, WATSON, and MORSE, JJ., concurred
JEWETT, J., did not sit in the case, and GRIDLEY, J., was absent
Judgment affirmed.

TRUSTEE CAN NOT BECOME PURCHASER OF TRUST ESTATE as long as the fiduciary relation continues: *Pratt v. Thornton*, 48 Am. Dec. 492, and note. A purchase by a trustee of property of his *cestui que trust*, whether made at public or private sale, is voidable only. The *cestui que trust* must make his election to set aside such purchase within a reasonable time: *Harrison v. McHenry*, 62 Am. Dec. 435; *Worthy v. Johnson*, Id. 399. One undertaking to act for another can not act for himself, as a general rule, in the same matter, but it is not universally true that a trustee can not purchase the trust estate; circumstances may arise which render such purchase necessary in order to protect the interests of the *cestui que trust*: *Spindler v. Atchison*, 56 Id. 755, and note; see also *Dwight v. Blackmar*, 57 Id. 130, and note.

ONE STANDING AS TRUSTEE IN RESPECT TO PROPERTY IN HIS POSSESSION is not permitted to purchase and hold it for his own benefit, although the sale is a judicial one under a title superior to that of the trustee or *cestui que trust*: *Colburn v. Morton*, 1 Abb. App. Dec. 385; S. C., 5 Abb. Pr., N. S., 315; S. C., 36 How. Pr. 160; S. C., 3 Keyes, 305; *Valentine v. Belden*, 20 Hun, 542; *Linge v. Wilkinson*, 57 N. Y. 457. A trustee who acquires title to property through a sheriff's deed takes the title subject only to the right of the *cestui que trust*, to ratify and confirm the title, or compel the conveyance thereof by the trustee, upon a proper case made in a court of equity for that purpose: *Holman v. Holman*, 68 Barb. 222. The *cestui que trust* may treat the purchase as for his benefit, whether the sale was public or private, and for a *bona fide* price or not: *Fullon v. Whitney*, 5 Hun, 19. A clerk of a broker employed to make sale of land, who has access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter that if he becomes the purchaser he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land: *Gardner v. Ogden*, 22 N. Y. 327. In all of the above cases *Jewett v. Miller* is cited as an authority.

ESTOPPEL. — The rule of the principal case, that an equitable estoppel never takes place unless the party seeking to avail himself of it has been actually misled, and that the other party intended so to mislead him, has been reaffirmed in *Christianson v. Linford*, 3 Robt. 225; *Chipman v. Montgomery*, 4 Hun, 752; *Sanford v. Sanford*, 2 Thomp. & C. 644; *Eetel v. Bracken*, 28 N. Y. Sup. Ct. 15; *Calkins v. Bloomfield*, 1 Thomp. & C. 547, all citing the principal case.

BAGLEY v. SMITH.

[10 NEW YORK (6 BELDEN), 489.]

PARTNER MAY SUE COPARTNER AT LAW for damages caused by his willfully dissolving the partnership before the expiration of the term fixed by the articles for its continuance.

DAMAGES RECOVERABLE BY ONE PARTNER for his copartners' wrongful dissolution of the copartnership include anticipated profits for the residue of the term fixed by the articles.

EVIDENCE OF PROFITS REALIZED during the continuance of a partnership may be received in evidence as aiding to estimate profits which would have been realized thereafter had the firm been continued.

APPEAL from a judgment of the New York superior court for damages for breach of articles of copartnership. The agreement was in writing and under seal, and provided for a continuance of the firm for a term of four years and one month from December 1, 1846. Before two years had quite expired, two of the partners, while the third was traveling in the west on business of the firm, published a notice of dissolution of the old firm, and of the formation of a new one in their own names to continue the business. They took possession of the stock, and commenced business according to their announcement. This suit was brought by the ousted partner for damages for this wrongful dissolution; and resulted in a verdict and judgment for plaintiff, subject to exceptions taken by defendant, which raised the questions discussed in the following opinion.

Daniel Lord, for the appellants, who had dissolved the firm

John Slosson, for the respondent, the ousted partner.

By Court, JOHNSON, J. The principal points presented by the exceptions in this case are: 1. Whether an action can be maintained for a breach of a covenant to continue a partnership for a fixed period, unless sooner dissolved in accordance with the terms of the covenant; 2. Whether actual damages can in such case be recovered; 3. Whether expected profits can be regarded as a ground of damages in such a case; and 4. Whether the amount of profits made prior to the dissolution could be considered by the jury as bearing, in any degree, upon the amount of damages to which the plaintiff was entitled. Another objection was presented on the argument, that the covenants of the defendants being several, no judgment for joint damages could be given. This objection, not having been presented at the trial, so far as the bill of exceptions informs us, can not be considered here.

There do not seem to be any special rules of law applicable to covenants contained in partnership articles and not to other covenants; and we may therefore say, without discussion, that an action will lie for a breach of covenant, no matter in what instrument the covenant be found. We may further affirm that no rule of law declares that the breach of a covenant contained in partnership articles shall be compensated only by nominal damages. The measure of damages must depend on the nature of the obligation, and the extent of the injury in this as in all other cases of broken covenants.

No question was made at the trial as to the sufficiency of the proof that a breach of the obligation to continue the partnership had taken place, except only so far as a question of that sort is raised by the objection of the defendants' counsel, that by the constitution of the partnership the partners have a power of revocation whenever they lose confidence in each other. It is not quite clear whether this objection points to the particular frame of this partnership, or is supposed to be founded upon the general rules applicable to that relation. If it relate to the provisions of the partnership agreement in this case, then it is clear that the articles contain no clause which warrants the defendants' proposition. If, on the other hand, the general law of partnership is referred to, while it must be conceded that some difference of opinion seems to exist as to the power of either partner in a partnership for a fixed term, contrary to his agreement, to put an end to the continuance of the firm at his own mere will, it can be safely affirmed that, conceding this power to exist in the broadest form, it has never been pretended that a partner who should, in contravention of his agreement, put an end to the partnership would not be held responsible for the injury thus committed.

We are left, then, to the only substantial question which this case presents: whether the loss of those profits which the plaintiff would have made during the stipulated term of the partnership is a proper subject of compensation, and whether the evidence of past profits, during the period next preceding the dissolution, can be considered as bearing upon the question of prospective profits. The form of the exceptions taken concedes that the judge committed no error, unless in taking the profits into consideration at all; that if he was correct in this he has annexed to his instructions all the proper qualifications to prevent an excessive and erroneous estimate of the amount of compensation for prospective profits.

The object of commercial partnerships is profit. This is the motive upon which men enter into the relation. The only legitimate beneficial consequence of continuing a partnership is the making of profits. The most direct and legitimate injurious consequence which can follow upon an unauthorized dissolution of a partnership is the loss of profits. Unless that loss can be made up to the injured party, it is idle to say that any obligation is imposed by a contract to continue a partnership for a fixed period. The loss of profits is one of the common grounds, and the amount of profits lost one of the common

measures, of the damages to be given upon a breach of contract. I need only refer to *Masterton v. Mayor etc. of Brooklyn*, 7 Hill, 61 [42 Am. Dec. 38]. So, too, in *Wilson v. Martin*, 1 Denio, 602; *Hecksher v. McCrea*, 24 Wend. 304; and *Shannon v. Comstock*, 21 Id. 457 [34 Am. Dec. 262], what the party would have made—in other words, his prospective profit from the performance of the contract—was held to be the true measure of damages. I refer also to two English cases on the question, although the English courts do not seem so carefully to have considered the rules by which, as matter of law, damages are to be measured as the courts in this country.

Gale v. Leckie, 2 Stark. 107, was at *nisi prius* before Lord Ellenborough. The defendant agreed, as author, to furnish a manuscript work to plaintiffs, to be published at their expense, and the profits to be equally divided. The defendant failed to fulfill, and this action was brought for damages. Lord Ellenborough told the jury the plaintiffs were entitled to their expenses of paper and printing, and added, "The sum of ninety pounds has been stated by the witnesses as the amount of profit which would probably have been derived from the first edition; and it is doubtful whether it would have reached a second;" after suggesting that there might have been a loss instead of profit, which would have been wholly the plaintiffs' loss under the contract, he submitted the matter to the jury, who found for the plaintiffs fifty pounds more than the expenses, etc., for loss of profit. The case does not appear to have been moved afterwards.

McNeil v. Reid, 9 Bing. 68, was an action upon a contract, by the defendant, to take the plaintiff into a firm of which the defendant was a member. It appeared, upon the trial, that the plaintiff had been offered, upon certain terms, the command of an East India ship for a double voyage; that the value of such voyage to the captain was not less than one thousand pounds; that the plaintiff had been induced by the defendant to give up this voyage to enter into the promised partnership. The jury found five hundred pounds for the plaintiff. It was objected, among other things, that the jury were wrongfully instructed as to damages. On this point Tindal, C. J., says: "I told the jury that they might see that the plaintiff considered the engagement equal to an Indian voyage, because he would not otherwise have relinquished it, and the defendant could not have estimated it at less, because he made his offer as a friend of the plaintiff." It was the value of the engagement as partner, therefore, which

the jury were to estimate; and Bosanquet, J., says: "The damages were estimated according to what the jury thought was the value of the contract. The value of the East India voyage has not been recovered as special damage, but has been taken as an ingredient for estimating the value which each party set on the proposed contract of partnership." In each of these cases the prospective profits of a joint undertaking unperformed was made the subject of compensation in damages in an action at law.

The next question relates to the admission of the evidence of the amount of past profits, to be considered by the jury as bearing upon future profits. It will be observed that the objection does not at all relate to the mode of proof, but only to the competency of the fact. It seems to me quite obvious that, outside of a court of justice, no man would undertake to form an opinion as to the prospective profits of a business without in the first place informing himself as to its past profits, if that fact were accessible. As it is a fact in its nature entirely capable of accurate ascertainment and proof, I can see no more reason why it should be excluded from the consideration of a tribunal called upon to determine conjecturally the amount of prospective profits than proof of the nature of the business, or any other circumstance connected with its transaction. It is very true that there is great difficulty in making an accurate estimate of future profits, even with the aid of knowing the amount of the past profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we the more inclined to refuse to make the inquiry by reason of its difficulty, when we remember that it is the misconduct of the defendants which has rendered it necessary.

Another question arises upon the defendants' third request to charge, viz.: "That supposing Bagley to be accountable through want of diligence, that should be taken into view in diminution of the damages." An issue had been formed upon the pleadings, and tried, whether Bagley had fraudulently abstracted a quantity of gold from the firm, and the judge had instructed the jury that if they found this issue for the defendants, then they were justified in dissolving the partnership, and the plaintiff could not recover damages. No issue had been made as to negligence on Bagley's part, nor did the evidence tend to the proof of such negligence; and on these grounds, as well as because the request was not in such a shape, even conceding it to have been well founded upon the evidence as to require the

judge to comply with it, we think the exception not well taken. A request must be in such form that the judge may properly charge in the terms of the request as made, without qualification, or his refusal will not be ground of error. If made, as requested here, the effect would have been to submit to the jury to find whether Bagley was accountable through want of diligence, without any instructions as to what sort of diligence he was bound to exhibit, or what sort of losses or other mishaps he was thus to be made accountable for. In this refusal there was no error.

It may be proper to notice briefly the proposition that the plaintiff's claim for profits must be limited to the period between the dissolution and his subsequent entry into business. This is obviously unfounded. The only question which could be made as to this part of the case is, whether the defendants, in mitigation of damages, could show that the plaintiff either was or might have been as profitably employed in business on his own account as he would have been had the firm business been continued. The plaintiff might, perhaps, have disputed the competency of such evidence. But surely the defendants can not be heard to say that the plaintiff was bound to remain idle at their expense, or lose his claim upon them altogether from the moment when he engaged in business.

JEWETT, GARDINER, MORSE, WILLARD, and MASON, JJ., concurred.

RUGGLES, C. J., and TAGGART, J., expressed no opinion.

Judgment affirmed.

WHEN FUTURE AND PROBABLE PROFITS MAY BE CONSIDERED IN ESTIMATING DAMAGES: See *Donnell v. Jones*, 52 Am. Dec. 194; *Blanchard v. Ely*, 34 Id. 250; *Masterson v. Mayor of Brooklyn*, 42 Id. 38, and extensive notes to the last two cases, citing numerous authorities. Where, in consequence of a trespass rendering premises uninhabitable, plaintiff was obliged to remove to another place of business, he is entitled to show, in an action for the trespass, that his business fell off in consequence, and how much. As a general thing, in an action purely of tort, where the amount of profits lost by the injury can be shown with reasonable certainty, they are not only admissible in evidence, but they constitute thus far a safe measure of damages: *Allison v. Ohsuller*, 11 Mich. 542. In *Washburn v. Hubbard*, 6 Lans. 11, the court hold that estimates of probable sales furnish no proper criterion for fixing damages; actual damages and actual loss of profits only can be recovered, and accordingly, in an action for breach of a contract to continue the plaintiff as the defendant's agent for the sale of car springs, and allow him commission on sales, evidence of the amount of profits which plaintiff might have made during the term of the contract is inadmissible. The principal case was

cited in each of the above cases. It was also cited in *Van Ness v. Fisher*, 5 Id. 236, where the court laid down the rule to govern the admission of evidence of profits which excludes such as are speculative and conjectural in character. In *Taylor v. Bradley*, 4 Abb. App. Dec. 365, the principal case is cited as an authority that damages in case of personal injury, sustained after the commencement of the action, are recoverable. An action of covenant will lie upon an agreement to continue the partnership: *Howard v. Francis*, 43 N. Y. 596.

JOHNSON v. CARNLEY.

[10 NEW YORK (6 SELDEN), 670.]

EVIDENCE THAT PURCHASER OF CHATTELS KEPT HOUSE OF ILL-FAME at the time of making the purchase held irrelevant to the question of good faith in making the purchase.

REPLEVIN MAY BE MAINTAINED FOR GOODS SEIZED BY SHERIFF, on an execution against their former owner, on proof that plaintiff had possession of them coupled with an interest; and notwithstanding the legal title and right of possession may have been vested in a third person.

APPEAL from a judgment for plaintiff in replevin. The defendant having as sheriff seized chattels in plaintiff's possession on an execution against Burbridge and another, as the property of Burbridge, this action of replevin was brought, in support of which plaintiff proved that before the seizure Burbridge made a bill of sale of the things to her, and proved other facts tending to show valuable consideration, delivery, etc. The defendant then offered to prove that at the time of the alleged sale plaintiff was engaged in keeping a house of ill-fame; but the judge refused to admit such evidence. The defendant then claimed a verdict, on the ground that the whole evidence showed the title to the things seized to have been at the time in third persons; but the judge ruled that the testimony, if believed, showed rightful possession and interest in the plaintiff, sufficient to enable her to maintain the action. The plaintiff had verdict and judgment, which the full bench sustained. The remaining facts appear from the opinion.

Brown and Matthews, for the appellant.

Doolittle, for the respondent.

By Court, TAGGART, J. There are but two questions which we deem of sufficient importance to notice in our examination of this case: 1. Did the judge err in rejecting the offer to prove that the plaintiff kept a house of ill-fame? We have been unable to discover, from an examination of the authorities cited

by the defendant's counsel, that he is in any manner sustained in this point by them. It is held that in questions of fraud, and in determining the probability of a secret trust, all the circumstances surrounding the transactions are to be considered; the persons who, the time when, the place where, and every fact which can affect or color the relations and motives of the parties.

We are unable, however, to perceive that the fact of the plaintiff's being a keeper of a house of ill-fame is a circumstance connected with the transaction in relation to the property in this case. It is true that the plaintiff lent money to Burbridge. It is not, however, shown that Burbridge was connected with the plaintiff in her house by any personal arrangement or intimacy, with the exception of the mere facts that she employed him to aid and advise Leonard in carrying on the cigar business after his failure, and previous to that time had lent him money. We agree with the court below that the proposed question was quite too remote to affect the question of title to the property claimed. We think, too, that the case of *Van Buren v. Wells*, 17 Wend. 203, is in point to sustain the judge in his decision. The fact offered to be proved was a mere isolated fact, not shown to be relevant by any evidence which had preceded it, and the defendant did not offer to make any subsequent proof which showed its relevancy.

2. The only question, then, on which there can be any claim to reverse the judgment is the refusal of the judge to charge the jury that if they find the title to the horse still remained in Van Antwerp & Co. when the action was commenced, the plaintiff can not recover; and the charge that if the purchase of the horse was made by the plaintiff in good faith, and there was no fraud or intent to hinder, cheat, delay, or defraud creditors, the plaintiff, under the bill of sale and delivery and payment, if they were made as testified to, obtained a sufficient title to enable her to maintain the action, even although it be true that one thousand cigars remained due to Van Antwerp & Co. on account of the horse.

The case of *Ingraham v. Hammond*, 1 Hill (N. Y.), 353, was an action of replevin for taking a yoke of oxen. The defendant Hammond pleaded property in Meade, his co-defendant. Each then pleaded various pleas of property in other persons, strangers to the suit. The pleas did not connect the defendants or either of them with the title set out, and each plea prayed a return of the property. The plaintiff demurred to all of the

pleas, and the defendants joined in demurrer. The court, Cowen, J., says: "It has long been settled, and never questioned, that in replevin the plea of property in a third person is good, and entitles the defendant to have a return thereof without connecting himself with the right of such person, or making avowry. The reason assigned is given in *Butcher v. Porter*, 1 Salk. 94, whether the property be in a defendant or a stranger, the defendant ought to have a return, because he had the possession which was illegally taken from him by the replevin."

The same doctrine was held in the case of *Prosser v. Woodward*, 21 Wend. 205. In the case of *Rogers v. Arnold*, 12 Id. 30, which was an action of replevin for taking the mill-irons or machinery of a saw-mill, being the goods and chattels of the plaintiff. The defendants pleaded, alleging property in the goods and chattels to be: 1. In themselves and one Earl Whitford as tenants in common; 2. In themselves as tenants in common with Earl Whitford and the plaintiff; 3. In themselves; 4. In themselves and the plaintiff as tenants in common; and 5. In Foster Whitford, one of the defendants—each plea traversing the property of the goods, etc., in the plaintiff. To those pleas the plaintiff replied, reaffirming the property in the goods to be in himself. The court in this case say: "It has been long settled in this state that the possession of personal chattels by the plaintiff, and actual wrongful taking by the defendant, are sufficient to support replevin, and that it may be brought where *trespass de bonis asportatis* will lie," citing *Pangburn v. Patridge*, 7 Johns. 140 [5 Am. Dec. 250]; *Cresson v. Stout*, 17 Id. 116 [8 Am. Dec. 373]; *Marshall v. Davis*, 1 Wend. 109 [19 Am. Dec. 463]; *Wheeler v. McFarland*, 10 Wend. 322; *Willmarth v. Crawford*, Id. 344.

This case concedes that the defendant in replevin may plead property in himself or in a stranger in bar of the action, and pray for a return and damages. Mr. Justice Nelson, delivering the opinion of the court, quotes from Baron Gilbert's treatise on the law of replevin as follows: "Property in the defendant is a good bar, because it avoids the injustice of the caption, which is the gist of the action, by showing he had a right to take it; and this not only abates the writ of the plaintiff whereby deliverance was made to him, but destroys all his right to the property." The learned justice then adds: "Substantially the same reasons are given for the plea of property in a stranger, though it has been well said elsewhere that this plea is not founded on very accurate reasoning. For the plaintiff being in possession of the goods

at the time of the caption, which is admitted by the plea, it is difficult to see how the defendant shows a right to the return of the property taken on replevin by proving title to it in a stranger. Upon this view of the case, the possession of the plaintiff would be left untouched, which, as we have already seen, is a sufficient ground *prima facie* to sustain the action."

Again, the learned justice says: "When we speak of property in the plaintiff or in defendant in this action, it is material to understand what is meant by the term. From the language used in some of the books, it might be inferred that the question between the parties involved the absolute ownership of it. The cases already referred to, showing under what circumstances this action will lie, negative this idea. Right to the possession and dominion of the goods and chattels for the time is all that is essential. This is the view which this court had of the question at an early day: *Harrison v. McIntosh*, 1 Johns. 380. It is conceded by the learned judge who delivered the opinion in that case that an interest in the property which would have sustained trespass or replevin would have constituted a good replication to the plea of property in a stranger. The property, then, whether in a defendant or a third person, sufficient to sustain a defense, must be such as goes to destroy the interest of the plaintiff, which, if existing, would sustain the action; or in other words, such as would defeat an action of trespass if brought in place of this, in case of a wrongful taking, or trover if brought for a wrongful detention. All that can be material for the plaintiff to maintain against a plea in bar is an interest in or connection with the property, which would give to him the action of replevin as an appropriate remedy for a wrongful taking or detention."

The plaintiff in this case proved a title in herself sufficient to authorize her to recover. She had the possession and rightful possession of the horse against all the world, including Van Antwerp & Co. She had the absolute right against everybody except Van Antwerp & Co. It would be unjust to allow the defendant, who has no privity of interest with the absolute owners (even admitting Van Antwerp & Co. to be the absolute owners), to defeat her recovery and realize the value of property which he has no possible claim upon, by a mere technicality such as is claimed in this case. As against the defendant, the plaintiff has proved title in herself, and is entitled to recover. The rule that a plea of property in a stranger is a good plea in replevin, without con-

necting the defendant therewith, is a rule of pleading, and is not infringed upon by the decision in this case.

The charge of the judge was as favorable to the defendant, as to the matters requested, as he was entitled to. The judge charged the jury that if in fact the plaintiff was not the owner of the property, the defendant was entitled to the verdict. The defendant was entitled to nothing more favorable. The part of the charge excepted to was right.

The form of the judgment can not be taken advantage of by exception. No exception can reach a matter of that kind. If the judgment is wrongly entered up, the defendant should have moved the court to set it aside for irregularity.

On the whole, the judgment must be affirmed.

All the judges concurred.

Judgment affirmed.

WHAT NECESSARY IN ORDER TO MAINTAIN REPLEVIN.—Declaration in replevin must assert property in the plaintiff, either general or special, and an allegation that he was "entitled to the possession" is not enough: *Pattison v. Adams*, 42 Am. Dec. 59. In the note to this case the same rule is laid down, supported by numerous New York cases. "It is well settled, as a general principle, that in Pennsylvania replevin lies whenever one man claims goods in the possession of another; and this whether the complainant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right of possession:" *Harlan v. Harlan*, 53 Id. 612. It is not sufficient for plaintiff in replevin to have clear legal title to the property in controversy, but he must also be entitled to the immediate possession in order to warrant a recovery: *Britt v. Aylett*, 52 Id. 282. As to when replevin lies generally, see *Marshall v. Davis*, 19 Id. 463, and note; *Sanford Mfg. Co. v. Wiggins*, 40 Id. 198. To maintain replevin in Missouri, all that is necessary is to show actual possession, or the immediate right thereto, in the plaintiff, and that the property was subsequently found in the hands of another, without the plaintiff's consent: *Crocker v. Mann*, 26 Id. 684.

ACTUAL POSSESSION OF PROPERTY, ACCOMPANIED BY EQUITABLE INTEREST in the plaintiff at the time of the seizure thereof by an officer, is sufficient to maintain the action of replevin, and entitle the plaintiff to a return of the property: *Frost v. Mott*, 34 N. Y. 253; *Stowell v. Otis*, 71 Id. 39, both citing the principal case; it is also cited to the point that the entry of a judgment in replevin for the value of the property, instead of in the alternative for the value of the property or its return, is an irregularity to be corrected in the court below, and not an error which would justify a reversal, in *Ingersoll v. Bostwick*, 22 Id. 426; *Gallati v. Orser*, 27 Id. 328; and *Cochran v. Gottwald*, 41 N. Y. Sup. Ct. 322.

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ADVERSE POSSESSION.

1. ADVERSE, EXCLUSIVE, AND CONTINUOUS POSSESSION for period prescribed by statute of limitations will confer title to land. *Stump v. Henry*, 300.
2. ONE'S RIGHT OF ENTRY IS NOT BARRED BY ANOTHER'S POSSESSION, unless it be adverse, exclusive, and continuous for period prescribed by statute of limitations. *Id.*
3. POSSESSION WILL NOT OPERATE AS BAR TO RIGHT OF ENTRY recognized or acknowledged by one in possession, until the statutory period has elapsed after such recognition or acknowledgment has been made. *Id.*

AGENCY.

1. AGENT MAKING DEMAND FOR DELIVERY OF PROPERTY BELONGING TO HIS PRINCIPAL must, as a general rule, prove his authority to make the demand; where, however, the party upon whom the demand is made makes no objection to the authority of the agent to make the demand, but puts his refusal to deliver upon other grounds which can not in point of law be supported, such refusal is a clear waiver of all objection to the authority of the agent, and amounts in law to a conversion. *Robertson v. Crane*, 520.
2. AGENT WHO HOLDS LEGAL TITLE TO DEMAND, though he may have acquired it as agent and hold it for the benefit of his principal, may sue upon it in his own name. *Poor v. Guilford*, 749.
3. AGENT IS RESPONSIBLE INDIVIDUALLY TO PURCHASER FOR FRAUD committed by him in the sale of property, although he does not profess to sell the property as his own, but acts throughout in his capacity as agent. *Campbell v. Hillman*, 195.
4. AGENT IS NOT ABSOLVED FROM LIABILITY FOR MISREPRESENTATION as to his principal's title to slaves, by the mere fact that he informed the pur-

chaser that his principal derived title under a will, which the purchaser had sufficient time and opportunity to examine, where the purchase was made upon the faith of the agent's representation that his principal had a good title, and the representation was calculated to induce belief and prevent further inquiry. *Id.*

5. NOTICE TO AGENT TO BE NOTICE TO PRINCIPAL MUST BE GIVEN TO HIM while acting in the course of his employment. *Weisser v. Denison*, 731.
6. RATIFICATION OF ASSIGNMENT OF NOTE MADE BY AGENT NOT AUTHORIZED TO ASSIGN It relates back to the time of the assignment. *Persons v. McKibben*, 85.

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ARREST.

1. DOORS OF HOUSE IN WHICH DEFENDANT DWELLS MAY LAWFULLY BE BROKEN OPEN BY OFFICER to effect his arrest; and another person obstructing the officer's entrance and search will make himself *particeps criminis*, although defendant was not then in the house. *Hawkins v. Commonwealth*, 147.
2. RIGHT TO BREAK OUTER DOORS INCLUDES RIGHT TO BREAK INNER DOORS TO EFFECT ARREST. The officer having valid criminal process in his hands is no trespasser, though he fail to find defendant; and to obstruct him is unlawful. *Id.*
3. OUTER DOOR OF DEFENDANT'S HOUSE CAN NOT, IN CIVIL CASES, BE BROKEN BY OFFICER TO EFFECT HIS ARREST, without previous demand for admittance and disclosure of purpose. *Id.*
4. HOUSE IN WHICH DEFENDANT DWELLS, THOUGH OWNED AND ALSO INHABITED BY OTHERS AT TIME, may be lawfully entered and searched by an officer to effect defendant's arrest. *Id.*
5. OFFICER CAN NOT BREAK HOUSE OF THIRD PERSON TO ARREST CRIMINAL NOT DWELLING THERE, unless such person is then actually in the house; but the owner may permit a peaceable entrance, and withdraw it at any time if the offender is not in the house, without unlawfully obstructing the officer. *Id.*

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ASSIGNMENT OF CONTRACTS.

1. ASSIGNMENT "OF ALL SUMS DUE OR TO BECOME DUE to me for services in laying common sewers" of the city of B. will not defeat a trustee process against said city to reach earnings arising out of engagements subsequently entered into between the assignor and the city. *Mulhall v. Quinn*, 414.
2. MERE POSSIBILITY OF BEING AGAIN EMPLOYED, and of earning wages at a future time under such employment, is not assignable. *Id.*
3. IRREVOCABLE POWER OF ATTORNEY DOES NOT AMOUNT TO ASSIGNMENT, when no assignable interest exists. *Id.*

4. **FUTURE EARNINGS MAY BE ASSIGNED** when the assignor is under an engagement for a term of time, and has entered on the duties of his office, although he is liable to removal at any time. *Id.*
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ASSUMPSIT.

1. **WHERE THERE IS LEGAL RIGHT TO DEMAND SUM OF MONEY**, and there is no other remedy, the law will, for all the purposes of a remedy, imply a promise of payment. *Poor v. Guilford*, 749.
2. **ONE BENEFITED BY LABOR OR PROPERTY OF ANOTHER** must answer for it on implied *assumpsit*. *Persons v. McKibben*, 85.
 See CO-TENANCY, 1; GUARDIAN AND WARD, 2; STATUTE OF FRAUDS, 4.

ATTACHMENTS.

1. **WRIT OF ATTACHMENT MUST BE UNDER SEAL OF COURT.** *Foss v. Isett*, 117.
2. **SEAL TO WRIT OF ATTACHMENT CAN NOT BE SUPPLIED BY AMENDMENT.** *Id.*
3. **WRIT OF ATTACHMENT SHOULD SHOW PRIMA FACIE COMPLIANCE WITH CODE**, sufficient to confer authority upon the clerk to issue it; and if materially defective in this respect, it may with propriety be quashed. *Barber v. Swan*, 124.
4. **WRIT OF ATTACHMENT CAN NOT BE AMENDED** when it is so materially defective as to be devoid of the essential requirements to give it validity and force. *Id.*
5. **THAT PROPERTY ATTACHED IS EXEMPT FROM EXECUTION MAY BE SHOWN** on motion to dissolve the attachment or to have the property released; but if the party fails to avail himself of such motion, it does not follow that his right to the property under the law is forfeited, or that he is estopped from recovering it in replevin. *Wilson v. Stripe*, 138.
6. **WHERE OFFICER WHO HAS ATTACHED PROPERTY IS SUED BY ALLEGED VENDEE** of the debtor, and sets up defense that the sale was fraudulent as to creditors, it is sufficient if he can show that he acted for a creditor, whether such creditor be for a small or a large amount. He is not obliged to show that the whole debt claimed in the action was due at the time when the attachment was made by him. *Walker v. Lovell*, 605.
7. **OFFICER DOES NOT RENDER HIMSELF LIABLE AS TRESPASSER *ab initio*** by selling property attached by him and applying to the satisfaction of the execution a larger amount than is legally due thereon. Notwithstanding this application, the excess is, in point of law, still in the hands of the officer for the use of the party entitled to it. *Id.*
 See BANKS AND BANKING, 3; DAMAGES, 2; MORTGAGES, 10, 11.

AUCTIONS.

1. **WHETHER TRANSACTION BETWEEN BIDDER AT AUCTION SALE AND ANOTHER**, before the sale was closed, prevented fair competition at the sale, is properly left to the jury. *Pike v. Balch*, 248.
2. **PROPERTY DOES NOT VEST IN HIGHEST BIDDER AT AUCTION** merely by being knocked off to him. *Id.*

3. PROPERTY KNOCKED OFF TO BIDDER AT AUCTION DOES NOT VEST IN HIM if a higher bid was made and known to or recognized by the auctioneer, and the sale was reopened or proposed to be reopened if desired. *Id.*
4. IT IS NOT DUTY OF AUCTIONEER TO REOPEN SALE AFTER KNOCKING OFF ARTICLE upon a mere suggestion that there has been a higher bid, but if there is an affirmation to that effect, and he is satisfied of its truth, it is then his duty to reopen the sale. *Id.*

See STATUTE OF FRAUDS, 1, 2.

BAILMENTS.

1. BAILLEES WITHOUT REWARD ARE BOUND TO SLIGHT DILIGENCE ONLY, and are not answerable except for gross neglect. *Knowles v. Atlantic & St. L. R. R. Co.*, 234.
2. BAILEE KNOWING GENERAL CHARACTER AND HABITS OF GRATUITOUS BAILEE, and the place where and the manner in which the goods deposited are to be kept, is presumed to assent that his goods shall be so treated, and can not maintain an action for loss or damage under such circumstances. *Id.*

See COMMON CARRIERS, 11, 12, 14-16; INNKEEPERS; MORTGAGES, 8, 9, 11; SALES, 4.

BANKS AND BANKING.

1. DRAFT ON BANK, FOR FIXED SUM payable out of the drawer's general deposit, being a large sum standing to his credit, is not operative as an assignment of the sum named in the draft, until it is presented at the bank and payment demanded, although verbally accepted by the cashier when absent from the bank. *Bullard v. Randall*, 433.
2. CHECK IS ORDER TO PAY HOLDER SUM OF MONEY at the bank on presentment of the check and demand of the money. *Id.*
3. MERE NOTICE TO BANK THAT CHECK HAS BEEN DRAWN, and that a party holds it, does not bind the bank, nor give the holder precedence over an attachment subsequently levied before presentment of the check for payment. *Id.*
4. CHECKS ARE NOT PAYABLE IN ORDER OF PRIORITY in which they are given, but in the order of their presentation for payment. *Id.*
5. BANKERS ARE PRESUMED TO BE FAMILIAR WITH SIGNATURES of their customers or depositors, and are responsible for paying forged checks purporting to be signed by them. *Weisser v. Denison*, 731.
6. DEPOSITOR IS NOT BOUND TO EXAMINE CHECKS when returned by the bank on the periodical balancing of his book; nor does his neglect to do so, or his confiding the duty to a clerk who conceals the true state of facts from him and the bank officers, render the balance as returned by the bank obligatory on him, or estop him from afterwards proving that some of the check returned by the bank as paid were forgeries. *Id.*

BILLS OF EXCHANGE.

See NEGOTIABLE INSTRUMENTS.

BONDS.

1. CONDITION IS NOT NECESSARY PART OF MONEY BOND, but the instrument may be complete and binding without any condition. Its office is simply

to suspend the efficacy of the obligation under which it is written, upon the happening of some event or the performance of some act. *Giles v. Halsted*, 668.

2. WHERE CONDITION IN BOND IS SENSELESS AND INOPERATIVE, the obligation which it professes to control is pure, simple, and single. *Id.*
 3. WHERE CONDITION OF BOND IS, BY MISTAKE, SO DRAWN AS TO BE SENSELESS and void, the bond does not thereby become void or inoperative, but will be enforced either as a single bond without any condition, or the condition will be read and taken according to the evident intention of the parties. *Id.*
 4. REMISSION BY GOVERNOR IN FAVOR OF ONE PARTY TO SEVERAL OBLIGATION or forfeited recognizance does not discharge the other. *State v. Davidson*, 603.
 5. REMISSION BY GOVERNOR FROM LIABILITY UPON RECOGNIZANCE TO APPEAR IN ONE COUNTY is not applicable to a recognizance to appear in another. *Id.*
- See CONTRIBUTION; DAMAGES, 11; EXECUTIONS, 3, 10; GUARDIAN AND WARD, 1, 2-6; JUDICIAL SALES, 3, 7; PAYMENT, 1; PLEADING AND PRACTICE, 9; SHERIFFS, 1, 3; SURETYSHIP, 4.

CARRIERS.

See COMMON CARRIERS.

COMITY.

See CONFLICT OF LAWS, 2.

COMMON CARRIERS.

1. CAREFUL SELECTION OF SERVANTS WITH REFERENCE TO SKILL AND COMPETENCE by a railroad company, and the occurrence of a negligent act without its sanction, will not relieve it from liability for injury suffered by a passenger from such negligent act. *Gillenwater v. Madison & I. R. R. Co.*, 101.
2. COMMON CARRIERS OF PASSENGERS ENGAGE NOT ONLY FOR COMPETENT SKILL of their employees, but for its faithful and continued application. *Id.*
3. NEGLIGENCE ACT OR OMISSION OF AGENT OR SERVANT IS, AS TO PUBLIC, EMPLOYER'S ACT, whether the employer be a natural or an artificial person. *Id.*
4. COMMON CARRIERS OF PASSENGERS ARE LIABLE FOR UTMOST CARE OF VERY CAUTIOUS PERSONS. *Id.*
5. RAILROAD COMPANIES ARE NOT DISTINGUISHED FROM STAGE COMPANIES in the degree of diligence required and the extent of liability incurred. *Id.*
6. PUBLIC POLICY DEMANDS THAT LAW SHOULD BE APPLIED AS RIGIDLY TO RAILROAD COMPANIES as to any other species of passenger carriers. *Id.*
7. FACT THAT PERSON TRAVELING ON RAILROAD PAID NO FARE makes no difference as to the liability of the company for the negligence of their servants. *Id.*
8. PROPRIETORS OF STAGE-COACHES PLYING BETWEEN DIFFERENT PLACES, AND CARRYING PASSENGERS FOR HIRE, ARE RESPONSIBLE for all accidents and injuries happening to the persons of the passengers which could have been prevented by human care and foresight. *Frank v. Coc*, 141.

9. **EXEMPLARY DAMAGES SHOULD BE GIVEN TO PASSENGER OF STAGE-COACH** who has been injured in consequence of the gross negligence on the part of the proprietor of the coach, in the employment of a known drunken driver. *Id.*
10. **JURY IS JUSTIFIED IN GIVING EXEMPLARY DAMAGES**, even where an intent or design to do the injury does not appear, where a stage proprietor or carrier is guilty of gross negligence. *Id.*
11. **COMMON CARRIERS AFTER COMPLETION OF TRANSIT ARE NOT LIABLE** at common carriers to owner of transported freight still on their cars, after notifying the owner of the completion of the carriage and that the freight must be at his risk. *Knowles v. Atlantic & St. L. R. R. Co.*, 234.
12. **COMMON CARRIERS RETAINING FREIGHT UPON THEIR CARS FOR OWNER'S ACCOMMODATION** and at his special request, but without additional compensation, are liable only as gratuitous bailees or depositaries. *Id.*
13. **RAILROAD CORPORATIONS ARE LIABLE AS COMMON CARRIERS** for losses occurring from any accident during the transit of the goods, except those arising from the act of God or the public enemy. They can not escape this liability by showing that the loss occurred from some cause for which neither they nor their agents are chargeable. *Norway Plains Co. v. Boston & M. R. R. Co.*, 423.
14. **COMMON CARRIER BY MEANS OF SHIPS MAY DELIVER** the goods at the usual wharf, and be thereby discharged from his liability as a carrier. *Id.*
15. **COMMON CARRIER BY RAILROAD MAY DELIVER** the goods on his platform at their place of destination; or may store them there if no one is present to receive them. Until the goods are so delivered or stored they are liable as common carriers; but after such storage they are responsible only as warehousemen. *Id.*
16. **IF GOODS CARRIED BY RAILROAD CORPORATION ARE DESTROYED BY FIRE** after they have reached their place of destination and been stored in the railroad warehouse, the transit being at an end, the corporation is not answerable as a common carrier, but only as a warehouseman. *Id.*

See NEGLIGENCE, 1, 4; RAILROADS, 1-4, 5, 9.

CONFLICT OF LAWS.

1. **VALIDITY OF CONTRACT IS TO BE DECIDED BY LAW OF PLACE** where it is made; but no nation is bound to recognize or enforce any contracts which are injurious to its own interests, or to those of its own citizens, or which are in fraud of its laws. *Smith v. Godfrey*, 617.
2. **LAWS OF COUNTRY HAVE NO BINDING FORCE BEYOND ITS TERRITORIAL LIMITS**, and their authority is admitted in other states, not *ex proprio vigore*, but *ex comitate*. *Id.*
3. **MERE KNOWLEDGE OF ILLEGAL PURPOSE FOR WHICH GOODS ARE PURCHASED** will not affect the validity of the contract of sale in the country to which they are to be taken and sold, where the goods are sold and delivered in the government where the contract is made, and the sale there is legal, and nothing remains to be done by the vendor to complete the transaction, and he is not in any way to be further connected with it. But if it is an ingredient of the contract between the parties that the goods shall be illegally sold, or that the seller shall do some act to assist or facilitate the illegal sale, or if the goods are to be delivered where the sale is prohibited, the contract will not be enforced. *Id.*

4. LAWS PROHIBITING SALE OF LIQUORS IN NEW HAMPSHIRE can not extend to sales made in another state in which such sales are lawful, where the sale is complete in the latter state. *Id.*
 5. CONTRACT AND RESPONSIBILITY OF ONE WHO INDORSES ACCOMMODATION NOTE IN ONE STATE, but which is subsequently delivered to a person in another, is governed by the law of the latter state. *Young v. Harris*, 170.
 6. CONTRACT IS TO BE GOVERNED AND CONSTRUED BY LEX LOCI CONTRACTUS, unless another place is appointed for its performance. *Id.*
 7. CONTRACT VALID IN STATE WHERE MADE IS ENFORCEABLE IN ANOTHER STATE, unless it is clearly contrary to good morals, or repugnant to the policy or positive institutions of that state. *Phinney v. Baldwin*, 62.
- See DOMICILE; HUSBAND AND WIFE, 10; NEGOTIABLE INSTRUMENTS, 13.

CONSTITUTIONAL LAW.

1. LAW WHICH PROVIDES FOR OPENING OF STREET OR ROAD IS CONSTITUTIONAL, where it imposes all the costs on those who are the more immediately benefited instead of the community at large. *Moale v. Mayor etc. of Baltimore*, 276.
2. CONSCIENTIOUS BELIEF OF RELIGIOUS DUTY FURNISHES NO LEGAL DEFENSE to the doing or refusing to do what the state, within its constitutional authority, may require. *Donahoe v. Richards*, 256.
3. LAW IS NOT UNCONSTITUTIONAL BECAUSE IT MAY PROHIBIT WHAT CITIZEN MAY CONSCIENTIOUSLY THINK RIGHT or require what he may conscientiously think wrong. *Id.*
4. PROVISION OF MAINE CONSTITUTION THAT "NO ONE SHALL BE HURT, molested, or restrained in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace nor obstruct others in their religious worship," was intended to prevent pains and penalties, imprisonment, or the deprivation of social or political rights being imposed as a penalty for religious professions and opinions. *Id.*
5. COURTS CAN NOT INHIBIT OR ANNUL LEGISLATION MERELY BECAUSE IT IS UNWISE, IMPOLITIC, OR IMMORAL. *Id.*
6. SUBSTANTIAL RIGHTS OF PARTIES CAN NOT BE CHANGED OR IMPAIRED BY SUBSEQUENT LAWS, but the remedial directions for enforcing those rights may be changed. *Coriell v. Ham*, 134.
7. LEGISLATURE MAY SUBMIT TO DETERMINATION OF THOSE INTENDED TO BE AFFECTED BY ACT, whether they will carry out its provisions or not. And an act which provides that if a majority of the legal voters of the county to be affected thereby, within a certain time, enter a written protest against its provisions, before the board of police, the act shall become void and of no binding force, is not unconstitutional. *Williams v. Cammack*, 508.
8. UNDER PROVISIONS OF CONSTITUTION WHICH REQUIRE THAT EVERY ACT shall embrace but one subject, and that that shall be expressed in its title, if the act relates to a subject so expressed, and to others inseparably connected therewith, it is constitutional. It could hardly be urged against a law that its title did not embrace the whole subject to which the law relates. *Davis v. State*, 331.

9. CONSTITUTIONAL PROVISION WHICH REQUIRES THAT EVERY ACT of the legislature should embrace but one subject, which should be expressed in its title, was passed for the purpose of preventing local and selfish provisions from being ingrafted upon acts of great public benefit and being adopted with them, and to prevent foreign matter from being incorporated into the law in the haste and excitement incident to the close of the sessions of the legislature. *Id.*
10. IF ACT OF LEGISLATURE CONTAINS MINOR MATTER NOT REFERRED to in the title, such matter alone is void; but if the act be composed of a number of discordant and dissimilar provisions, so that no one could be pronounced as the principal one, the whole act is void. *Id.*
11. PART OF STATUTE MAY BE DECLARED VOID AND RESIDUE VALID, where such part conflicts with the constitution of the state, while such residue does not so conflict. *Fisher v. McGirr*, 381.
12. LEGISLATURE MAY DECLARE POSSESSION OF CERTAIN PROPERTY TO BE UNLAWFUL, where such property would be dangerous, injurious, or noxious; and may by due process of law, by proceedings *in rem*, provide for the abatement of the nuisance and the punishment of the offender by the seizure and confiscation of the property, by the removal, sale, or destruction of the noxious articles. *Id.*
13. FOURTEENTH SECTION OF MASSACHUSETTS STATUTE OF 1852, CONCERNING MANUFACTURE AND SALE OF SPIRITUOUS OR INTOXICATING LIQUORS, is in conflict with the fourteenth article of the declaration of rights contained in the constitution of that state, declaring that every subject has a right "to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions," because the statute, while it authorizes the issuing of a warrant to search dwelling-houses for spirituous or intoxicating liquors, does not require the warrant nor the complaint therefor to state that such liquors are kept by any person named, nor does the statute limit the officer's right of seizure to articles described by quantity, quality, or marks, or restrict his power of seizure to liquors kept for sale. The statute is further objectionable because, on complaint being made that any such liquors are kept in any store, warehouse, or other place, for sale, a warrant must issue for the seizure and removal of all liquors therein, whether kept for sale there or not, or whether imported and remaining in original packages or not. The statute was also held to be repugnant to other provisions of the fundamental law of the state. *Id.*
14. SPIRITUOUS LIQUORS ARE PROPERTY, at least until they are judicially and finally confiscated and ordered to be destroyed. *Id.*
15. PROCEEDINGS FOR SEIZURE AND CONFISCATION OF SPIRITUOUS LIQUORS, in which proceedings the owner is not required to be named, in which he is not required to be notified unless known to the officer, and in which, if notified, he is required to appear forthwith, can not be authorized under the constitution of this state. *Id.*
16. STATUTE AUTHORIZING FORFEITURE OF INTOXICATING LIQUORS seized by an officer, unless the owner can prove that they were lawfully kept, is unconstitutional. It violates article 12 of the Massachusetts declaration of rights, which declares that no "subject shall be arrested or deprived of his property, immunities, or privileges, or of his life, liberty, or estate, but by judgment of his peers or the law of the land," because it throws

- the burden of proof upon the owner, and authorizes the forfeiture of his property in the absence of any evidence against him or it. *Id.*
17. STATUTE AUTHORIZING SEIZURE AND FORFEITURE OF INTOXICATING LIQUORS is not obnoxious to that part of the constitution prohibiting the taking of private property for public use without making compensation therefor. If such liquors can be rightfully taken at all, it would be on the ground that they were illegally kept and constituted a *de facto* nuisance, in which case their owner would not be entitled to any compensation. *Id.*
 18. STATUTE WHICH AUTHORIZES IMPOSITION OF FINE, WITH ALTERNATIVE OF IMPRISONMENT IN CASE OF NON-PAYMENT, AGAINST OWNER OF INTOXICATING LIQUORS, IS UNCONSTITUTIONAL, if it does not provide for an indictment, information, or complaint in which a specific offense is charged against him, so that it can be put on record and traversed, or an issue joined thereon and tried in due course of law. *Id.*
 19. PROCEEDINGS UNDER UNCONSTITUTIONAL STATUTE CAN NOT BE SUSTAINED, although they are so conducted as not to bear upon their face the objectionable features of the statute; or in other words, an unconstitutional law can not be made operative by the magistrate adopting expedients and taking precautions not required by the statute. *Id.*
- See EMINENT DOMAIN, 4; EXECUTIONS, 1; HABEAS CORPUS, 1; OFFICES AND OFFICERS, 1; PROCESS, 3; SCHOOLS, 1-3; STATUTE OF LIMITATIONS, 1; STATUTES, 1; TAXATION, 2-46.

CONTRACTS.

1. WHEN PRIVATE RIGHTS CONFLICT WITH CONSIDERATIONS OF PUBLIC POLICY the former must yield. *Willey v. Collier*, 346.
2. MORTGAGE EXECUTED UPON CONSIDERATION THAT MORTGAGEE SHOULD OBTAIN from the governor, even by fair means, a *nolle prosequi* to be entered in a prosecution pending against a third party, and in the dismissal of which the mortgagors were interested, is against public policy, and void. *Id.*
3. IT IS NO ANSWER TO OBJECTION OF "PUBLIC POLICY," to an agreement to obtain a writ of *nolle prosequi* from the governor, that he had a right to issue such writ. *Id.*
4. CONSPIRACIES TO DEFRAUD AFFECT PUBLIC INTEREST SO CLOSELY that any compromise by which a *nolle prosequi* is entered in a prosecution for such offense has never been allowed. *Id.*
5. IF PARTY IN PURSUANCE OF AGREEMENT TO OBTAIN NOLLE PROSEQUI in a criminal prosecution resorted to only fair means to obtain such writ, the *onus* of showing such fact is upon him. *Id.*
6. CONTRACTS NOT TO CARRY ON BUSINESS OR TRADE, made upon good consideration, may be sustained, where there are special circumstances rendering the restriction reasonable and useful, and the promisor is not restrained more than is needful for the protection of the promisee in the enjoyment of the promisor's good will. *Dunlop v. Gregory*, 746.
7. COVENANT BY PURCHASERS OF STEAMBOAT that she should never be run on the upper Hudson, held obligatory so long as any of the sellers should be interested in Hudson-river steamboat business. *Id.*
8. CONTRACT IS BROKEN BY OCCASIONALLY KEEPING TRAVELERS FOR PAY, although the defendant does not hold himself out to the world as a tavern-keeper, and make a regular business of keeping tavern, where he

sold the plaintiff land for a tavern-stand, and as a part consideration agreed to quit the business in favor of the plaintiff as soon as the plaintiff was prepared to keep tavern. *Heichew v. Hamilton*, 122.

9. ORDINARY CONTRACT BETWEEN PUBLISHER AND PAPER-CARRIER, by which the publisher of a newspaper, in consideration of a carrier's efforts to sell the paper, engages to furnish him exclusively with copies to sell over a certain route, if it does not stipulate for any definite term, may be terminated by either party without notice unless one is required by the contract. The publisher is not liable to an action on behalf of the carrier for refusing to furnish copies further, and supplying them to another person. *Hathaway v. Bennett*, 739.
 10. TWO JOINT DEBTORS CAN DISCHARGE THEMSELVES FROM THEIR FIRST CONTRACT, by giving two separate notes for their respective shares of the joint debt, if the notes are satisfactory to the creditor and he accepts them. *Yates v. Donaldson*, 233.
- See CONFLICT OF LAWS; DAMAGES, 1, 9-13; ESTOPPEL, 1, 2; EXECUTIONS, 1; EXECUTORS AND ADMINISTRATORS, 1; HUSBAND AND WIFE, 4; NEGOTIABLE INSTRUMENTS, 2, 3, 13; PARTNERSHIP, 1, 2; PAYMENT, 12; RAILROADS, 2; RESCISSION OF CONTRACTS; STATUTE OF FRAUDS, 4, 5; STATUTE OF LIMITATIONS; 1-4, 9; VENDOR AND VENDEE; WILLS, 12.

CONTRIBUTION.

- ONE JOINT OBLIGOR CAN MAINTAIN ACTION OF CONTRIBUTION FOR EXCESS AGAINST ANOTHER, where the former has paid the whole or more than his share of the joint debt contracted for the purchase of property to be owned, as between themselves, in different proportions; and his right of action accrues on the expiration of the time at which the creditor could have sued upon the joint agreement. *Yates v. Donaldson*, 233.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

See AGENCY, 1; TROVER.

CORPORATIONS.

1. SUBSCRIBERS ARE BOUND TO PAY FOR RAILROAD STOCK SUBSCRIBED BY THEM, upon the location of the road so as to make a designated town a point, and before its construction, where they agree to pay for the shares "at such times and places as may be required by the board of directors," upon condition that the road "shall be located and constructed" so as to make such town a point in the road. *McMillan v. Maysville & Lexington R. R. Co.*, 181.
2. CONDITIONAL DISPOSITION OF STOCK MAY BE MADE by the president and directors of the Maysville and Lexington railroad, under its charter; and where subscribers agree to take stock upon condition that the road shall be so located as to make a designated town a point, they become unconditional stockholders when the road is thus located. *Id.*
3. SUBSCRIBERS FOR RAILROAD STOCK ARE NOT RELEASED FROM LIABILITY FOR SUBSCRIPTIONS by the fact that the company have suspended operations upon the road, that it will require a large additional expenditure

- of labor and money to complete its construction, and even that the means of the company are wholly inadequate to accomplish its object. *Id.*
6. MUNICIPAL CORPORATION IS LIABLE ON SAME PRINCIPLE AS INDIVIDUAL CITIZEN for acts of non-feasance or negligence of its agents in the construction of its various improvements, in the absence of an express statute to the contrary. *Wallace v. City of Muscatine*, 131.
 6. MUNICIPAL CORPORATION IS LIABLE FOR DAMAGES OCCASIONED BY OVERFLOW OF WATER upon private property, through the improper and negligent manner in which it executes its powers and duties in constructing culverts, drains, and gutters. *Id.*
 6. MUNICIPAL CORPORATION ENJOYS EXEMPTION OF GOVERNMENT, IN EXERCISE OF POWERS WHICH IT POSSESSES FOR PUBLIC PURPOSES, and which it holds as part of the government of the country, from responsibility for its own acts and the acts of its officers deriving their authority from the sovereign power; although it is answerable for the acts of its agents under powers conferred upon it for private purposes. *Stewart v. City of New Orleans*, 218.
 7. GOVERNMENTAL FUNCTION CONFERRED FOR PUBLIC PURPOSES IS EXERCISED by the city of New Orleans in appointing watchmen, whose duties are the preservation of public order and tranquillity; and the city is therefore not liable for the acts of such officers. *Id.*
 8. TOWNS ARE NOT LIABLE FOR NECESSARY INTERRUPTION OF TRAVEL AND INCONVENIENCE TO PUBLIC in repairing streets and sidewalks. *Kimball v. City of Bath*, 243.
 9. TOWNS LEAVING THEIR STREETS OR SIDEWALKS WHILE UNDERGOING REPAIRS in such a condition as unnecessarily to expose those who may pass upon them to inconvenience or danger are as liable for injuries resulting as they are when their ways are permitted to become unsafe from want of repairs. *Id.*
 10. PUBLIC STREETS OR SIDEWALKS WHILE UNDERGOING REPAIRS SHOULD NOT BE LEFT AT NIGHT without some temporary railing or other means of protection, or some beacon to warn passengers against such uncommon danger. *Id.*
 11. MUNICIPAL CORPORATION IS NOT LIABLE IN DAMAGES to a person injured in consequence of driving against rubbish in a city street, where the rubbish was left there by private persons, without license or authority from the city, and there is no proof that the city officers had notice to remove it. *Griffin v. Mayor etc. of New York*, 700.
 12. MUNICIPAL CORPORATION, AS INCIDENT, HAS POWER TO TAKE AND HOLD PROPERTY, REAL AND PERSONAL, unless restrained by express words of its charter. *Christy's Adm'r v. St. Louis*, 598.
 13. ACTION AGAINST MUNICIPAL CORPORATION TO RECOVER ILLEGAL TAXES, assessed under color of law, can not be maintained by one who has voluntarily paid them, on the ground that the city has no capacity to take and retain the money where no restraint to take and hold personal property is imposed by the words of its charter. This principle is not affected by the fact that the money was paid by an administrator. *Id.*
 14. CITY HAS POWER TO ENACT ORDINANCE PROVIDING THAT "No INTOXICATING LIQUORS SHALL BE USED or kept in any refreshment-saloon or restaurant within the city, for any purpose whatever," where the legislature has conferred upon it such power. *State v. Clark*, 611.

15. **VALIDITY OF BY-LAW OF CORPORATION IS PURELY QUESTION OF LAW**, to be determined by the court. *State v. Overton*, 671.

See **RAILROADS**, 4, 6.

CO-TENANCY.

1. **ASSUMPSIT LIES BY TENANT IN COMMON AGAINST CO-TENANT**, in Massachusetts, to recover from the latter any surplus in money received by him over and above his share of the profits of the estate; but to maintain the action it must appear that he has received more than his proportion of the proceeds, not of a single article, but of the entire products of the estate, after deducting all proper charges, and that the plaintiff, and no other co-tenants, is entitled to the surplus. *Shepard v. Richards*, 473.
2. **MORTGAGEE OF UNDIVIDED PART OF LAND IS CO-TENANT OF ESTATE**, has a right to enter and take possession to the extent of his title under the mortgage, and being in possession, has a right to the perception of his share of the rents and profits, although his entry was for the purpose of foreclosure, and was informal and invalid for that purpose. *Id.*

COURTS.

1. **CIRCUIT COURT OF CITY OF BALTIMORE HAS JURISDICTION TO GRANT WRITS OF ERROR**. *Davis v. State*, 331.
2. **CIRCUIT COURT OF INDIANA MAY HOLD OVER TO COMPLETE TRIAL IN PROGRESS** at the expiration of the regular term of the court, under the statute of 1843. *Addington v. Wilson*, 81.

COVENANTS.

COVENANT THAT PURCHASER SHALL HAVE USE OF STREETS IS IMPLIED FROM SALE, where a party sells property lying within the limits of a city, and in the conveyance, bounds it by streets designated as such in the conveyance, or on a map made by the city, or by the owner of the property. *Moale v. Mayor etc. of Baltimore*, 276.

See **DEEDS**, 6; **GUARDIAN AND WARD**, 2; **LANDLORD AND TENANT**, 2, 4, 5; **WITNESSES**, 3.

CRIMINAL LAW.

1. **ASSAULT AND BATTERY CONSISTS IN UNLAWFUL AND UNJUSTIFIABLE use of force and violence upon the person of another, however slight**. *Commonwealth v. McKie*, 410.
2. **IF IN PROSECUTION FOR ASSAULT AND BATTERY IT DOES NOT APPEAR THAT ACT WAS UNJUSTIFIABLE**, from the evidence of the prosecution, the accused should be acquitted. The prosecution must show, not only the commission of the act, but also, beyond a reasonable doubt, that it was not justifiable; for if justifiable, it is not criminal. *Id.*
3. **ACTUAL AND POSITIVE DANGER IS NOT INDISPENSABLE TO JUSTIFY SELF-DEFENSE**, and an instruction which may be understood by the jury as denying to the accused on a trial for murder the right to defend himself unless his danger was not only apparently imminent, but real and positive, is erroneous. *Campbell v. People*, 49.
4. **WHERE PERSON IS PURSUED OR ASSAULTED in such a way as to induce in him a reasonable and well-grounded belief that he is actually in danger**

- of losing his life or of suffering great bodily harm, he is justified in defending himself, whether the danger was real or only apparent. *Id.*
6. **DISTINCT AND SEPARATE OFFENSES ARE CREATED BY STATUTE** which provides that "if any slave, free negro, or mulatto shall prepare, exhibit, or administer to any person or persons in this state any medicine whatsoever, with intent to kill such person or persons, he or she so offending shall be judged guilty of a felony, and shall suffer death." But there is no objection to the insertion of several distinct felonies of the same degree in the same indictment against the same offender. *Sarah v. State*, 544.
 8. **JOINDER IN ONE INDICTMENT OF TWO FELONIES WHICH DO NOT DIFFER** either in their character or in the punishments attached to their commission is not good ground for quashing the indictment. *Id.*
 7. **WORDS "IN THIS STATE," USED IN STATUTE OF 1822, SECTION 53, ARE** intended to designate the jurisdiction in which the offenses are prohibited, and not as descriptive of the persons against whom they may be perpetrated. *Id.*
 9. **COUNT IN INDICTMENT AVERRING THAT PRISONER MIXED MEDICINE** with coffee which had been prepared for the use of the person intended to be killed does not charge two distinct felonies. The alleged act of mixing the medicine with the coffee is not charged as an act of felony, but is merely stated as a part of the means or manner in which the administration of the medicine was effected. *Id.*
 9. **WORD "ADMINISTER," IN SECTION 53 OF ACT OF 1822, DOES NOT MEAN** that the article given in order to effect the felonious intent must be given or administered under pretense that it is a medicine. The intention of the legislature was to punish any preparation, giving, or administration of any substance known as a medicine with intent to kill. *Id.*
 10. **IT IS MATTER IN DISCRETION OF COURT WHETHER IT WILL COMPEL PROSECUTION TO ELECT** upon which one of two separate counts of an indictment charging two distinct felonies it will proceed to try the prisoner. *Id.*
 11. **RULE THAT IT IS SUFFICIENT TO DESCRIBE OFFENSE IN WORDS OF STATUTE** applies only in cases where there is a sufficient description of the offense intended to be created by the legislature. *Id.*
 12. **INDICTMENTS UPON HIGHLY PENAL STATUTES MUST STATE ALL CIRCUMSTANCES** which constitute the definition of the offense in the act, so as to bring the defendant precisely within it. *Id.*
 13. **INDICTMENT IS INVALID UNLESS IT CONTAINS AVERMENT OF MALICIOUS INTENT**, wherever such intent is an essential ingredient in the constitution of an offense created by statute, although it is not so made by the express words of the act. *Id.*
 14. **WORDS "WITH INTENT TO KILL" ARE CONSTRUED TO MEAN** "with intent to commit murder." *Id.*
 15. **CRIMINAL INTENT IS SUFFICIENTLY CHARGED IN INDICTMENT FOR INDECENT EXPOSURE** where the words in the introductory part are "devising and intending the morals of the people to debauch and corrupt," followed by the allegation that the defendant did the act "unlawfully, scandalously, and wantonly," when taken in connection with the particular acts charged. *Commonwealth v. Haynes*, 437.
 16. **INDICTMENT FOR INDECENT EXPOSURE NEED NOT CONCLUDE**, "to the common nuisance of all the citizens," etc. *Id.*

17. UNDER PLEA OF NOT GUILTY, all matters of justification or excuse may be given in evidence. *Commonwealth v. McKie*, 410.
 18. BURDEN OF PROVING THAT OFFENSE HAS BEEN COMMITTED rests upon the government; and if the evidence fails to establish any essential element of the crime charged, the defendant must be acquitted. *Id.*
 19. GENERAL RULE IS THAT ALL PARTY HAS SAID WHICH IS RELEVANT TO QUESTIONS INVOLVED in the trial is admissible in evidence against him. The exceptions to this rule are where the confession has been drawn from the prisoner by means of a threat or a promise, or where it is not voluntary because obtained compulsorily or by improper influence. *Hendrickson v. People*, 721.
 20. ANSWERS OF WITNESS EXAMINED AT CORONER'S INQUEST, before any criminal charge has been made or process issued against the witness, may be proved against him on his subsequent trial for having killed the deceased. *Id.*
 21. MOTIVE—EVIDENCE THAT WILL MADE BY WOMAN'S FATHER WAS SUCH as greatly to disappoint her husband's expectations of pecuniary benefit from his marriage to her is competent against him on a trial for murdering her. Such evidence may tend to show a motive in him for the killing. *Id.*
 22. ON TRIAL FOR MURDER, EVIDENCE THAT DECEASED MADE THREATS against the accused on the day of his death, and at other times shortly before that day, is properly admitted, in connection with other testimony, for the purpose of showing that the accused acted in necessary self-defense, where the proof was that the deceased, having a hatchet in his hand, sought the accused at his own house, with the design of assaulting or arresting him. *Campbell v. People*, 49.
 23. PRISONER, THOUGH ONCE IN JEOPARDY UNDER INDICTMENT, IS STILL IN CUSTODY under that indictment until the case has been finally disposed of, and he is released by judgment of the court. *Wright v. State*, 90.
 24. PRISONER ONCE IN JEOPARDY MAY BE DISCHARGED ON MOTION by the court having jurisdiction over the indictment, or he may plead the jeopardy in bar of a second trial. *Id.*
 25. PERSON IS ONCE IN JEOPARDY whenever he has been given in charge, on a legal indictment, to a regular jury, and that jury is unnecessarily discharged, and the discharge is equivalent to a verdict of acquittal. *Id.*
 26. IF IT IS UNCERTAIN WHICH ONE OF TWO OR MORE PERSONS IS GUILTY PARTY, all must be acquitted, although it may be positively proved that some one of them committed the crime. *Campbell v. People*, 49.
 27. ON TRIAL FOR MURDER, COLOR OF ACCUSED IS NO GROUND OF DISTINCTION in applying the principles of the law applicable to the case. *Id.*
 28. KEEPING INTOXICATING LIQUORS IN CELLAR UNDER SALOON OR RESTAURANT is a violation of an ordinance which prohibits the keeping of such liquors in a saloon or restaurant. *State v. Clark*, 611.
- See CONSTITUTIONAL LAW, 18; CONTRACTS, 2-5; DAMAGES, 5-7; HARRAS CORPUS, 2; SLANDER, 1, 3; SURETYSHIP, 4.

DAMAGES.

1. SPECIAL DAMAGES ARE NOT REQUIRED TO BE SHOWN BY PLAINTIFF in order that he may recover upon a contract, when he has proved a breach

- thereof; he is entitled to at least nominal damages. *Heichew v. Hamilton*, 122.
2. MEASURE OF DAMAGES IN ACTION UPON ATTACHMENT BOND is only the natural and proximate damages resulting from the attachment; but in an action on the case for maliciously suing out an attachment, damages for injury to credit and business can be recovered. *State, Use of Roe, v. Thomas*, 580.
 3. MEASURE OF DAMAGES IN SUIT BY OWNER OF CHATTEL which he has conditionally sold, and for which he has been partly paid, is the full value of such chattel. *Angier v. Taunton Paper Mfg. Co.*, 436.
 4. MERE INTRODUCTION OF EVIDENCE IN DEFENSE OF ACTION OF TRESPASS can not be considered in aggravation of damages, no matter for what purpose it was offered. *Taber v. Hutson*, 96.
 5. PUNITORY DAMAGES ARE NOT TO BE AWARDED IN CIVIL SUIT for torts punishable criminally, for one is not to be punished twice for the same act. *Id.*
 6. COMPENSATORY DAMAGES ONLY ARE TO BE AWARDED IN TRESPASS FOR ASSAULT AND BATTERY, for the defendant is liable to indictment for the offense. *Id.*
 7. COMPENSATORY DAMAGES IN TRESPASS FOR ASSAULT AND BATTERY are not confined to the plaintiff's actual pecuniary loss, but the jury may consider every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind, and his individual happiness. *Id.*
 8. WEALTH OF DEFENDANT IS NOT TO BE CONSIDERED in awarding compensatory damages. *Id.*
 9. STIPULATION IN CONTRACT LIQUIDATING DAMAGES FOR BREACH THEREOF should be sustained and enforced where it is manifest that ascertaining the actual damages would be difficult, and that parties agreed on the amount named for the purpose of avoiding the expense and difficulty of doing so. *Cothéal v. Talmage*, 716.
 10. ABOVE RULE MAY BE APPLIED, notwithstanding the contract bound the promisor to do several things of different degrees of importance, and did not discriminate between them in specifying the damages, if all the covenants were of uncertain nature in respect to the amount of injury a breach would cause. *Id.*
 11. WHERE CONDITION OF PENAL BOND CONTAINS PROVISION FOR PAYMENT OF FIXED SUM ON BREACH OF AGREEMENT, the presumption is that the sum named in the condition was not designed as a penalty. *Id.*
 12. LIQUIDATED DAMAGES.—Where a contract not to run a boat above a certain point provides that for every violation thereof two hundred dollars shall be the liquidated damages, such sum will be so considered and decreed. *Dunlop v. Gregory*, 746.
 13. PLANTER IS ENTITLED TO RECOVER DAMAGES FOR LOSS OF CROP AND EXTRA WAGES PAID, in consequence of the delay through the fault of the manufacturers, but without any bad faith or fraud on their part, in putting in operation a sugar-mill and steam-engine, which the manufacturers undertook to build and put up on the plantation of the planter within a certain time, where it is evident that it entered into the contemplation of the parties that the mill and engine were to grind a certain crop of sugar-cane. *Goodloe v. Rogers*, 205.

See COMMON CARRIERS, 9, 10; CORPORATIONS, 5, 11; DEEDS, 6; EMINENT DOMAIN, 6, 7; FRAUD, 2, 3; HIGHWAYS, 5; INJUNCTIONS, 1; NEGLIGENCE, 3; PARTNERSHIP, 1, 2; PLEADING AND PRACTICE, 5, 22, 29-31; SCHOOLS, 7; TROVER, 1-4; WATERCOURSES, 2.

DEDICATION.

1. ORIGINAL OWNER IS PRECLUDED FROM REVOKING DEDICATION, where property is set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it; the law considers it in the nature of an estoppel *in pais*. *Sarpy v. Municipality No. 2*, 221.
2. SUFFICIENT EVIDENCE OF OWNERS' INTENTION TO MAKE DEDICATION IS FURNISHED by plans on which the land is designated in a manner indicating its abandonment to the public use, and by contemporaneous acts of the owners in making sales with reference to the plans, and in making partition in which the land was not embraced, followed by the long use and enjoyment of the property by the public without opposition on the part of the owners. *Id.*

DEEDS.

1. INADEQUACY OF CONSIDERATION, IN ORDER TO AVOID DEED, must be so glaringly so as to stamp the transaction with fraud and to shock the common sense of honesty. The sale of property worth eight hundred dollars for two hundred dollars does not amount to such. *Feigley v. Feigley*, 375.
 2. PRESUMPTION IS AGAINST VALIDITY OF DEED WHICH PRESENTS MATERIAL INTERLINEATION ON ITS FACE; but this is not a presumption *juris et de jure*: it yields to contrary proof, and even to concurrent circumstances, which create a strong presumption that the interlineation was made before the execution and delivery of the deed. *Pipes v. Hardesty*, 202.
 3. ANY ONE INTERESTED IN CONDITION IN DEED OR IN LANDS to which it relates may perform the condition. *Wilson v. Wilson*, 227.
 4. CONDITION IN DEED THAT GRANTEE SHALL MAINTAIN AND SUPPORT CERTAIN NAMED PERSONS in a comfortable and convenient manner does not raise a personal trust in the grantee, but the support may be furnished by others. *Id.*
 5. IF GRANTOR IN DEED OF WARRANTY SUBSEQUENTLY ACQUIRE TITLE, he and his successors in interest are, at the election of the grantee, estopped to set up the subsequently acquired title as against him; but there is no force in the original deed to convey the title not then existing in the grantor. *Blanchard v. Ellis*, 417.
 6. WHERE GRANTEE UNDER WARRANTY DEED HAS BEEN EVICTED BY TITLE PARAMOUNT, the grantor can not, by purchasing such title, compel the grantee to accept the same, either in satisfaction of the covenant against incumbrances, or in mitigation of damages for breach of it. *Id.*
- See COVENANTS; EASEMENTS, 2, 3; ESTOPPEL, 1; EVIDENCE, 9, 12; EXECUTIONS, 9; GUARDIAN AND WARD, 2; HIGHWAYS, 1, 3; MARRIAGE AND DIVORCE, 3; MARRIED WOMEN, 1; NEGOTIABLE INSTRUMENTS, 17.

DOMICILE.

1. DOMICILE OF PERSON IS THAT PLACE WHERE HE HAS HIS TRUE, FIXED, PERMANENT HOME, and to which, when he is absent, he has the inten-

tion of returning. To constitute domicile, two things must concur: 1. Residence; and 2. The intention of the party to make it his home. *Hairston v. Hairston*, 530.

2. DOMICILE MAY BE ACQUIRED BY LONGER OR SHORTER RESIDENCE, no definite period of time being necessary to create it; the true basis and foundation of domicile is the intention, the *quo animo*, of the residence. *Id.*
3. LONG-CONTINUED RESIDENCE IS CONTROLLING CIRCUMSTANCE in determining the question of domicile, in the absence of any avowed intention or of any acts evincing a contrary intention, and in most cases it is unavoidably conclusive. *Id.*
4. WHERE PERSON CONTINUED TO RESIDE TEN YEARS AT PLACE where a large part of his property was situated, declared that he expected to live and die there, and repeatedly voted there for state and county officers, these facts conclusively show that place to be his domicile. *Id.*
5. WIFE'S LEGAL DOMICILE IS THAT OF HER HUSBAND, although she may be actually residing at another place. *Id.*
6. WIFE IS ENTITLED TO DISTRIBUTION OF PERSONAL PROPERTY OF HER HUSBAND according to the law of the place where he has his domicile at the time of his death, whether the marriage was contracted in Virginia or in Mississippi. *Id.*
7. DOMICILE REMAINS, NOTWITHSTANDING ABSENCES FOR SPECIAL PURPOSES AND FOR DEFINITE PERIODS, so long as the intention to return remains. *Ducknam v. Thompson*, 237.

See STATUTE OF LIMITATIONS, 8.

DOWER.

See WILLS, 10, 11.

EASEMENTS.

1. MAN CAN NOT SUBJECT ONE PART OF HIS PROPERTY TO ANOTHER by easement, for a man can not have an easement in his own property. *McTavish v. Carroll*, 353.
2. IF MAN WHO OWNS LARGE TRACT OF LAND UPON WHICH IS SITUATED MILL, mill-race and dam, and a road along the race, conveys by deed of gift that part of his estate upon which the dam, race, and road are situated to one person, and afterwards conveys the part upon which the mill is situated to another (both subject to his own life estate), it would seem but reasonable that the first grantee should be considered as having taken her portion of the estate subject to all such mill rights as were in use at the date of the conveyance to her, and which continued to be used subsequently, and which were absolutely necessary to continue the mill in operation. *Id.*
3. WHERE MAN OWNS LARGE TRACT OF LAND UPON WHICH IS SITUATED MILL, mill-race, and dam, and a road along the race to be used in repairing the same, conveys by deed of gift that part of his estate upon which the dam, race, and road are situated to one person, and afterwards conveys the part upon which the mill is situated to another (reserving to himself a life estate in each case), the owner of the mill should have the privilege of using the dam, race, and road, upon the principle of legal necessity. *Id.*

4. **WAY BY NECESSITY.**—If the owner of a tract of land conveys a part of his land to another, if the latter has no other right of way out, he has a way by necessity over the remaining lands of his grantor. *Id.*
5. **OWNER OF TRACT OF LAND WHO HAS EASEMENT IN MILL-RACE, DAM, and a roadway along said race to repair the same, has not got a private right of way for ordinary purposes over said road, but only a right to use it as occasion might require to repair the race and dam.** *Id.*
6. **OWNER OF LAND SUBJECT TO EASEMENT** has all the rights of owner, subject only to a reasonable use of the easement. Consequently where such owner builds a fence across a road, to which another person has an easement for occasional use, if the owner offers to and is willing to take down the fence every time the person having the right desires to pass, he occasions such latter person no damage which can be recovered in an action. *Id.*
7. **EASEMENT TO TRAVEL ALONG ROAD RUNNING ALONG MILL-RACE, FOR PURPOSE OF REPAIRING SAME,** is not necessarily obstructed by "plowing and cultivating" the road, the sort of cultivation not being mentioned. There are different modes of cultivation, some of which in particular stages of it would create no such obstruction as could prevent carts and wagons from being used with convenience in repairing the dam and race. *Id.*

See EMINENT DOMAIN, 7; RAILROADS, 11.

EJECTMENT.

See EVIDENCE, 14; PLEADING AND PRACTICE, 14, 15.

ELECTIONS.

1. **EVIDENCE IS INADMISSIBLE TO SHOW INTENTION OF PERSONS VOTING for "H. I. Higgins" to vote for "Henry I. Higgins," and to show the identity of "H. I. Higgins" with "Henry I. Higgins."** *People v. Higgins*, 491.
2. **STATUTE OF MICHIGAN PRESCRIBING MANNER OF KEEPING BALLOTS AFTER ELECTION IS DIRECTORY, and a compliance with its provisions is not requisite.** *Id.*

EMINENT DOMAIN.

1. **PRIVATE PROPERTY MAY BE APPROPRIATED TO PUBLIC USE BY STATE WHEN PUBLIC NECESSITY OR UTILITY REQUIRES IT,** upon securing to the owner a just compensation for any injury he may sustain. This is a portion of its inherent sovereignty, and is an exercise of the right of eminent domain as contradistinguished from that of the taxing power. *Moale v. Mayor etc. of Baltimore*, 276.
2. **TAKING POWER IS TO BE DISTINGUISHED FROM RIGHT OF EMINENT DOMAIN.** The former exacts money or services from individuals, as and for their respective shares of contribution to any public burden; the latter takes private property, not as the owner's share of contribution to a public burden, but as so much beyond his share. *Id.*
3. **SPECIAL COMPENSATION IS TO BE MADE FOR PRIVATE PROPERTY TAKEN UNDER RIGHT OF EMINENT DOMAIN,** because the government is a debtor for the property so taken; but not in taxation, because the payment of taxes is a duty, and creates no obligation to repay, otherwise than in the proper application of the tax. *Id.*

4. **ACT DENYING OWNER USE OF HIS LAND WITHOUT COMPENSATION IS UNCONSTITUTIONAL AND VOID;** it is in fact an act of confiscation. An act worded thus: "That no person shall be entitled to damages for any improvement, unless the same shall have been made or erected before the laying out or locating of such street," is one of this sort. *Id.*
5. **COMPENSATION MUST BE ALLOWED TO OWNER OF LOT LYING ON BED OF STREET TAKEN FOR PUBLIC USE,** precisely as if no such street was opened over it. *Id.*
6. **TRUE RULE, WHERE THERE HAS BEEN NO DEDICATION, OF ASSESSING DAMAGES IS TO VALUE LOT PRECISELY AS THOUGH NO STREET WAS TO BE OPENED.** To do this the value of neighboring and contiguous lots may be looked to, but they do not furnish an unerring standard to measure the value of the lot condemned. *Id.*
7. **PURCHASER OF LOT BOUNDED IN FRONT BY CERTAIN STREET ACQUIRES RIGHT TO USE OF SUCH STREET** as a street, and a subsequent purchaser, from the same vendor, of the lot upon the bed of the street in front acquires only the naked fee, subject to an easement, or right of way, not only in the prior purchaser but in the public, and is entitled to but nominal damages for its condemnation upon the opening of the street. *Id.*

See TAXATION, 4.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT.

ENTRY.

See ADVERSE POSSESSION, 2, 3; LANDLORD AND TENANT, 3, 7; PLEADING AND PRACTICE, 15; PUBLIC LANDS, 2, 3.

EQUITY.

1. **BILL IN EQUITY SWORN TO BY COMPLAINANT MAY BE USED AS EVIDENCE** of the facts stated in it concerning his title to certain lands, in another case in chancery affecting the same lands. *Stump v. Henry*, 300.
2. **ANSWER IN CHANCERY, WHEN RESPONSIVE TO BILL, IS CONCLUSIVE,** unless contradicted by two witnesses, or one witness and corroborating circumstances. *Feigley v. Feigley*, 375.
3. **EQUITY WILL COMPEL CONVEYANCE OF PATENTEE'S TITLE** obtained under circumstances sufficient to make him trustee for party making prior entry. *Carman v. Johnson*, 593.
4. **MONEY OR LAND IS CONSIDERED IN EQUITY AS THAT SPECIES OF PROPERTY** into which it is directed to be converted, where money is directed to be employed in the purchase of land, or land is directed to be sold and converted into money, and this in whatever manner the direction is given. *Collins v. Champ's Heirs*, 179.
5. **MONEY ARISING FROM SALE OF INFANT'S REAL ESTATE IS TREATED AS REALTY** in equity for the purposes of distribution, where the sale is made by the infant's guardian, under an order of court, with the object of re-investing the proceeds in other real estate. *Id.*

See ESTOPPEL, 3; EXECUTIONS, 3, 10, 11; EXECUTORS AND ADMINISTRATORS, 1; HUSBAND AND WIFE, 3-6; INFANCY, 3, 4; INJUNCTIONS; JUDICIAL SALES, 4-7; MARRIED WOMEN, 3, 4; PLEADING AND PRACTICE, 14, 15; RESCISSION OF CONTRACTS; STATUTE OF FRAUDS, 5; STATUTE OF LIMITATIONS, 5, 6; SURETSHIP, 2; WITNESSES, 2.

ESTATES OF DECEDENTS.

DISTINCTION BETWEEN WHOLE AND HALF BLOODS IS NOT ADMITTED in New Hampshire in determining who are to take by inheritance, except where the statute has interfered to change the descent of property derived in a particular manner by an infant who dies under age and unmarried. *Prescott v. Carr*, 652.

See **DOMICILE**, 6; **EQUITY**, 5; **EXECUTIONS**, 6; **EXECUTORS AND ADMINISTRATORS**; **HUSBAND AND WIFE**, 8; **JUDICIAL SALES**, 2, 3.

ESTOPPEL.

1. **PARTY IS NOT ESTOPPED TO SHOW THAT HIS ADVERSARY HAS TAKEN ADVANTAGE** of wrong or fraud committed against him to annul a contract or conveyance. *Woods v. Kirk*, 614.
 2. **RECORD OF FORMER RECOVERY UPON SAME CONTRACT HAS EFFECT WHEN PLEADED BY WAY OF ESTOPPEL**, by the plaintiff, to prevent the defendant from denying that the plaintiff could recover according to the conditions of the contract. *Heichew v. Hamilton*, 122.
 3. **EQUITABLE ESTOPPEL NEVER TAKES PLACE** unless the party seeking to avail himself of it has been actually misled. *Jewett v. Miller*, 751.
- See **ATTACHMENTS**, 5; **BANKS AND BANKING**, 6; **DEDICATION**, 1; **DEEDS**, 5; **MARRIED WOMEN**, 1; **MORTGAGES**, 2.

EVIDENCE.

1. **AS ITEM OF EVIDENCE, BLOTTER MAY BE REFERRED TO BY WITNESS**, salesman of a firm, to show that he had sent a bill copied therefrom to defendant, and to ascertain, by referring thereto, of what the bill consisted. *Atholl v. Miller*, 294.
2. **PROPER FOUNDATION FOR INTRODUCTION OF SECONDARY EVIDENCE OF CONTENTS OF BILL OF PARCELS** must first be laid before blotter can be referred to, to show what articles were embraced in it, and may be done by showing a notice duly served upon defendant to produce the original paper, and disregard of the same. *Id.*
3. **PLAINTIFF'S ENTRIES IN BLOTTER ARE NOT EVIDENCE PER SE IN HIS FAVOR**, and can not become so without being collaterally connected with other facts and circumstances. *Id.*
4. **DECLARATION IS ADMISSIBLE AS PART OF RES GESTÆ**, when made by the plaintiff at the time in reference to the injuries he had received from the overturning of a stage-coach. *Frink v. Coe*, 141.
5. **DECLARATION MUST BE REGARDED AS PART OF RES GESTÆ**, and may be shown to the jury along with the principal facts, if it is made at the time the act is done, and is calculated to explain the character, nature, or quality of the facts constituting the act and its effects, so as to unfold and harmonize them as parts of the same transaction. *Id.*
6. **STATEMENTS MADE TO WITNESS IN PRESENCE OF PURCHASER** by vendor, in reference to land he is about to sell, are equivalent to statements made to the purchaser himself. *Alexander v. Beresford*, 538.
7. **ADMISSIONS OR DECLARATIONS IN FAVOR OF ONE'S CLAIM** must be received if those adverse to his claim are admitted. *Bowie v. Stonestreet*, 318.
8. **DECLARATIONS OF SLAVE, MADE TO ATTENDING PHYSICIAN, AS TO ILLNESS** under which she is suffering at the time, the manner of the attack, and

the progress of the disease, are admissible in evidence on the question of soundness or unsoundness, in an action for breach of warranty of soundness of the slave. *Allen v. Vancleave*, 184.

9. PARTY WILL NOT, BY HIS OWN DECLARATIONS, BE PERMITTED TO CONTRADICTION PRIOR DEED; but in some cases the declarations and admissions of a grantor will be received where the effect may be to impair the title of persons claiming under him. *McDowell v. Goldsmith*, 305.
10. QUALITY AND INTENTION OF ACTS MAY BE PROVED BY EVIDENCE OF DECLARATIONS ACCOMPANYING, or so nearly connected with them in point of time as will serve to explain their true character and purpose. *Id.*
11. DECLARATIONS NEED NOT TAKE PLACE IMMEDIATELY WITH OCCURRENCE OF MAIN ACT, but may be before and sometimes after, provided they be calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonize with them as to constitute one transaction. *Id.*
12. DECLARATIONS OF GRANTOR ARE ADMISSIBLE AS PART OF RES GESTÆ AGAINST GRANTEE, if they tend to show fraud in the making of the deed; and though made to conveyancer who prepared the deed, but not in grantee's presence, may be received in a case where grantor's creditors seek to vacate the deed as fraudulent against them. *Id.*
13. EVIDENCE THAT PURCHASER OF CHATTELS KEPT HOUSE OF ILL-FAME at the time of making the purchase held irrelevant to the question of good faith in making the purchase. *Johnson v. Carnley*, 762.
14. IN ACTION OF EJECTMENT BY MORTGAGEE FOR LAND MORTGAGED, evidence that a bill filed by him against the same defendant to foreclose the same mortgage was dismissed after a hearing on the merits ought to be admitted. The decree dismissing such bill would bar the plaintiff from setting up any title under the mortgage, and be in effect a discharge of it; and even if this decree was erroneous, still it stands as an adjudication of his right until reversed on error or otherwise duly set aside. *Hodge v. Mitchell*, 524.
15. PRESUMPTION, LIKE FACT PROVED, REMAINS AVAILABLE TO PARTY IN WHOSE FAVOR IT ARISES until overcome by opposing evidence. *Bates v. Prickett*, 73.
16. UNDATED ASSIGNMENT OF NOTE IS PRESUMED TO HAVE BEEN MADE at the date of the note. *Id.*
17. EVIDENCE TO SHOW THAT PLAINTIFF'S TESTATE HELD NOTE AS AGENT AND NOT AS OWNER MAY BE REBUTTED by evidence of the state of the accounts and money transactions between such party and his indorser. *Burke v. Allen*, 642.
18. STATUTES OF SISTER STATE CAN NOT BE PROVED BY PAROL. *Emery v. Berry*, 622.
19. PRINTED VOLUME OF STATUTES OF SISTER STATE, purporting on its face to have been printed by its authority and to contain its laws, should be admitted as *prima facie* evidence to show what those laws are. *Id.*
20. NEGATIVE EVIDENCE IS ADMISSIBLE WITHIN REASONABLE LIMITS. *Persons v. McKibben*, 85.
21. TESTIMONY BY JOINT MAKER OF NOTE THAT THERE HAS BEEN NO DEMAND, evidence having been introduced of a demand upon the other maker, though evidence of the feeblest kind, is admissible. *Id.*

22. PARTY IS NOT DEBARRED FROM PROVING HONEST AND LEGAL DEFENSE by the circumstance that his evidence also tends to prove him guilty of a fraud in some other matter upon which his defense does not rest. *Woods v. Kirk*, 614.

See CRIMINAL LAW, 17-22; DAMAGES, 4; DEDICATION, 2; DEEDS, 2; DOMICILE, 4; ELECTIONS, 1; EQUITY, 1; EXECUTIONS, 16; FRAUD, 3; FRAUDULENT CONVEYANCES, 4, 5; HIGHWAYS, 1, 2; HUSBAND AND WIFE, 1-4; JUDGMENTS, 3; JURISDICTION, 2, 5; MALICIOUS PROSECUTION; MARRIAGE AND DIVORCE, 2; NEGOTIABLE INSTRUMENTS, 10-11; NOTARIES; PARTNERSHIP, 3; PLEADING AND PRACTICE, 2, 8, 16, 18, 20-23, 31, 32; SALES, 1; STATUTES, 4; WITNESSES.

EXCEPTIONS.

See PLEADING AND PRACTICE, 23-28.

EXECUTIONS.

1. EXECUTION LAW IN FORCE AT TIME OF CONTRACT ENTERS INTO AND BECOMES PART OF IT, so far as it affects the obligation; but so far as it is merely remedial, it may be modified or changed at any time. *Coriell v. Ham*, 134.
2. LEVY UPON PROPERTY EXEMPT FROM EXECUTION, WITHOUT ASSENT OF DEFENDANT, IS INVALID. *Perry v. Hensley*, 164.
3. DELIVERY BOND EXACTED BY LEGAL COERCION, FOR PROPERTY EXEMPT FROM EXECUTION, but levied upon without defendant's assent, is no recognition of the validity of the levy or waiver of defendant's right; it is void, and equity will relieve against it. *Id.*
4. PHRASE "HEAD OF FAMILY" INCLUDES MAN who has neither wife nor children, within the meaning of the execution exemption act. *Wade v. Jones*, 584.
5. ADJOURNMENT OF EXECUTION SALE WILL NOT HAVE EFFECT TO INVALIDATE IT, when the adjournment was made by public proclamation, the agent of the execution defendant was present and had notice of it, and the postponement was occasioned by the agent's failure to pay the amount he had bid upon the property. *Coriell v. Ham*, 134.
6. SALE OF LAND UNDER EXECUTION ISSUED AND TESTED AFTER DEATH OF DEFENDANT, without a revival, is not void, but merely voidable, and is valid until regularly set aside in a direct proceeding for that purpose by the heir or terre-tenant. *Hodge v. Mitchell*, 524.
7. SHERIFFS' SALES HAVE BEEN HELD TO BE VOID ONLY IN CASES where either there was no judgment to sustain the execution, or where the officer exceeded his power by selling more land than was required for the payment of the amount due on the execution. *Walker v. McKnight*, 190.
8. SHERIFF'S SALE WILL BE VALID, ALTHOUGH PART OF DEBT MAY HAVE BEEN PAID, if there be a judgment, and the execution conforms to it substantially, and if the payment does not constitute a part of the judgment, or has not been indorsed upon the execution. *Id.*
9. SHERIFF'S SALE IS VALID, where, the execution not having been returned, the only evidence of its amount, and of the sum for which the land was sold, is furnished by the sheriff's deed, which does not show that any

credit was indorsed upon the execution therein recited, nor that the sheriff sold the land for a sum exceeding the amount he was authorized to make. *Id.*

10. EXECUTION PLAINTIFF WHO ACQUIRES LEGAL TITLE TO LAND AT SHERIFF'S SALE CAN NOT BE COMPELLED TO SURRENDER AND CONVEY IT to one who has the equitable right to the land under a bond for title, where such plaintiff had no notice of the existence of the right before he obtained the title. *Id.*
 11. EXECUTION PLAINTIFF, PURCHASING LAND AT SHERIFF'S SALE, SHOULD BE REGARDED IN EQUITY AS HOLDING TITLE IN TRUST for the benefit of persons having an equitable right to the land, to so much of it as was not paid for by the balance due on the execution, where the sale was made for a sum exceeding the amount actually due on the judgment. *Id.*
 12. PURCHASER AT ADJOURNED EXECUTION SALE WILL NOT BE CHARGED WITH NOTICE OF IRREGULARITIES, from the mere fact that he was present at the first sale and had notice of the adjourned sale. *Coriell v. Ham*, 134.
 13. TITLE OF DEFENDANT IS BY OPERATION OF LAW VESTED IN PURCHASER at execution sale. *Stump v. Henry*, 300.
 14. PURCHASER AT SHERIFF'S SALE must be deemed an assignee in law. *Martin v. Martin*, 364.
 15. SALE OF LAND UNDER EXECUTION, AFTER EXPIRATION OF LIEN OF JUDGMENT under which it was issued, is sufficient to convey the title of the defendant, at least from the time it is made, except as to a superior title or prior liens. *Hodge v. Mitchell*, 524.
 16. STATEMENT IN RETURN THAT MONEY MADE ON EXECUTION WAS PAID TO PLAINTIFF IS NOT COMPETENT EVIDENCE to prove the fact or time of payment, it not being in response to the command of the writ. *Walker v. McKnight*, 190.
- See ATTACHMENTS, 5, 7; HUSBAND AND WIFE, 9; LANDLORD AND TENANT, 9, 10, 12; MORTGAGES, 7, 8; REPLEVIN, 1, 2; SHERIFFS, 3.

EXECUTORS AND ADMINISTRATORS.

1. CONTRACTS OF GUARDIANS AND ADMINISTRATORS WITH WARDS AND DISTRIBUTEES ARE REGARDED WITH SUSPICION BY COURTS OF EQUITY; and an administrator's purchase of a distributee's interest, soon after his coming to full age, and for a grossly inadequate consideration, is fraudulent. *Wright v. Arnold*, 172.
2. ADMINISTRATOR IS NOT BOUND TO INTERPOSE STATUTE OF LIMITATIONS to defeat a recovery, unless, under the facts known to exist, it can avail as a successful defense. *Roberts v. Rogers*, 542.
3. ADMINISTRATOR WHO HAS MADE VOLUNTARY PAYMENTS must, in a future contest with the distributees, show that the debts, though paid under no legal compulsion, were, nevertheless, such as could have been enforced against the estate. He is not to be regarded as in any worse position than the creditor was at the time of the payment. *Id.*
4. EXPENSE OF BRINGING PROPERTY OF DECEASED PERSON FROM ANOTHER STATE to the jurisdiction in which the administrator who incurred such expense is acting is not a legal claim against the estate. The probate court can not allow a claim for services rendered or expenses incurred on account of property while it was subject to another jurisdiction. *Id.*

5. ADMINISTRATOR'S SALE IS SHOWN TO BE VOID when it affirmatively appears that the publication of notice required by statute, previous to the order, could not have been given; or when the record shows that it has not been approved by the court, although the approval need not be in express terms. *Valle v. Fleming*, 566.
 6. ADMINISTRATOR'S SALE VOID FOR WANT OF NOTICE in not complying with certain sections of an act can not be sustained on the ground that it might have been made under other sections of the same act requiring no notice. *Id.*
 7. VOID ADMINISTRATION SALE IS NOT RENDERED VALID AGAINST HEIRS because they receive the benefit of the proceeds, particularly when they are minors. *Id.*
 8. ADMINISTRATION SALE CAN NOT BE AVOIDED because the last administrators made it, where, after the death of one of two administrators, letters of administration were granted to the survivor and another without any express revocation of the former letters. *Id.*
 9. FATHER RESIDING IN NEW HAMPSHIRE WHO HAS IN HIS POSSESSION MONEY BELONGING TO ESTATE of his son, who died in another state, may be charged by a creditor of the deceased as an executor *de son tort* where there is no evidence to show for what purpose the money was sent to him, or that any person, either in New Hampshire or elsewhere, has any right to legal control over it. *Emery v. Berry*, 622.
 10. EXECUTOR DE SON TORT MAY, IT SEEMS, DISCHARGE HIMSELF from liability as such by taking out letters of administration. *Id.*
 11. ANY ACT WHICH EVINCES CONTROL OVER PROPERTY OF DECEASED PERSON, without legal right to exercise such control being shown, makes a party exercising it an executor in his own wrong as against creditors; but acts of necessity or humanity, by which a person does not assume to have any control over the property more than others, will not constitute him an executor *de son tort*. *Id.*
- See CORPORATIONS, 13; JUDICIAL SALES, 3; LANDLORD AND TENANT, 2; PLEADING AND PRACTICE, 13; WILLS, 12.

FORGERY.

See BANKS AND BANKING, 5. 6.

FRAUD.

1. TO CONSTITUTE FRAUD, IT IS NOT ONLY NECESSARY THAT REPRESENTATION SHOULD BE UNTRUE, but also that the party making it should know it to be so at the time it was made. *Campbell v. Hillman*, 195.
 2. DAMAGES ARE ENTITLED TO BE RECOVERED IN ACTION FOR FRAUD, adequate to the injury sustained, as a general rule, if the plaintiff succeed. *Id.*
 3. MEASURE OF DAMAGES FOR FRAUDULENT REPRESENTATION that the vendor's title to slaves was absolute, when it was but a life estate, is the difference in the value of the two estates at the time of the sale; but subsequent events and circumstances, calculated to aid in forming a correct estimate of this difference, and to show the actual extent of the injury sustained, may be given in evidence for that purpose. *Id.*
- See AGENCY, 3, 4; DEEDS, 1; ESTOPPEL, 1; EVIDENCE, 12, 13, 22; EXECUTORS AND ADMINISTRATORS, 1; FRAUDULENT CONVEYANCES; JUDICIAL SALES,

1; MARRIAGE AND DIVORCE, 1; MARRIED WOMEN, 1; MORTGAGES, 1; NEGOTIABLE INSTRUMENTS, 10-12; RESCISSION OF CONTRACTS; STATUTE OF FRAUDS, 5.

FRAUDULENT CONVEYANCES.

1. DIFFERENCE BETWEEN CONVEYANCE IN FRAUD OF CREDITORS AND IN FRAUD OF WIFE is this: A creditor's claim upon his debtor's estate is such that the debtor can not, even by a *bona fide* gift of any part of his property to a third person, impede a creditor in the collection of his debt. Such transfer would be voluntary, and void as against creditors. But in the case of a wife, the husband having the free and unlimited right to alienate his property at will, if the conveyance is not made with the actual intent of defrauding the wife, the transfer will be sustained, although the wife is thus left without the means of subsistence. *Feigley v. Feigley*, 375.
 2. ABSOLUTE BILL OF SALE OF PERSONAL PROPERTY, unless it be "followed and accompanied" by the possession of the purchaser, is void as to creditors of the vendor. *Jarvis v. Davis*, 186.
 3. WHERE PARTIES TO ABSOLUTE BILL OF SALE OF PERSONAL PROPERTY RESIDE TOGETHER, an actual visible change of possession, such as might be understood and known in the neighborhood, is necessary to vest title in the vendee—there must be more than a mere formal or colorable delivery. *Id.*
 4. POSSESSION, WHEN SALE IS MADE, FOLLOWS TITLE, and as between the parties themselves, is presumed to be with vendee; but this presumption may be repelled by proof that the vendor still remained in the possession of the property, and that no change of possession, either actual or constructive, was made or intended to be made by the parties. *Id.*
 5. ACTUAL POSSESSION OF PROPERTY BY VENDOR AFTER SALE, LISTING IT FOR TAXATION, treating it as his own, and apparently owning it when he contracted debts, will repel the legal presumption that possession passed to the vendee by transfer of title. *Id.*
- See ATTACHMENTS, 6; EVIDENCE, 12; STATUTE OF LIMITATIONS, 11.

GOVERNOR.

See OFFICES AND OFFICERS.

GUARDIAN AND WARD.

1. CONVEYANCE OF REAL ESTATE OF WARDS BY GUARDIAN UNDER LICENSE OF PROBATE COURT, but without giving the statutory bond, vests no title in the grantee. *Williams v. Morton*, 229.
2. MONEY PAID FOR CONVEYANCE BY GUARDIAN THAT PASSES NO TITLE, by reason of no bond being given, may be recovered from the guardian upon his covenants in the deed or in an action for money had and received. *Id.*
3. GUARDIAN'S BOND GIVEN FOR FAITHFUL DISCHARGE OF GUARDIANSHIP DUTIES is not security for the observance of the statutory provisions in a sale of real estate, and the proper application of the proceeds, when the sale is under a special license, and a special bond is required. *Id.*
4. OMISSION BY GUARDIAN TO GIVE SPECIAL BOND REQUIRED UPON SALE OF WARD'S REALTY is no breach of the guardian's general bond. *Id.*
5. GUARDIAN'S DEED OF WARD'S REALTY UNDER LICENSE but without the statutory bond is not valid as a release under the Maine statute. *Id.*

6. **CONDITION IN GUARDIAN'S GENERAL BOND THAT HE SHALL RENDER ACCOUNT** as often as required by the court is not broken by a failure to account after due citation for that purpose, if the ward's estate consists only of real estate which has been duly inventoried, although the real estate has been sold by the guardian and he has not accounted for the proceeds; for such accounting is secured by a special bond required upon the sale of real estate. *Id.*

See PLEADING AND PRACTICE, 27.

HABEAS CORPUS.

1. **PRISONER MAY BE RELEASED ON HABEAS CORPUS**, where it appears on the face of the proceedings that the magistrate had no jurisdiction, or that the conviction was under an unconstitutional statute. *Fisher v. McGirr*, 381.
2. **UPON WRIT OF HABEAS CORPUS, COURT CAN NOT DISCHARGE PRISONER REMANDED TO JAIL** to await another trial, although he has been once in jeopardy by reason of the unnecessary discharge of the jury engaged in the trial of his case, under the Indiana statute, which provides that "no court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, * * * upon a warrant issued * * * upon an indictment or information;" for the prisoner was still in custody awaiting his trial under an indictment. *Wright v. State*, 90.

HIGHWAYS.

1. **IN TRESPASS FOR CUTTING TREE IN HIGHWAY, PLAINTIFF'S DEED IS ADMISSIBLE** in evidence for the purpose of showing the boundaries of his farm, and that it included the part of the road in which the tree stood. *Winter v. Peterson*, 678.
2. **EVIDENCE THAT OVERSEER OF HIGHWAY ACTED FROM IMPROPER MOTIVES** in cutting down a tree in the highway is admissible in an action of trespass brought against him by the owner of the adjoining field for cutting down the tree. And it is not error for the court to refuse to permit the defendant to go into the history of the difficulties out of which the bad feeling between the parties originated. *Id.*
3. **CONVEYANCE OF LAND BOUNDED ON PUBLIC HIGHWAY** is presumed by law to carry with it the fee to the center of the road, if nothing appears to the contrary. *Id.*
4. **TREE GROWING IN HIGHWAY BELONGS TO OWNER OF FEE.** *Id.*
5. **OVERSEER OF HIGHWAY MAY REMOVE THEREFROM WHATEVER OBSTRUCTS** or interferes with the public use of it; but if he cuts down a tree which does not obstruct or interfere with such public use, he is a trespasser, and if he acts maliciously in so doing, he is liable to exemplary damages. *Id.*
6. **WHETHER OR NOT TREE CUT BY OVERSEER OF HIGHWAY OBSTRUCTED** the public use thereof, and whether or not he cut it maliciously, are questions of fact. *Id.*

See CONSTITUTIONAL LAW, 1; CORPORATIONS, 8-11; COVENANTS; EASEMENTS, 2-7; EMINENT DOMAIN, 5, 7; RAILROADS, 8.

HOMICIDE.

See CRIMINAL LAW.

HUSBAND AND WIFE.

1. HUSBAND'S DECLARATIONS TO THIRD PERSONS, WITHOUT HIS WIFE'S PRESENCE, AND NOT PART OF RES GESTÆ, ARE INADMISSIBLE AGAINST HIS CREDITORS to establish a specific equitable lien in wife's favor upon portions of his land which he agreed to give her, if she would unite with him in a sale of lands owned by her before marriage, and sold for the purpose of paying his debts. *Bowie v. Stonestreet*, 318.
 2. SETTING UP OF SECRET EQUITIES BETWEEN HUSBAND AND WIFE, IN DIRECT OPPOSITION TO SPIRIT AND DESIGN OF REGISTRY LAWS, can not be established by proof of husband's declarations, not made in wife's presence, or forming a part of the *res gestæ*, in order to sustain wife's claim to a specific equitable lien in opposition to creditors through the agency of such declarations made during coverture. *Id.*
 3. EQUITY WILL ENFORCE CONTRACT BETWEEN HUSBAND AND WIFE, where he agrees to transfer property to his wife for a *bona fide* and valuable consideration coming from her. *Id.*
 4. EVIDENCE FAILING TO ESTABLISH CONTRACT BETWEEN HUSBAND AND WIFE may, however, show circumstances justifying a court of equity in decreeing compensation to extent of purchase money paid and value of lasting improvements, where husband agrees to give his wife an equivalent for her property which she unites with him in selling for the payment of his debts. *Id.*
 5. THERE IS NO STATUTE OF LIMITATIONS TO BAR WIFE'S EQUITABLE CLAIM AGAINST HER HUSBAND which she can not enforce against him during his life in a court of law, and equity will not allow less than twenty years to bar it upon the rule as to lapse of time. *Id.*
 6. WIFE IS NOT GUILTY OF GROSS LACHES IN PROSECUTING HER RIGHTS, or of unreasonable acquiescence in the assertion of adverse rights, in declining to promptly sue her husband to enforce her equitable claims against him. *Id.*
 7. HUSBAND DURING HIS LIFE IS ENTITLED TO RENTS, ISSUES, AND PROFITS OF HIS WIFE'S ESTATE. *Id.*
 8. WIFE CAN CLAIM COMPENSATION ONLY FOR VALUE OF LAND WITH INTEREST FROM HER HUSBAND'S death where he has agreed to give her an equivalent for her land which she united with him in selling for the payment of his debts. To that extent she will be regarded as a general creditor of the estate. *Id.*
 9. HUSBAND'S JUDGMENT CREDITOR CAN NOT SUBJECT TO HIS DEMAND IMPROVEMENTS ON WIFE'S LAND, paid for and made by the husband, where such improvements consist mainly of the repair of a house with materials furnished in the greater part by the wife's parents, and they were necessary to put the premises in habitable condition; there being no intentional wrong in which the wife may be presumed to have participated. *Robinson v. Huffman*, 177.
 10. PROPERTY PURCHASED IN LOUISIANA BECOMES PROPERTY OF HUSBAND, and not of the husband and wife jointly, where the spouses never resided in Louisiana, were not married there, and at the time of the marriage did not contemplate residing there. *Armorer v. Case*, 209.
- See DOMICILE, 5, 6; FRAUDULENT CONVEYANCES, 1; MARRIAGE AND DIVORCE; MARRIED WOMEN.

INDICTMENT.

See CRIMINAL LAW, 6, 8, 10-17.

INDORSEMENTS.

See NEGOTIABLE INSTRUMENTS.

INFANCY.

1. INFANT CAN NOT EXECUTE POWER OF APPOINTMENT coupled with an interest. *Thompson v. Lyon*, 599.
2. INFANT'S DISABILITY CAN NOT BE DISPENSED WITH by instrument creating power of appointment. *Id.*
3. MERE LAPSE OF TIME WILL NOT PREVENT COURT OF EQUITY FROM DIVESTING LEGAL TITLE, conveyed by trustee under direction of infant beneficiary exercising power of appointment, at any period short of that constituting a bar by the statute of limitations. *Id.*
4. PURCHASER'S TITLE TO INFANT'S ESTATE, OBTAINED FOR VALUABLE CONSIDERATION, AND WITHOUT NOTICE OF ANY CLAIM AGAINST ESTATE, will not be disturbed in equity. *Id.*

See EQUITY, 5; ESTATES OF DECEDENTS, 1; EXECUTORS AND ADMINISTRATORS, 1, 7, 9; INNKEEPERS, 1; PLEADING AND PRACTICE, 27.

INJUNCTIONS.

1. TO OBTAIN INJUNCTION, SOME STRONG AND SPECIAL FACTS must be shown which entitle the petitioner to this extraordinary remedy. It will not issue to compel a builder to remove his joists inserted without license in the wall of an adjoining proprietor; yet the injured party may recover damages. *Rankin v. Charless*, 574.
2. IT IS SETTLED LAW OF MARYLAND THAT ALTHOUGH EQUITY WILL NOT INTERFERE BY INJUNCTION to restrain a trespasser merely as such, yet it will interfere where the injury about to be committed would be irreparable, or where the legal remedy would be insufficient, or where the trespass goes to the destruction of the property as it had been held and enjoyed, or to prevent a multiplicity of suits. *Shipley v. Ritter*, 371.
3. INJUNCTION WILL BE GRANTED TO RESTRAIN DESTRUCTION OF TIMBER, ORNAMENTAL, AND FRUIT TREES, as the destruction of such would be a case of great and irremediable mischief for which compensation could not be made in damages, as it reaches to the very substance and value of the estate, and goes to the destruction of it, in the character in which it is enjoyed. *Id.*
4. EACH CASE MUST BE CONSIDERED WITH REFERENCE TO NATURE, CHARACTER, AND CONDITION of the property to be protected, where an injunction is asked to restrain trespass for destroying such property. *Id.*
5. INJUNCTION WILL BE GRANTED WHEN IT APPEARS THAT COMPLAINANT IS OWNER OF PIECE OF LAND UPON WHICH is situated his dwelling, and part of which is grown to timber, particularly valuable as such, which timber protects his dwelling, and is ornamental to his farm, if it appears that defendants have cleared part of said timber land, and have laid it waste, and converted it into pasture, and that they are continuing their depredations upon the timber left standing, and are cutting it down, and are converting it into pasture; as such acts constitute an irremediable and irreparable damage, loss, and injury. *Id.*

2. EQUITY WILL INTERFERE AS MUCH TO PROTECT NATURAL TREES NEAR WHICH PARTY HAS BUILT his dwelling as ornamental and shade trees planted by him. The jurisdiction of equity does not depend on the worth of the trees merely as wood or timber, but on their location as part of an estate. *Id.*

See TAXATION, 7.

INNKEEPERS.

1. WHERE MEANS PROVIDED BY FATHER FOR SUPPORT OF HIS MINOR SON while traveling and attending college are stolen from the latter's room while stopping at an inn, the father may maintain an action against the innkeeper to recover the amount so stolen. *Eppe v. Hinds*, 528.
2. INNKEEPER'S RESPONSIBILITY FOR PROPERTY OF HIS GUESTS extends to every part of his house into which it is usual for such property to be taken, and this responsibility can only be limited by his showing that there was a different understanding between him and his guest. *Id.*
2. WHERE GUEST ORDERS HIS TRUNK CONTAINING MONEY TO BE TAKEN TO HIS ROOM at an inn, and during the night the money is stolen, the innkeeper is liable for the loss. *Id.*

See CONTRACTS, 8.

INSANITY.

See WILLS, 2-4.

INSTRUCTIONS.

See PLEADING AND PRACTICE, 18-22, 26, 33, 34; SLANDER, 3.

INSURANCE.

1. INSURANCE COMPANY CAN NOT TAKE ADVANTAGE OF FAILURE TO BRING ACTION FOR LOSS WITHIN TIME STIPULATED in the policy when the delay is mainly caused by hopes of amicable adjustment held out by the company. *Grant v. Lexington F. L. & M. Ins. Co.*, 74.
2. INSURANCE POLICIES ARE LIBERALLY CONSTRUED IN FAVOR OF ASSURED, and exceptions therein are strictly construed against the underwriter. *Id.*
2. TERMINATION OF VOYAGE FROM L. to N., during which, and eight days thereafter, a cargo of hay is insured, is N., the place of landing and discharging the cargo, and not a neighboring but separate municipality, though the latter is the usual hay-market where sales of hay are negotiated; and the risk is not terminated by a delay of more than eight days at the latter place. *Id.*
4. UNDERWRITER IS BOUND TO KNOW NATURE AND PECULIAR CIRCUMSTANCES OF BRANCH OF TRADE to which policy relates. *Id.*
5. DISCHARGING NUMBER OF HANDS EMPLOYED ON FLAT BOAT CONVEYING INSURED CARGO before termination of voyage according to usage is not in contravention of a condition in the policy that the boat should be manned by a competent number of hands. The insurers are bound to know the usage, and evidence as to this is admissible. *Id.*
6. STIPULATION IN INSURANCE POLICY THAT BOATS CONVEYING INSURED CARGO SHALL BE MANNED with a specified number of hands is an executory stipulation or promissory warranty. *Id.*

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7. **EXECUTORY STIPULATION OR PROMISSORY WARRANTY INSERTED IN INSURANCE POLICY** is a binding condition on the insured and requires strict performance, and the breach of it, whether the thing warranted was material or not, renders the policy void from its inception. *Id.*
8. **COOK IS COMPETENT HAND WITHIN MEANING OF STIPULATION IN INSURANCE POLICY** requiring boats to be manned by a certain number of competent hands. *Id.*
9. **STIPULATION IN POLICY OF INSURANCE ON CARGO OF FLAT BOAT** that company shall not be liable for loss arising from specified causes, "nor in any case if towed by a steamboat," discharges the company only as to any loss accruing from such towing by steamer. *Id.*
See SHIPPING, 2.

INTEREST.

- NOTE CONTINUES TO BEAR INTEREST AT RATE STIPULATED THEREIN** so long as the principal remains unpaid. *Phinney v. Baldwin*, 62.
See PLEADING AND PRACTICE, 27.

INTOXICATING LIQUORS.

- See CONSTITUTIONAL LAW, 12-18; CORPORATIONS, 14; CRIMINAL LAW, 28;
PLEADING AND PRACTICE, 12; PROCESS, 4.

JEOPARDY.

- See CRIMINAL LAW, 23-25; HABEAS CORPUS, 2.

JUDGMENTS.

1. **JUDGMENT CAN NOT BE AFFIRMED WITH TWELVE PER CENT DAMAGES AND DOUBLE COSTS** by the supreme court of Minnesota, under the statutes, upon an appeal from an order refusing a new trial. *St. Martin v. Denoyer*, 494.
 2. **AFTER JUDGMENT HAS BEEN RENDERED AGAINST DEFENDANT, BINDING HIS LAND**, he can not create liens thereon to the prejudice of the plaintiff to such action. If any rights are acquired by third persons in dealing with the defendant in relation to said land, they are in subordination to such judgment. *Martin v. Martin*, 364.
 3. **JUDGMENT, UNTIL REVERSED, IS CONCLUSIVE OF EVERY ISSUE THAT WAS OR SHOULD HAVE BEEN TRIED** under the pleadings, but is not conclusive of facts that were in no way in issue, nor admitted by the pleadings; therefore a judgment accompanied by an order of sale of property attached is not conclusive that the property is exempt from sale. *Wilson v. Stripe*, 138.
 4. **JUDGMENT IS NOT COLLATERALLY IMPAIRED** when a sale of exempt property, under an accompanying order, is prevented by maintaining an action of replevin for the property. The judgment is independent of the order of sale, and the replevin proceeding merely affects the order. *Id.*
 5. **JUDGMENT AND ORDER TO SELL PROPERTY ATTACHED IS NO BAR TO ACTION OF REPLEVIN** for the property, on the ground that it is exempt from seizure and sale. *Id.*
- See EVIDENCE, 14; EXECUTIONS, 7, 8, 15; MARRIED WOMEN, 6; MORTGAGES, 1, 2.

JUDICIAL SALES.

1. **OBVIOUS POLICY OF LAW IS TO PROTECT JUDICIAL SALES**, in the absence of fraud. *Coriell v. Ham*, 134.
 2. **STRICT COMPLIANCE WITH STATUTE AUTHORIZING PROBATE COURT TO ORDER SALE OF LANDS** belonging to the estate of a deceased person must be shown in order to render such order and the sale made pursuant to it valid. This is particularly the case where a special and extraordinary power, not legitimately belonging to the jurisdiction of the court, is conferred upon it by statute. *Currie v. Stewart*, 500.
 3. **WHERE STATUTE REQUIRES ADMINISTRATOR TO GIVE BOND**, upon the sale by him of the lands of his intestate, conditioned to apply the proceeds of the sale in the same way that the lands would have gone, his omission to give such bond renders the sale void. *Id.*
 4. **SALES IN CHANCERY ARE MADE SUBJECT TO INCUMBRANCES WHICH ARE ON PROPERTY**, unless expressly stipulated to the contrary by the terms of sale. The interest and estate of the parties is the only thing sold, and the doctrine of *caveat emptor* applies. *Farmers' and Planters' Bank v. Martin*, 350.
 5. **BURDEN OF PROOF IS ON PURCHASER AT CHANCERY SALE** to show that he made the purchase free from all incumbrances. *Id.*
 6. **WHERE PURCHASER AT CHANCERY SALE FAILS TO COMPLY WITH TERMS OF SALE**, and a resale is ordered, the trustee making sale is allowed his commissions on the amount of the sale, and his legal fee for filing the petition. He will not be allowed additional commission for the collection of the money. *Id.*
 7. **WHEN RE-SALE IS ORDERED, TRUSTEE IS ALLOWED** his legal fees and commission on the proceeds of the second sale; but where he proceeds at law by suit upon the purchaser's notes or bonds, he is not allowed a double commission, and consequently he is awarded an attorney's fee. *Id.*
- See EXECUTIONS; EXECUTORS AND ADMINISTRATORS, 5-8; GUARDIAN AND WARD, 1; LANDLORD AND TENANT, 11; MORTGAGES, 6-8.**

JURISDICTION.

1. **WHERE JURISDICTION OF COURTS OF LAW AND EQUITY ARE BLENDED**, plaintiff is entitled to all the relief that would formerly have been afforded by a court of law and equity. *Rankin v. Charles*, 574.
2. **WHERE JURISDICTIONAL FACTS DO NOT APPEAR OF RECORD**, their existence may be proved *aliunde*. And where it sufficiently appears that a special meeting of the board of police was held after the notice required by law had been given, such meeting is shown to have been legally held, notwithstanding the record does not show that previous notice was given. *Williams v. Cammack*, 508.
3. **MAGISTRATE OF INFERIOR COURT ACTING WITHOUT OR IN EXCESS OF JURISDICTION IS LIABLE IN DAMAGES** to a party injured thereby, and can show no legal justification under any judicial record. *Piper v. Pearson*, 438.
4. **COMMITMENT OF WITNESS FOR CONTEMPT BY JUSTICE IN CAUSE OF WHICH HE HAS NO JURISDICTION IS UNAUTHORIZED AND VOID**, and renders him liable in damages. *Id.*
5. **RECORD PRIMA FACIE SHOWS WANT OF JURISDICTION IN JUSTICE** for the county of Middlesex, where it sets out on its face an offense committed

in the city of Lowell, a district in which the police court has exclusive jurisdiction. *Id.*

6. RECORD OF INTERIOR COURT MUST SHOW THAT MAGISTRATE ACTED WITHIN LIMITS OF JURISDICTION, in order to avail him as a defense to an alleged trespass. *Id.*

See COURTS; CRIMINAL LAW, 7; EXECUTORS AND ADMINISTRATORS, 4; HABEAS CORPUS, 1; MALICIOUS PROSECUTION; OFFICES AND OFFICERS, 4; PLEADING AND PRACTICE, 9; PROCESS, 1, 5; SHIPPING, 6, 7.

JURY AND JURORS.

1. ALL ISSUES OF FACT MUST BE TRIED BY JURY, if a party desires to have them so tried; and the court should grant him the privilege of such a trial, although the statute which gives him the remedy he is pursuing may be silent on the subject. *Scott v. Nichols*, 503.
 2. VERDICT WILL BE SET ASIDE WHEN JURY AGREE EACH TO SPECIFY SUM as due to the plaintiff, and divide the aggregate by twelve, and take the quotient as the result. *St. Martin v. Desnoyer*, 494.
 3. AFFIDAVITS OF JURORS ARE INCOMPETENT TO SHOW MISCONDUCT on the part of the jury, and thus impeach and avoid the verdict. *Id.*
 4. AFFIDAVITS OF THIRD PERSONS OF JURORS' DECLARATIONS ARE INCOMPETENT TO SHOW MISCONDUCT on the part of the jury, and thus impeach and avoid the verdict. *Id.*
 5. TO DETERMINE SUFFICIENCY OF PROOF TO ESTABLISH VALID CONTRACT BETWEEN PARTIES is the province of the jury. *Atwell v. Miller*, 294.
- See AUCTIONS, 1; CRIMINAL LAW, 25; DAMAGES, 7; PAYMENT, 1; PLEADING AND PRACTICE, 5, 18-22, 28-34; RAILROADS, 4; SALES, 2, 3; SLANDER, 3.

JUSTICE OF PEACE.

See JURISDICTION; OFFICES AND OFFICERS, 4; PROCESS, 5.

LANDLORD AND TENANT.

1. TENANT CAN NEVER DISPUTE HIS LANDLORD'S TITLE except in a few special cases. *Winston v. President and Trustees of Franklin Academy*, 540.
2. PARTY WHO TAKES POSSESSION UNDER LESSEE IS BOUND BY COVENANTS contained in the latter's lease of the premises; and after the death of such party, his executor is bound by everything that bound his testator. *Id.*
2. WHERE LANDLORD HAS, BY TERMS OF LEASE, RIGHT TO RE-ENTER and become reinvested with his former estate in the premises demised, he is entitled to recover damages according to the injury which the property had sustained at the time when this right accrued. And if the tenant has removed buildings from the premises, the injury sustained is measured by the landlord's loss of rent arising from such removal. *Id.*
4. COVENANT TO PAY RENT ON SPECIFIED DAY CREATES NO DEBT until the day of payment arrives. *Russell v. Fabyan*, 629.
5. WHERE LESSEE UNDER LEASE RESERVING ANNUAL RENT IS EVICTED before the day of payment by one holding a title paramount to that of the lessor, payment on the day the rent became due to the person holding such paramount title is a good defense to an action on the lease for covenant broken. But if before any rent is paid such paramount title is de-

- feated by the lessor, he may maintain an action for the rent that fell due during the eviction. *Id.*
6. **AFTER CONSTRUCTIVE AND TEMPORARY EVICTION, IF TENANT RETURNS** and occupies the premises, the right to the rent, once suspended, is restored, and there are authorities which hold that such would be the case even after an actual ouster. *Martin v. Martin*, 364.
 7. **ENTRY WITHOUT EXPULSION OF LESSEE** will not produce a suspension of the rent. *Id.*
 8. **ASSIGNEE OF REVERSION IS ENTITLED TO RENT FALLING DUE** after the assignment, where there is no reservation of the rent, as rent is incident to the reversion and passes with it. *Id.*
 9. **LESSOR CAN NOT CLAIM RENT FALLING DUE** after eviction of the tenant by a purchaser at sheriff's sale, under a judgment entered before the commencement of the tenancy. *Id.*
 10. **PURCHASER UNDER JUDGMENT RENDERED BEFORE EXECUTION OF LEASE** is entitled to the rent falling due after his title has accrued. This right is not affected by the lessor's drawing orders upon the tenant on account of the rent not yet due, which orders had been accepted by the tenant. *Id.*
 11. **RENT CAN NOT BE APPORTIONED IN RESPECT TO PART OF TIME** except as provided by statute 11 Geo. II., c. 15, sec. 19; and the party holding the reversion when the rent falls due is entitled to the entire amount. The lessor, in case of a judicial sale of his property during the term of a lease, gets compensation for such rent as had accrued up to date, by the increased price his property will bring at the sale. *Id.*
 12. **PURCHASER AT SHERIFF'S SALE OF LANDS UNDER LEASE** is substituted in the place of the landlord, not only as to the time of the sale, but as to his title and interest at the date of the judgment. He is substituted by law in the place of the judgment creditor. *Id.*

See PLEADING AND PRACTICE, 17.

LEX DOMICILII.

See DOMICILE.

LEX LOCI CONTRACTUS.

See CONFLICT OF LAWS.

LICENSE.

See STATUTES, 2.

MAGISTRATES.

See OFFICES AND OFFICERS; PROCESS.

MALICIOUS PROSECUTION.

RECORD OF PROSECUTION AND ACQUITTAL AFFORDS NO SUFFICIENT BASE TO SUSTAIN ACTION FOR MALICIOUS PROSECUTION, where the proceedings were before a magistrate who had no jurisdiction of the offense. *Bisby v. Brundige*, 443.

See PLEADING AND PRACTICE, 7.

MARRIAGE AND DIVORCE.

1. DECREE OF DIVORCE A VINCULO CAN NOT BE SET ASIDE on the ground that it was obtained by false testimony and fraud, upon an original libel filed at a subsequent term of the court. *Greene v. Greene*, 454.
2. WHERE PLAINTIFF, WHO HAS FILED ORIGINAL BILL FOR DIVORCE, afterwards files a supplemental bill reaffirming the charges made in the original bill, without objection from defendant, it is properly a part of the case, and evidence of acts supportive of the plaintiff's case, which occurred after the filing of the original bill, but prior to the filing of the supplemental one, are admissible in evidence. *Feigley v. Feigley*, 375.
3. IN PROCEEDING FOR DIVORCE, WHERE PLAINTIFF SEEKS ALSO TO HAVE DEED from defendant to his sister set aside, and for that purpose makes the sister a party, if the sister answers without objection, she must be considered as having submitted her rights under that deed for adjudication in such proceeding. *Id.*
4. TO CERTAIN EXTENT WIFE STANDS IN RELATION TO HER HUSBAND, in reference to her claim upon him for support or for alimony, in the same attitude that a creditor stands towards his debtor. This is so under the statute of Elizabeth. *Id.*
5. IF HUSBAND HAS NO ESTATE, NO ALIMONY CAN BE ALLOWED, as alimony is an allowance out of the husband's estate. *Id.*
6. LIS PENDENS HAS NO APPLICATION TO ACTION FOR DIVORCE and petition for alimony; but is a proceeding directly relating to the thing or property in question. *Id.*
7. HUSBAND'S REAL ESTATE CAN NOT BE SET OFF TO WIFE IN FEE SIMPLE for the purpose of giving her alimony. The court will but give the wife a lien upon the real estate for the amount of alimony decreed, or will set off a portion of it to her for life, if the husband desires her to be allowed a definite part of his property in preference to a periodical claim upon him. *Russell v. Russell*, 112.
8. ALIMONY WILL BE DECREED WITH DUE CONSIDERATION of the available means of the husband, and the condition of the parties. *Id.*

MARRIED WOMEN.

1. MARRIED WOMAN AND HER HEIRS ARE NOT ESTOPPED TO DENY VALIDITY OF HER DEED, executed during coverture, but dated previously to her marriage, and signed with the name she bore at that time, with a fraudulent purpose of deceiving and imposing upon some person to be affected by it, and without disclosing the fact of her marriage. *Lowell v. Daniels*, 448.
2. FEME COVERT MAY SUE IN HER OWN NAME FOR SETTLEMENT. *Wright v. Arnold*, 172.
3. WIFE'S RIGHT OF SURVIVORSHIP, BUT NOT HER EQUITY TO SETTLEMENT, will be destroyed by the husband's transfer of her choses in action that he has a right to reduce into immediate possession. *Id.*
4. WIFE CAN NOT DEMAND SETTLEMENT IN EQUITY OF HER INTEREST IN HER FATHER'S ESTATE, to which the husband had an immediate right of possession, if she was present and made no objection to her husband's sale of it. Such conduct repels her equity against the purchaser. *Id.*

6. **WIFE'S RIGHT TO SETTLEMENT IS NOT PREJUDICED BY MORTGAGE OF HER REVERSIONARY INTEREST**, executed by her and her husband, and to secure a pre-existing debt of the husband. *Id.*
 7. **PERSONAL JUDGMENT CAN NOT BE RENDERED AGAINST MARRIED WOMAN** on a note executed by herself and husband. She can not bind herself personally, although she may render her separate estate liable for her engagements. *Sweeney v. Smith*, 188.
 7. **LANDS ARE SUBJECT TO WIFE'S POWER OF APPOINTMENT AND DISPOSITION**, AS SEPARATE ESTATE, to which even the husband's limited power given him by the Kentucky statutes over his wife's lands does not attach, where they are conveyed directly to the wife, but expressly for her separate use and benefit, and not to be liable in any way for the debts of the husband. *Id.*
- See DOMICILE, 5, 6; HUSBAND AND WIFE; MARRIAGE AND DIVORCE.

MASTER AND SERVANT.

1. **CARPENTER EMPLOYED BY RAILROAD COMPANY IN BUILDING BRIDGE IS NOT FELLOW-SERVANT** of those employed in the management of the company's train, while traveling on such train by direction of the company in order to assist at another place in loading bridge timbers; and if he is injured during the journey by the negligence of such employees, the company is liable to him as to a passenger and stranger. *Gillenwater v. Madison & I. R. R. Co.*, 101.
 2. **ONE IS NOT FELLOW-SERVANT WHO HAS NO PARTICIPATION IN DUTIES** the neglect of which contributed to the injury complained of, but whose duties belong to a distinct department; and for such injury the employer will be liable as to a stranger. *Id.*
- See COMMON CARRIERS, 1-3, 7, 9; CORPORATIONS, 4, 6, 7.

MECHANIC'S LIEN.

1. **WHERE OWNER OF TOWN LOT AGREES TO SELL SAME**, to make a building loan to the purchaser for the erection of a building thereon, and to take security for the price of the lot and amount of the loan in the form of a mortgage on the lot and building, conveyance to be made and mortgage given on completion of the building, he is not constituted "the owner of the building" within the meaning of the mechanic's lien act, although it was erected on the lands of which he had the legal title. *Loonie v. Hogan*, 683.
2. **PERSONS FURNISHING MATERIALS FOR SUCH BUILDING CAN NOT, UNDER SUCH ACT**, compel payment for them out of money agreed to be advanced by the seller to the purchaser. *Id.*
3. **PAROL PROMISE BY SELLER OF TOWN LOT TO PAY FOR MATERIALS FURNISHED TO PURCHASER** to be used in the construction of a building thereon, as well as parol promise to accept a bill drawn on him by the purchaser for such materials, is within the statute of frauds, and void. *Id.*

MORTGAGES.

1. **MORTGAGE UPON WHICH DECREE OF SALE, ETC., FOR PAYMENT OF MORTGAGE DEBT HAS BEEN OBTAINED**, CAN NOT AFTERWARDS BE IMPEACHED in a court of concurrent jurisdiction, in a suit brought by creditors to

set aside such mortgage as fraudulent against them. As the decree can not be assailed, its foundation, the mortgage, can not be. *McDowell v. Goldsmith*, 305.

2. DECREE AGAINST DEFENDANT MADE PARTY TO FORECLOSURE SUIT, UNDER GENERAL ALLEGATION that he claimed some interest in the premises "as subsequent purchaser or incumbrancer, or otherwise," bars rights and interests in the equity of redemption, but not those which are paramount to the title of both mortgagor and mortgagee. *Lewis v. Smith*, 706.
3. MORTGAGE OF CHATTELS PASSES WHOLE LEGAL TITLE OF PROPERTY CONDITIONALLY TO MORTGAGEE, and to defeat such title the mortgagor, or those claiming under him, must show a performance of the condition. Upon the breach of the condition, the title is absolute at law in the mortgagee, although the mortgagor may be entitled in equity to a redemption. *Tannahill v. Tuttle*, 490.
4. MORTGAGEE OF CHATTELS IS ENTITLED TO IMMEDIATE POSSESSION OF PROPERTY, to hold until condition broken, unless the parties otherwise stipulate in the mortgage. *Id.*
5. MORTGAGOR'S POSSESSION OF CHATTELS MORTGAGED IS DEEMED POSSESSION OF MORTGAGEE, where the mortgagor is suffered to retain the property without an agreement to that effect, so that the mortgagee may reduce the property to his possession at any moment, and may maintain trespass, trover, or replevin for any intermeddling with or taking of the property by a third party. *Id.*
6. MORTGAGEE'S RIGHT OF ACTION FOR UNLAWFUL INTERFERENCE WITH CHATTELS MORTGAGED EXISTS, as well when the property is taken by an officer under color of legal process as when it is taken without color of authority of law. *Id.*
7. MORTGAGOR'S INTEREST IN CHATTELS MORTGAGED MAY BE SEIZED AND SOLD only when he is entitled to the possession under an agreement to that effect, and not when his possession is by permission, nor after condition broken. *Id.*
8. MORTGAGOR OF CHATTELS, WITHOUT RIGHT OF POSSESSION, HAS NO LEGAL INTEREST WHICH CAN BE SOLD, under section 23, page 476, of the Michigan revised statutes, providing that "when goods or chattels shall be pledged by way of mortgage or otherwise," "the right and interest in such goods of the person making such pledge may be sold on execution against him;" the section was not designed to create rights and subject them to seizure, but only to extend the remedy by execution over rights in existence. *Id.*
9. DISTINCTION BETWEEN MORTGAGE OF CHATTELS AND PLEDGE IS, that the former passes the legal title, which becomes absolute at law upon breach of the condition; while a pledge only passes the possession, with a right of retainer until the obligation is fulfilled, and the title does not become absolute in the pledgee, who has only a right of foreclosure, or of sale after notice. *Id.*
10. MORTGAGOR'S INTEREST IN CHATTELS MORTGAGED CAN BE SEIZED UPON ATTACHMENT, if at all, only when the mortgagor has possession by agreement with the mortgagee, and before condition broken, and it would seem not even in that case. *Id.*

11. **STATUTE AUTHORIZING SALE OF INTEREST OF PLEDGOR OR MORTGAGOR ON EXECUTION DOES NOT AUTHORIZE** an attachment of such interest. *Id.*
 See **CONTRACTS**, 2; **CO-TENANT**, 2; **EVIDENCE**, 14; **MARRIED WOMEN**, 5; **MECHANIC'S LIEN**, 1; **STATUTE OF LIMITATIONS**, 7; **TRUSTS AND TRUSTEES**; **WILLS**, 11.

MOTIONS.

See **PLEADING AND PRACTICE**, 3, 6.

MUNICIPAL CORPORATIONS.

See **CONSTITUTIONAL LAW**, 7; **CORPORATIONS**, 4-14; **CRIMINAL LAW**, 28; **PLEADING AND PRACTICE**, 8.

NEGLIGENCE.

1. **LAW EXACTS FROM RAILROAD COMPANIES, AS TO PASSENGERS AND FREIGHTS,** HIGHEST DILIGENCE, skill, and care, and for the want of them measures their liability for alight negligence. But the party injured must be free from such negligence as contributes to the injury complained of. *Chicago & Miss. R. R. Co. v. Patchin*, 65.
 2. **PARTY PERMITTING HIS CATTLE TO BE ON RAILROAD TRACK** is not blameless. *Id.*
 3. **DAMAGES FOR NEGLIGENCE CAN NOT BE RECOVERED** if it appears that the injury the plaintiff sustained was in any degree caused by his own negligence or want of due care. *Murch v. Concord R. R. Corporation*, 631.
 4. **PASSENGER WHO VOLUNTARILY JUMPS FROM CARS WHILE IN MOTION,** to avoid being carried beyond her destination, where the cars did not stop as they were in the constant habit of doing, is guilty of such imprudence as relieves the railroad company from liability for injuries thereby sustained. *Damont v. New Orleans & C. R. R. Co.*, 214.
- See **COMMON CARRIERS**, 1; **CORPORATIONS**, 4, 5; **MASTER AND SERVANT**, 1; **RAILROADS**, 4-8, 10, 12.

NEGOTIABLE INSTRUMENTS.

1. **PERSON TO WHOM BILL OF EXCHANGE OR PROMISSORY NOTE IS MADE PAYABLE** should be specified; but this may be done without inserting his name. And if the payee be so certainly described or referred to as to be easily ascertained by allegations and proofs, the promisee will be valid. *Adams v. King*, 64.
2. **ONE JOINT PROMISOR IS NOT DISCHARGED BY GIVING TIME TO ANOTHER;** both are principals. *Yates v. Donaldson*, 283.
3. **RELEASE OF ONE JOINT PROMISOR OR PRINCIPAL RELEASES ANOTHER,** except where the remedy against the other is expressly reserved. *Id.*
4. **ONE OF TWO MAKERS OF PROMISSORY NOTE CAN NOT DEFEND ACTION BROUGHT AGAINST HIM BY PAYEE,** on the ground that he made the note as surety for the other and for his accommodation, which was known to the payee at the time, and that after it became due the plaintiff gave time to the other maker without the consent of the defendant. *Id.*
5. **MAKER OF ACCOMMODATION NOTE IS LIABLE TO HOLDER,** the latter knowing when it was made that it was for indorser's accommodation; and giving time to indorser does not discharge the maker. *Id.*
6. **THERE IS NO DIFFERENCE BETWEEN ACCOMMODATION NOTES AND THOSE NEGOTIABLE FOR VALUE.** The court will look to the relation that par-

- ties bear to each other on the instrument itself, and determine their liabilities accordingly. *Id.*
7. POSSESSION OF ACCOMMODATION DRAFT IS PRIMA FACIE EVIDENCE OF CONSIDERATION AND TITLE, in an action by the indorsee against the acceptor. *Ellicott v. Martin*, 327.
 8. ONUS PROBANDI IS CAST UPON DEFENDANT TO PROVE WANT OF CONSIDERATION in an action by indorsee upon an accommodation acceptance. *Id.*
 9. ONUS PROBANDI IS UPON PLAINTIFF TO AFFIRMATIVELY PROVE CONSIDERATION, if fraud or illegality in the inception of the paper is relied upon as a defense to an action brought by the indorsee upon a bill of exchange. *Id.*
 10. EVIDENCE OF FRAUD IN INCEPTION OF ACCOMMODATION PAPER is not shown by the fact that drawer did not place defendant, the acceptor, in funds or goods to meet the draft upon its maturity, as he promised to do. *Id.*
 11. PLAINTIFF'S PRIMA FACIE TITLE FROM POSSESSION OF DRAFT CAN NOT, IN ABSENCE OF MALA FIDES, BE REBUTTED BY EVIDENCE that the title is in some other party. *Id.*
 12. MALA FIDES MUST BE ALLEGED IN ACTION UPON BILL OF EXCHANGE, where plaintiff has it in his possession, before a court will inquire whether the party sues for himself or as trustee for another, or into the right of possession. *Id.*
 13. INDORSEMENT OF NOTE IMPLIES TRANSFER, and if the indorsement is made in one place and delivery in another, the latter is the place of contract. Mere indorsement, without transfer, is no contract. *Young v. Harris*, 170.
 14. IF TIME OF PAYEE'S INDORSEMENT OF PROMISSORY NOTE IN HOLDER'S HANDS DOES NOT APPEAR, it will be inferred that it was indorsed, if not on the day of its date, at least before its maturity. *McDowell v. Goldsmith*, 305.
 15. MAKER MAY SHOW THAT PAYEE AND INDORSER WAS INSANE at the time of the indorsement of the note, as a bar to a suit thereon by the indorsee. *Burke v. Allen*, 642.
 16. NOTICE TO PARTIES SOUGHT TO BE CHARGED AS DRAWERS AND INDORSERS OF BILLS MUST BE PROVED like all other facts; and the Louisiana statute of 1827, which makes the certificates of notice by notaries in Louisiana competent evidence of such notice, has no effect beyond such instruments executed within that state, and by officers whose acts are thus clothed by law with the authority of authentic evidence. *Schneider v. Cockrane*, 204.
 17. CONDITION IN NOTE THAT MAKER WILL PAY IF HE SHALL GET CERTAIN LAND described in the note is equivalent to the condition if he shall get a valid title to the land; and such condition is not satisfied by his getting a deed, or a defeasible possession, or a defective title. *Woods v. Kirk*, 614.
 18. MAKER OF NOTE PAYABLE IN JOB OF WORK TO BE PERFORMED FOR PAYEE by debtor of maker, the maker to be bound by the note unless the job is completed, is entitled to credit on the note for the value of the labor performed though his debtor die before completing the work. *Peters v. McKibben*, 85.
 19. DEBT EVIDENCED BY LOST NOTE MAY BE ASSIGNED, and the assignee may sue for it in his own name. *Leng v. Constant*, 559.

See AGENCY, 6; BANKS AND BANKING; CONFLICT OF LAWS, 5; CONTRACTS, 10; EVIDENCE, 16, 17, 21; INTEREST; MARRIED WOMEN, 6; NOTARIES, 1; PAYMENT, 2; PLEADING AND PRACTICE, 13; STATUTE OF LIMITATIONS, 3, 4; SURETSHIP, 3; VENDOR AND VENDEE, 1, 3.

NOTARIES.

NOTARIAL PROTESTS OF FOREIGN BILLS ARE RECEIVED IN EVIDENCE as making proof of themselves, and bills drawn from one state on another are regarded as foreign bills to this extent; but beyond this the acts of foreign notaries or of notaries of other states are not admissible in evidence without proof of the signatures and capacity of the notaries. *Schneider v. Cochran*, 204.

See NEGOTIABLE INSTRUMENTS, 16.

NOTICE.

See AGENCY, 5; BANKS AND BANKING, 3; CONTRACTS, 9; EVIDENCE, 2; EXECUTIONS, 10, 12; EXECUTORS AND ADMINISTRATORS, 5, 6; INFANCY, 4; JURISDICTION, 2; NEGOTIABLE INSTRUMENTS, 16; PLEADING AND PRACTICE, 2, 3; SHIPPING, 4.

NUISANCE.

See CONSTITUTIONAL LAW, 8, 17.

OFFICES AND OFFICERS.

1. THAT SECTION OF CONSTITUTION WHICH PROVIDES THAT GOVERNOR SHALL APPOINT ALL OFFICERS "whose appointment or election is not otherwise herein provided for, unless a different mode of appointment be prescribed by the law creating the office," simply means that he shall fill all offices, however created, unless the act creating them provides otherwise. If the act creating the office provides how it shall be filled, it must be filled in that manner, but if it fails to make such direction, the governor shall appoint by virtue of the above provision. *Davis v. State*, 331.
 2. SAME AUTHORITY WHICH CONFERRED POWER UPON GOVERNOR TO MAKE APPOINTMENT TO OFFICE CAN TAKE IT AWAY. An office of legislative creation can be modified, controlled, or abolished by the same power, or the mode of appointment thereto can be changed. *Id.*
 3. PUBLIC OFFICER ACTING IN GOOD FAITH IS NOT LIABLE FOR ERRONEOUS JUDGMENT in a matter submitted to his determination. *Donahoe v. Richards*, 256.
 4. JUSTICE WHO EXCEEDS JURISDICTION WITH COGNIZANCE OF FACTS CONSTITUTING EXCESS is liable as a trespasser to any party injured; although he may not be liable where the defect or want of jurisdiction is occasioned by some facts or circumstances applicable to a particular case of which he had neither knowledge nor means of knowledge. *Clarke v. May*, 470.
- See ARREST; ASSIGNMENT OF CONTRACTS, 4; ATTACHMENTS, 6, 7; CONSTITUTIONAL LAW, 19; CORPORATIONS, 7, 11; EXECUTIONS, 7; HABEAS CORPUS, 1; JURISDICTION, 3-6; NOTARIES; PLEADING AND PRACTICE, 3, 9; PROCESS, 1; SCHOOLS, 4-6; SHERIFFS; TAXATION, 7; TRUSTS AND TRUSTEES.

PARTNERSHIP.

1. PARTNER MAY SUE COPARTNER AT LAW for damages caused by his willfully dissolving the partnership before the expiration of the term fixed by the articles for its continuance. *Bagley v. Smith*, 756.
2. DAMAGES RECOVERABLE BY ONE PARTNER for his copartners' wrongful dissolution of the copartnership include anticipated profits for the residue of the term fixed by the articles. *Id.*
3. EVIDENCE OF PROFITS REALIZED during the continuance of a partnership may be received in evidence as aiding to estimate profits which would have been realized thereafter had the firm been continued. *Id.*

PATENTS.

See EQUITY, 3; PLEADING AND PRACTICE, 14, 15; PUBLIC LANDS, 1, 2.

PAYMENT.

1. FORMER DEBT CAN NOT BE EXTINGUISHED BY ACCEPTANCE OF SECURITY OR UNDERTAKING OF EQUAL DEGREE, unless it is received in satisfaction, or is intended as an abandonment of the remedy on the first contract; and these are questions for the jury. *Yates v. Donaldson*, 283.
 2. ACCEPTANCE OF PROMISSORY NOTES IN LIEU OF FORMER DEBT suspends the remedy on the first contract until the notes mature. *Id.*
- See CONTRACTS, 10; EXECUTIONS, 8; PLEADING AND PRACTICE, 16, 17; STATUTE OF LIMITATIONS, 7.

PLEADING AND PRACTICE.

1. ALL RELATING TO MANNER AND TIME IN WHICH CASE SHALL BE CONDUCTED AND TRIED, from its inception to final judgment and execution, is generally embraced under the title of practice. *Wright v. State*, 90.
2. IT IS INSUFFICIENT NOTICE, TO LET IN SECONDARY EVIDENCE OF CONTENTS OF PAPER, to merely notify defendant during trial to produce such paper, without showing it to be in court at the time, and in his possession, or if elsewhere, that it would be of easy access. *Atwell v. Miller*, 294.
3. MERELY CLERICAL ERROR OF CLERK OF COURT IN MAKING UP RECORD may be corrected by the docket, by the order of the court, without motion or notice to either party. *Emery v. Berry*, 622.
4. MANY CAUSES OF ACTION, UNDER CODE PRACTICE, MAY BE JOINED IN ONE PETITION; but each must be set out separately from the others, with its appropriate prayer for relief. *Mooney v. Kennett*, 576.
5. IF SEVERAL CAUSES OF ACTION ARE JOINED IN ONE PETITION, there should be a separate assessment of damages or verdict in each cause; but a general finding for defendant on such petition may be sustained. *Id.*
6. IMPROPER BLENDING OF SEVERAL CAUSES OF ACTION MAY BE CURED by motion to compel an election. *Id.*
7. PETITION IN ACTION FOR WRONGFUL PROSECUTION IS FATALY DEFECTIVE, unless it states that the prosecution was malicious, and that plaintiff was acquitted of it. *Id.*
8. CITY ORDINANCES ARE NOT SUBJECT OF JUDICIAL NOTICE; when relied on they must be pleaded. *Id.*
9. OBLIGORS OF BAIL BOND, BY MAKING IT, ADMIT FACTS AND CIRCUMSTANCES WHICH RENDERED IT NECESSARY; and those facts and circum-

- stances need not be averred in order to sustain an action on the bond. It will be presumed that the officer had jurisdiction to take the bond. *Ferguson v. State*, 120.
10. FACTS ESTABLISHED BY BAIL BOND NEED NOT BE SPECIFICALLY AVERRED IN PETITION in a suit on the bond, where the bond is made a part of the petition. *Id.*
 11. PRESUMPTIONS OF LAW NEED NOT BE AVERRED OR PROVED. *Id.*
 12. COMPLAINT OR INDICTMENT ALLEGING SALE OF "SPIRITUOUS OR INTOXICATING LIQUOR," without authority or license therefor, is bad for uncertainty, and insufficient to sustain a judgment. *Commonwealth v. Grey*, 476.
 13. ALLEGATIONS IN DECLARATION ON PROMISSORY NOTE, THAT PLAINTIFFS WERE ADMINISTRATORS of a certain person deceased at the time the promise was made, and that it was made to them personally by that name and description, are traversable allegations, and must be denied under oath. *Adams v. King*, 64.
 14. FACTS SUFFICIENT TO COMPEL CONVEYANCE OF PATENTEE'S TITLE HELD IN TRUST FOR ANOTHER, and relied upon as a defense in ejectment, must be set up in answer with the same particularity required of a bill in chancery. *Carman v. Johnson*, 593.
 15. MERE STATEMENT IN ANSWER TO EJECTMENT THAT DEFENDANT'S ENTRY WAS PRIOR to that upon which plaintiff's patent issued shows no ground for equitable relief. *Id.*
 16. EVIDENCE TENDING TO ESTABLISH PAYMENT may be given under the general issue. *Crews v. Bleakley*, 58.
 17. PAYMENT CAN NOT BE SHOWN UNDER GENERAL ISSUE IN ACTION ON COVENANT for rent, except with a brief statement. But payment may be shown in such action under a special plea of payment. *Russell v. Fabyan*, 629.
 18. UNDER EVIDENCE SHOWING CONSTRUCTIVE DELIVERY either party has the right to ask instructions of the court as to the legal effect of any particular circumstance which may be offered to the jury, and from which the delivery is to be deduced. *Atwell v. Miller*, 294.
 19. INSTRUCTION TO EFFECT THAT ACTUAL DELIVERY IS NECESSARY TO MAKE VALID SALE, in all cases where it depends upon delivery alone, will be refused. *Id.*
 20. PLAINTIFF'S PRAYER FOR INSTRUCTION, BASED UPON HIS OWN EVIDENCE, CAN NOT BE GIVEN, when the proof of the defendant, if believed by the jury, would establish any proposition inconsistent with the theory of such prayer. Plaintiff must assume or admit the truth of all the defendant's proof on the subject. *McTavish v. Carroll*, 353.
 21. EVIDENCE ADMITTED UNDER ASSURANCE THAT IT WILL BE FOLLOWED UP BY PROOF OF OTHER MATERIAL FACTS intimately connected with it should be disregarded by the jury if the assurance is not fulfilled, and it is the duty of the court to so instruct them upon subsequent application of counsel. *Atwell v. Miller*, 294.
 22. INSTRUCTION TO JURY, IN TRIAL FOR ASSAULT AND BATTERY, IN ERRONEOUS WHICH RUNS THUS: "Although you may believe from the evidence that the defendant had probable cause for giving information of the violation of the law by the plaintiff, still this does not authorize or justify the defendant in committing an assault and battery upon the person of the

- plaintiff; and if the jury also believe he did so commit an assault and battery, the law presumes it to have been done maliciously, and the jury are at liberty, in such case, to render a larger amount than the amount actually paid by the plaintiff, by way of smart-money." *Mooney v. Kennett*, 576.
23. EXCEPTION TO ADMISSIBILITY OF EVIDENCE NOT TAKEN IN COURT BELOW can not be insisted upon in the superior court. *Burke v. Allen*, 642.
 24. EACH DISTINCT EXCEPTION WHICH EMBRACES INDEPENDENT PROPOSITION OF LAW should be signed and sealed by the court below before it can be regarded as a valid exception. *Ellicott v. Martin*, 327.
 25. SIGNING AND SEALING LAST EXCEPTION TO SERIES OF RULINGS SUCCESSIVELY EXCEPTED TO does not make the whole one continuous exception properly certified to. Each separate exception must be signed and sealed. *Id.*
 26. ONE EXCEPTION PROPERLY TAKEN AND EXECUTED WILL EMBRACE WHOLE SERIES of rejected or modified requests for instructions, as this is but one act. *Id.*
 27. ERROR IN CHARGING INTEREST ON FUNDS OF INFANT IN GUARDIAN'S HANDS WILL NOT BE NOTICED ON APPEAL, if no exception is made in the court below to the report of the auditor appointed to examine the guardian's accounts. *Collins v. Champ's Heirs*, 179.
 28. COUNSEL'S COMMENT IN ADDRESSING JURY, UPON AMOUNT OF VERDICT given in a former trial of the same action, if assignable as error at all, must be objected to at the time when made, and not alleged as error upon an *ex parte* affidavit after verdict. *St. Martin v. Desnoyer*, 494.
 29. VERDICT WILL NOT BE INTERFERED WITH ON GROUND OF EXCESSIVE DAMAGES, unless the sum be so excessively large and disproportionate as to warrant the inference that the jury were swayed by prejudice, preference, partiality, passion, or corruption. *Id.*
 30. VERDICT WILL NOT BE SET ASIDE ON GROUND THAT DAMAGES are either excessive or inadequate, unless it is apparent that the jury acted under some bias, prejudice, or improper influence, or have made some mistake of fact or law. *Kimball v. City of Bath*, 243.
 31. MERE FACT THAT DAMAGES AWARDED BY JURY ARE GREATER than court would have awarded upon the evidence is not sufficient ground to set aside the verdict. *Id.*
 32. IMPROPER EXCLUSION OF EVIDENCE IS NOT GROUND FOR REVERSAL, when verdict is substantially sustained by other evidence. *Persons v. McKibben*, 85.
 33. ERRONEOUS REFUSAL OF INSTRUCTION IS NOT GROUND FOR REVERSAL when the court has virtually given it in other instructions. *Taber v. Hutson*, 96.
 34. OBJECTION THAT INSTRUCTIONS WERE NOT REDUCED TO WRITING comes too late in the appellate court when the law does not require the court to reduce its charges to writing unless requested to do so by a party, and no such request was made, and no objection interposed. *Id.*
 35. NO INFERENCE OF FACT CAN BE MADE where the action comes before the court upon a case stated. *McTavish v. Carroll*, 353.
- See CONSTITUTIONAL LAW, 12, 15, 16; CORPORATIONS, 15; COURTS; CRIMINAL LAW, 2-6, 8, 10-18, 23-27; DEDICATION, 2; DEEDS, 2; EQUITY, 2; ESTOPPEL, 2; EVIDENCE, 15; FRAUDULENT CONVEYANCES, 4; INJUN-

TRONS; JUDGMENTS; JUDICIAL SALES, 5; JURISDICTION, 1; JURY AND JURORS, 1-4; MARRIAGE AND DIVORCE, 1-3, 6; MARRIED WOMEN, 2; MORTGAGES, 1; NEGOTIABLE INSTRUMENTS, 4, 8, 9, 12, 15, 16; PAYMENT, 1; SALES, 2, 3; SHIPPING, 5; SLANDER, 3; STATUTES, 2, 4; TIME.

PLEDGE.

See MORTGAGES, 8, 9, 11.

POSSESSION.

See ADVERSE POSSESSION; CO-TENANCY, 2; FRAUDULENT CONVEYANCES, 2-5; MORTGAGES, 4, 5, 7, 8; NEGOTIABLE INSTRUMENTS, 11, 17; REPLEVIN, 1, 2; STATUTE OF LIMITATIONS, 7; VENDOR AND VENDEE, 1.

POWERS.

See INFANCY, 1-3; MARRIED WOMEN, 7; WILLS, 12.

PRESUMPTIONS.

See PLEADING AND PRACTICE, 9, 11, 22, 35.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PROCESS.

1. OFFICER IS NOT PROTECTED BY PROCESS regular on its face, if the magistrate issuing it had not jurisdiction. *Fisher v. McGirr*, 381.
2. TRESPASS WILL LIE AGAINST OFFICER ACTING UNDER VOID PROCESS. *Id.*
3. OFFICER IS NOT JUSTIFIABLE IF ACTING UNDER WARRANT issued under a statute which is unconstitutional and void. *Id.*
4. OWNER OF INTOXICATING LIQUORS MAY MAINTAIN ACTION AGAINST OFFICER who has unlawfully seized them, notwithstanding section 19 of the statute provides that "no action of any kind shall be had or maintained in any court in this commonwealth, for the recovery or possession of intoxicating liquors, or the value thereof, except such as are sold or purchased in accordance with the provisions of this act." *Id.*
5. OFFICER IS NOT LIABLE FOR ACTS DONE IN EXECUTION OF PROCESS, issued by a justice without jurisdiction, where the excess of jurisdiction does not appear on the face of the process. *Clarke v. May*, 470.
6. WRITS OF MESNE PROCESS RUNNING AGAINST BODY OF DEFENDANT ARE VOID if made returnable after an intervening term, or at no definite term; although in general, where the return-day of process is mistaken or defectively stated, the process is voidable only, and the defect may be remedied by amendment. *Kelly v. Gilman*, 648.
7. PROCESS MAY BE SERVED UPON MEMBER OF MAN'S FAMILY, by leaving a copy thereof with his widowed sister keeping house for him. *Wade v. Jones*, 584.

See ARREST, 2; MORTGAGES, 6; REPLEVIN, 2.

PROMISSORY NOTES.
See NEGOTIABLE INSTRUMENTS.

PUBLIC LANDS.

1. FEE IN LAND DISPOSED OF BY UNITED STATES remains in the government until patent issues. *Carman v. Johnson*, 593.
2. PATENT IS BETTER LEGAL TITLE THAN PRIOR ENTRY, as giving the right to possession. *Id.*
3. ENTRY OF PUBLIC LAND GIVES NO TITLE TO TIMBER cut and lying upon it at the time such entry is made. *Keeton v. Audsley*, 560.

See EQUITY, 3; PLEADING AND PRACTICE, 14, 15.

RAILROADS.

1. PASSENGER ON RAILROAD TRAIN WHO REFUSES TO PAY HIS FARE MAY BE REMOVED therefrom at a suitable time and place, if no unnecessary force be used in effecting such removal. *State v. Overton*, 671.
2. PASSENGER ON RAILROAD TRAIN, BY PURCHASING TICKET BETWEEN TWO POINTS on its line, acquires a right to be carried directly from the one point to the other without interruption, but not to be carried from one point to the other at different times and by different lines of conveyance. If he leaves the train before reaching his destination, he forfeits all right under his contract, and can not resume his journey on a different train by virtue of the check given to him by the conductor of the original train. *Id.*
3. RAILROAD COMPANY MAY CHARGE WAY-PASSENGER HIGHER FARE for traveling over its road by different journeys than it charges through-passengers. *Id.*
4. REGULATIONS OF RAILROAD COMPANY OPERATING UPON AND AFFECTING RIGHTS OF PASSENGERS are not, properly speaking, by-laws of the corporation, and their validity depends upon the fact of their being reasonable, which fact is to be determined by the jury. *Id.*
5. ONE RAILROAD COMPANY BY MERELY PERMITTING ANOTHER TO USE ITS ROAD IS NOT OBLIGED TO PUT ROAD IN REPAIR, or to make any change whatever in the arrangements of the road, or alterations in the road itself. *Murch v. Concord R. R. Corporation*, 631.
6. RAILROAD COMPANY DOES NOT ASSUME DUTY TO PASSENGERS OF ANOTHER RAILROAD COMPANY by merely giving the latter permission to use its road; nor, it seems, by contracting to make its road safe for such passengers. The remedy of a passenger injured is against the company with whom he contracted. *Id.*
7. RAILROADS ARE NOT NECESSARILY PUBLIC WAYS; and if it could be inferred from the nature of their chartered powers that they are such, or if the court is bound to take notice that they had become public corporations, it does not follow that all their tracks are public ways. *Id.*
8. DUTIES OF OWNERS OF RAILROADS THAT ARE PUBLIC WAYS ARE CLOSELY ALLIED to those of towns, which are bound to keep in repair the public highways within their limits, and to those of turnpike and bridge companies, which are bound to keep in repair their roads and bridges; but the liability of those whose duty it is to keep in repair public ways is limited by the nature of those ways. *Id.*

9. OWNERS OF RAILROADS THAT ARE PUBLIC HIGHWAYS ARE BOUND TO MAKE SUITABLE PLACES OF ACCESS to their roads, and keep the same in such condition that they may safely accommodate those who may be reasonably expected to use them; but there is no obligation to do anything, either for the convenience or safety of passengers, at points where none are expected to pass. *Id.*
 10. RAILROAD COMPANIES OCCASIONALLY TRANSPORTING PASSENGERS UPON FREIGHT TRAINS are not common carriers of passengers upon such trains, and are not chargeable for the want of accommodations such as would be otherwise justly required. *Id.*
 11. IN ILLINOIS RAILROAD COMPANY IS NOT BOUND TO FENCE ITS ROAD, nor, on the other hand, is the owner of cattle compelled to prevent them from running at large. *Chicago & Miss. R. R. Co. v. Patchin*, 65.
 12. RIGHT OF RAILROAD COMPANY TO LAND UPON WHICH THEIR ROAD IS BUILT is an absolute ownership in fee for railroad purposes. If it be allowable to graze cattle on such land, it is not a matter of right, but at most an immunity, not a privilege. *Id.*
 13. MERE PROOF OF KILLING OF CATTLE ON RAILROAD TRACK is not sufficient to charge the company with negligence. Wanton, willful, or gross negligence on the part of the company must be shown in order to make it liable. *Id.*
- See COMMON CARRIERS, 5-7, 13, 15, 16; CORPORATIONS, 1-3; MASTER AND SERVANT, 1; NEGLIGENCE, 1; WATERCOURSES, 2.

RATIFICATION.

See AGENCY, 6.

RECEIVER.

See TRUSTS AND TRUSTEES.

RECOGNIZANCE

See BONDS.

REMAINDERS.

See WILLS, 11.

RENT.

See LANDLORD AND TENANT; PLEADING AND PRACTICE, 17.

REPLEVIN.

1. REPLEVIN MAY BE MAINTAINED FOR GOODS SEIZED BY SHERIFF, on an execution against their former owner, on proof that plaintiff had possession of them coupled with an interest; and notwithstanding the legal title and right of possession may have been vested in a third person. *Johnson v. Carnley*, 762.
2. ACTION OF REPLEVIN IS AUTHORIZED BY IOWA CODE TO RECOVER POSSESSION OF PERSONAL PROPERTY taken by legal process from the owner, when such property is exempt from seizure by such process; and the action may be brought at any time before the property is finally sold by virtue of the process, unless the same issue has been *res judicata* on motion. *Wilson v. Stripe*, 138.

See ATTACHMENTS, 5; JUDGMENTS, 4, 5; MORTGAGES, 5.
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RESCISSION OF CONTRACTS.

COURT OF EQUITY WILL RESCIND CONTRACT FOR SALE OF LAND on the ground of fraud practiced on the vendee, where at the time of the sale the vendor represented to the vendee that the land was good for agricultural purposes, above the influence of the waters of the river, and not subject to overflow, except from the backwater of a certain bayou, although he knew at the time that the land was subject to general overflow, which diminished its value, the purchaser being at the time unable to ascertain from appearances whether the land was subject to overflow or not. *Alexander v. Bereford*, 538.

See VENDOR AND VENDEE, 12.

RESIDENCE.

See DOMICILE; STATUTE OF LIMITATIONS, 8.

REVERSION.

See LANDLORD AND TENANT, 8.

RIPARIAN RIGHTS.

See WATERCOURSES, 2-4.

SALES.

1. WRITING OF ITSELF IS INSUFFICIENT TO PROVE CONTRACT, if it consist merely of a letter from vendee to vendor, asking for a bill of parcels of goods; yet it may be a circumstance, in connection with other facts, tending to establish the contract. *Atwell v. Miller*, 294.
2. DELIVERY IS FACT TO BE FOUND BY JURY. *Id.*
3. CONSTRUCTIVE DELIVERY IS MIXED QUESTION OF LAW AND FACT, and the circumstances or facts necessary to constitute it must be found by the jury, as in actual delivery. *Id.*
4. VENDEES ARE LIABLE FOR VALUE OF COW UPON DELIVERY, where they directed her to be delivered at their slaughter-house, and agreed to pay as much for her as though they had previously seen her, and she was accordingly delivered, but the vendees, not finding her as good as expected, ordered her to be turned out, whereby she was lost. The delivery and sale are unconditional, and the price is conditional; but even if the sale were on condition, the vendees would be liable as bailees. *Neally v. Wilhelm*, 118.
5. WHERE GOODS ARE SOLD, SALE OF PART OF WHICH IS PROHIBITED by law, the illegality of the sale of that part can have no effect upon the sale of the other articles made at the same time for a separate, agreed, and ascertainable price, wholly distinct from the price of the prohibited articles. *Walker v. Lovell*, 605.

See AUCTIONS; CONFLICT OF LAWS, 3, 4; DAMAGES, 3; EVIDENCE, 8; EXECUTIONS, 5-15; EXECUTORS AND ADMINISTRATORS, 5-8; FRAUD, 3; FRAUDULENT CONVEYANCES, 2-5; JUDICIAL SALES; PLEADING AND PRACTICE, 18, 19; SHIPPING, 1-6; STATUTE OF FRAUDS, 1-3; TAXATION, 5-7; WILLS, 12

SALVAGE.

See SHIPPING, 6.

SCHOOLS.

1. REQUIREMENT THAT PROTESTANT OR ANY VERSION OF BIBLE BE READ IN PUBLIC SCHOOLS, and imposition of penalty of expulsion in case of refusal, is not in violation of either the letter or spirit of the constitution. *Donahoe v. Richards*, 256.
2. REQUIREMENT THAT BIBLE BE USED IN PUBLIC SCHOOLS MERELY AS READING-BOOK is not an interference with religious belief. *Id.*
3. REQUIREMENT OF USE OF PARTICULAR VERSION OF BIBLE AS READING-BOOK by pupils who may conscientiously believe it to have been erroneously made, is not an imposition of hurt, molestation, or restraint upon religious worship or sentiments, nor of a religious test; nor is it a subordination or preference of any sect or denomination to another within the constitutional provisions of Maine. *Id.*
4. STATUTORY POWERS AND DUTIES OF SUPERINTENDING SCHOOL COMMITTEE RELATIVE TO EXPULSION OF PUPILS being of a semi-judicial character, for an honest though erroneous decision they are not liable to the expelled pupil. *Id.*
5. RIGHT TO PRESCRIBE GENERAL COURSE OF INSTRUCTION AND TO DIRECT WHAT BOOKS SHALL BE USED being reposed by the legislature in a school committee, no power of revision being conferred upon any other tribunal, includes the power to make injudicious and ill-advised selections. *Id.*
6. SCHOOL COMMITTEE, BY EXPULSION OR OTHERWISE, MAY ENFORCE OBE-
DENCE TO ALL REGULATIONS within the scope of their authority, to select and prescribe what books shall be used in schools. *Id.*
7. PUPIL CAN NOT BE EXCUSED FROM READING IN DULY PRESCRIBED TEXT-BOOK because of conscientious religious scruples; and if expelled for refusal to read in such book, he has no action for damages. *Id.*

SHERIFFS.

1. SUIT UPON SHERIFF'S BOND IS PROPERLY BROUGHT in name of state. *State v. Moore*, 563.
2. SHERIFF IS LIABLE FOR ALL ACTS DONE BY HIS DEPUTY as such. *Id.*
3. SHERIFF'S BONDSMEN ARE LIABLE FOR HIS TRESPASS committed in seizing property exempt from execution. *Id.*

SHIPPING.

1. MASTER MAY SELL SHIP AND CARGO WHEN VOYAGE IS BROKEN UP by un-
governable circumstances; but the sale must be in good faith, for the
good of all concerned, and in case of supreme necessity, which sweeps
all ordinary rules before it. *Pike v. Balch*, 248.
2. MASTER OF SHIP ACTS FOR OWNERS AND INSURERS BECAUSE THEY CAN NOT
ACT for themselves, and he is not justified in selling ship or cargo except
in case of extreme necessity. *Id.*
3. MASTER MUST COMMUNICATE WITH OWNERS BY ANY AVAILABLE MEANS
in his power before selling ship and cargo in case of emergency, if this
can be done before they will probably be lost. *Id.*
4. MASTER MUST COMMUNICATE WITH OWNERS BY SUCH OTHER MEANS THAN
MAIL as may be in his power, and by which notice may be speedily com-
municated to them, before selling ship and cargo in an emergency, when

the calamity occurs in a place from which transmission of intelligence by mail would be obviously fruitless. *Id.*

5. WHETHER MASTER HAS EXERCISED SOUND JUDGMENT AND DISCRETION IN SELLING SHIP AND CARGO in an emergency without communicating with the owners is a matter of fact for the jury. *Id.*
6. ONE PURCHASING CARGO AT SALE BY MASTER, BUT ACQUIRING NO TITLE, the sale being unnecessary, has no claim for salvage when sued at law by the owner for the possession of the property, though he might have such a claim if sued in admiralty. *Id.*
7. EQUITABLE CLAIM FOR SALVAGE BY ONE PURCHASING CARGO OF WRECKED VESSEL at master's sale, but acquiring no title, the sale being unnecessary, is enforceable only in a court of admiralty jurisdiction. *Id.*
8. COMPENSATION OF SHIP-MASTER CEASES WHEN VOYAGE IS BROKEN UP BY SHIPWRECK, and he can no longer act in capacity of master. *McGivney v. Stackpole*, 245.
9. SHIP-MASTER MAY RECEIVE WAGES OF MASTER AFTER SHIPWRECK during the time he stays by the wreck rendering services to protect and secure the owner's property, until the wreck and other property of the owners are sold. *Id.*
10. SHIP-MASTER IS ENTITLED TO REASONABLE COMPENSATION AS AGENT OF OWNERS for services rendered and expenses incurred in securing and transporting or transmitting funds of the owners, after shipwreck and the termination of his services as master. *Id.*
11. SHIP-MASTER BECOMES AGENT OF OWNERS AND ALL CONCERNED AFTER INTERRUPTION OF VOYAGE by shipwreck or other casualty. *Id.*
12. SHIP-MASTER IS NOT ENTITLED TO COMPENSATION AFTER SHIPWRECK FOR SERVICES RENDERED or expenses incurred in his own behalf, and not in the implied employment of the owners. *Id.*

See COMMON CARRIERS, 14.

SLANDER.

1. WORDS ARE ACTIONABLE PER SE, when they charge a person with having committed an act for which, if the charge were true, he would be punishable criminally by indictment. *St. Martin v. Desnoyer*, 494.
2. WORDS "YOU HAVE STOLEN MY BELT" ARE ACTIONABLE PER SE. *Id.*
3. INTENT WITH WHICH WORDS WERE SPOKEN IS QUESTION THAT MAY BE LEFT TO JURY, in an action for slander, where the words are of doubtful import, with the instruction that if there was an intent to charge the crime of stealing, the words were actionable. *Id.*

STATUTE OF FRAUDS.

1. AUCTION SALES ARE WITHIN STATUTE OF FRAUDS. *Pike v. Balch*, 248.
2. SALE AT AUCTION IS NOT COMPLETE UNTIL AUCTIONEER, acting as agent of both parties, enters the purchaser's name in his memorandum-book, or until some other of the requirements of the statute of frauds be performed. *Id.*
3. ACTUAL OR MANUAL DELIVERY OF GOODS IS NOT NECESSARY IN ORDER TO GRATIFY STATUTE OF FRAUD, where they are ponderous and incapable of being handed over from one to another, and where the buyer so far accepts them as to treat them as his own; or where the delivery is sym-

- tical; or where actual delivery is impracticable, and can only be by such symbolical means as the circumstances of the case will allow. *Atwell v. Miller*, 294.
4. CONTRACT TO PURCHASE LAND, WHICH IS VOID BY STATUTE OF FRAUDS, is not rendered valid by payment of part of the price in such sense that *assumpsit* can be maintained for the balance. *Baldwin v. Palmer*, 743.
 5. PART PERFORMANCE OF PAROL CONTRACT IS ALLOWED by a court of equity to dispense with the requirements of the statute of frauds, upon the principle of preventing a fraud. A court of law has no such dispensing power. *Id.*

See MECHANIC'S LIEN, 3.

STATUTE OF LIMITATIONS.

1. STATUTES OF LIMITATIONS PERTAIN TO REMEDY, and not to the essence of the contract; and the legislature has power to regulate the remedy and modes of proceeding in relation to past as well as future contracts, provided it does not take away all remedy upon the contract, or impose upon its enforcement new burdens and restrictions which materially impair the value and benefit of the contract. *Briscoe v. Anketell*, 553.
2. PROMISE OR ACKNOWLEDGMENT IS NOT SUFFICIENT, under the Mississippi act of 1844, to prevent the running of the statute of limitations, unless it is made in writing, or on presentation of the claim sued on. *Id.*
3. PROMISE OR ACKNOWLEDGMENT OF ONE OF SEVERAL MAKERS of a promissory note does not charge the co-makers. *Id.*
4. NEW PROMISE, MADE BEFORE NOTE IS BARRED BY STATUTE OF LIMITATIONS, does not create a new and substantive contract, but is merely evidence of an existing liability. *Id.*
5. NO EQUITABLE EXCEPTIONS CAN BE INGRAFTED UPON STATUTE OF LIMITATIONS; and where there is no express exception, the court can not create one. *Butler v. Craig*, 527.
6. STATUTE PROVIDING "THAT NO WRIT OF ERROR SHALL ISSUE unless within three years from the rendition of the judgment or decree sought to be reversed," is positive and imperative, and the court can not allow any equitable exception to it. *Id.*
7. BAR OF LIMITATIONS DOES NOT ATTACH TO MORTGAGE PAID IN PART until the statutory period has run from such payment, though mortgagor may have been in possession for nearly the whole of such time prior to the payment. *Stump v. Henry*, 300.
8. "RESIDE WITHOUT STATE," IN STATUTORY PROVISION THAT STATUTE OF LIMITATIONS shall not run in favor of any one during the time he shall be absent from and reside without the state, means only an established residence or home without the state. *Bucknam v. Thompson*, 237.
9. STATUTE OF LIMITATIONS, AS BETWEEN PRINCIPAL AND SURETY, BEGINS TO RUN from the time of the payment of the debt by the surety, and not from the date of the maturity of the original contract. *Scott v. Nichols*, 503.
10. STATUTE OF LIMITATIONS WILL BAR AS TO TRUSTS CREATED BY OPERATION OF LAW, though it may not in express trusts. *McDowell v. Goldsmith*, 305.

11. STATUTE OF LIMITATIONS MAY BE RELIED UPON BY FRAUDULENT GRANTEE, where creditors of grantor impeach a deed as fraudulent in fact against them. *Id.*

See ADVERSE POSSESSION; EXECUTORS AND ADMINISTRATORS, 2; HUSBAND AND WIFE, 5; INFANCY, 3; PAYMENT, 2; STATUTES, 4.

SURETYSHIP.

1. SURETY IS DISCHARGED BY GIVING TIME TO PRINCIPAL. *Yates v. Donaldson*, 283.
2. WHERE PARTY DOES NOT APPEAR ON INSTRUMENT TO HAVE MADE HIMSELF LIABLE AS SURETY, he can not, at law, avail himself of the equities between himself and the other parties to the instrument, unless he was accepted by the creditor as a surety, or has been discharged from the first contract by agreement of the creditor. *Id.*
3. PAYEE'S EXPRESS ASSENT IS NECESSARY, when a joint and several promissory note, made in the common form by two, is delivered to him, before he can be regarded as placing himself in a situation to treat one as surety for the other. *Id.*
4. "EACH" MAKES SEVERAL AND NOT JOINT LIABILITY, where principal and surety in a recognizance to answer an indictment acknowledge themselves each to be bound in a specified sum. *State v. Davidson*, 603.
See NEGOTIABLE INSTRUMENTS, 4; STATUTE OF LIMITATIONS, 9.

STATUTES.

1. ENACTMENT OF ONE LAW IS AS MUCH REPEAL OF ALL INCONSISTENT LAWS as if those inconsistent laws had been repealed by express words. This rule prevails even under article 3, section 17, Maryland constitution, which provides that "no law or section of law shall be revived, amended, or repealed by reference to its title or section only." *Davis v. State*, 331.
 2. FAILURE TO EMBODY PROVISION IN INDIANA STATUTE OF 1843 concerning continuance of term of circuit court, when the completion of the trial of a case requires it, in the act of 1852, which was a substantial re-enactment of the former statute with respect to the courts of common pleas, is a *casus omissus*, and the provision is continued in force by the section of the act of 1852, continuing in force laws and usages relative to pleading and practice in criminal actions. *Wright v. State*, 90.
 3. CONSTRUCTION OF STATUTE, TAKING OUT LICENSE.—The act of 1821, chapter 77, provided for the appointment of an inspector of bark. The act of 1854, chapter 200, provided that any free white citizen could act as such inspector, but must first take out a license, and pay one hundred dollars therefor: *held*, that whether the act of 1854 abolished the office as it previously existed or not, the inspector appointed by the governor must take out a license. *State v. Davis*, 331.
 4. MISSISSIPPI ACT OF 1844 APPLIES TO ALL CAUSES OF ACTION existing at the time of its passage, except in cases where its application would deprive the party of all remedy, by shortening the period of limitation so as to cut off all right of action, or by destroying the validity of the evidence upon which the establishment of his demand depends. *Briecce v. Anketell*, 553.
- See CONSTITUTIONAL LAW; CRIMINAL LAW, 5, 7, 9, 11-14; ELECTIONS, 2; EVIDENCE, 18, 19; JUDGMENTS, 1; MORTGAGES, 8, 11; STATUTE OF LIMITATIONS, 8; TAXATION, 1; WILLS, 9.

TAXATION.

1. ACT AUTHORIZING LEVY FOR LEVEE PURPOSES OF UNIFORM TAX of not exceeding ten cents per acre on all lands in a certain county lying within ten miles of the Mississippi river, and a uniform tax of not exceeding five cents per acre on all lands in said county lying ten miles from said river, prescribes a rule of taxation for all the taxable lands in the county, as well for those lying beyond the range of ten miles from the river as for those lying within ten miles of it. *Williams v. Cammack*, 508.
 2. ACT WHICH EXEMPTS FROM TAXATION FOR LEVEE PURPOSES lands lying between the river and the levee does not confer exclusive privileges upon the owners of such lands, and does not violate the constitutional provisions "that all freeman are equal in rights," and "that no man or set of men are entitled to exclusive, separate, public emoluments or privileges from the community but in consideration of public services." These provisions declare that honors, emoluments, and privileges of a personal and political character are alike free and open to all the citizens of the state; but they have no reference to the private relations of the citizens, nor to the action of the legislature in passing laws regulating the domestic policy and business affairs of the people, or any portion of them. *Id.*
 3. POWER OF TAXATION AND MANNER OF EXERCISING IT BELONG TO LEGISLATURE, subject to such restrictions as the constitution imposes; and such power, while exercised within the scope of the grant, is subject alone to the legislative discretion, with which the judicial tribunals have no right to interfere, simply because in their judgment the action of the legislature is contrary to the principles of natural justice. *Id.*
 4. IMPOSITION OF TAX UPON ALL LANDS WITHIN CERTAIN COUNTY, for the purpose of establishing a work of improvement for the general good and benefit of all persons interested in such lands, is not a taking of private property for a public use, but is a legitimate exercise of the power of taxation by the legislature. *Id.*
 5. POWER TO SELL LANDS UPON FAILURE TO PAY TAX levied thereon is a mere incident to the power of taxation. *Id.*
 6. LEGISLATURE HAS POWER TO IMPOSE TAX ON LOCAL DISTRICT for the construction of local public improvements. *Id.*
 7. SALE OF LAND FOR TAXES, AFTER SERVICE OF INJUNCTION upon the commissioners who levied the tax, enjoining them "from collecting or proceeding to collect" the tax on such land, is irregular and will be set aside. *Id.*
- See CORPORATIONS, 13; EMINENT DOMAIN, 1-3; FRAUDULENT CONVEYANCES, 5.

TENDER.

TENDER ADMITS LIABILITY OR INDEBTEDNESS to the amount of the sum tendered. *Frank v. Coe*, 141.

TIME.

MONTH REFERRED TO WITHOUT DESIGNATION OF YEAR WILL BE UNDERSTOOD to be of the current year, unless from the connection it is apparent that another year is intended. A writ, therefore, made in February, returnable at the court to be held on the fourth Tuesday of April, will be understood as returnable on the fourth Tuesday of April next. *Kelly v. Gilman*, 648.

See DOMICILE, 2-4; NEGOTIABLE INSTRUMENTS, 14.

TRESPASS.

See ATTACHMENTS, 7; DAMAGES, 4-7; HIGHWAYS, 2, 5; INJUNCTIONS, 2-4; JURISDICTION, 6; MORTGAGES, 5; OFFICES AND OFFICERS, 4; PROCESS, 2; SHERIFFS, 3.

TROVER.

1. MEASURE OF DAMAGES IN TROVER IS VALUE OF PROPERTY AT TIME OF CONVERSION. *Moody v. Whitney*, 239.
2. ORIGINAL OWNER REGAINING POSSESSION OF CONVERTED PROPERTY WITH ITS ACCRETIONS after conversion may recover the value of the property and its accretions if it be again converted, either by the original converter or by a stranger. *Per Tenney, J. Id.*
3. DEMAND BY ORIGINAL OWNER AND REFUSAL BY CONVERTER, after converted property has passed into an improved condition, may be regarded as evidence of a conversion after the first taking, so as to admit of the owner recovering in trover the value of the property in its improved state. *Per Tenney, J. Id.*
4. DAMAGES IN TROVER FOR TIMBER CUT AND HAULED are confined to the value of the timber at the time of its severance from the freehold, if the possession of the converter subsequent to that time has been uninterrupted. *Id.*

See AGENCY, 1; MORTGAGES, 5.

TRUSTEE PROCESS.

See ASSIGNMENT OF CONTRACTS, 1.

TRUSTS AND TRUSTEES.

RULE THAT TRUSTEE CAN NOT PURCHASE TRUST PROPERTY FOR HIS OWN ACCOUNT forbids that a receiver, who has bought in on foreclosure of a mortgage property of which he held the equity of redemption as receiver, should be allowed to hold the property as against a *cestui que trust* who elects to claim the benefit of the purchase. *Jewett v. Miller*, 751.

See DEEDS, 4; EQUITY, 3; EXECUTIONS, 11; INFANCY, 8; JUDICIAL SALES, 6, 7; PLEADING AND PRACTICE, 14; STATUTE OF LIMITATIONS, 10.

VENDOR AND VENDEE.

1. CONTRACT FOR SALE OF LAND, WHEN VENDOR CAN NOT PUT END TO.—Where, on the sale of land, part of the purchase money is paid, and notes for the balance are executed, and the vendor gives to the vendee a bond to convey the title to him upon the punctual payment of the notes, and the vendee goes into possession, the contract is mutual and dependent, and the vendor can not put an end to it without performance or a valid offer to perform on his part. *Jackson v. Jackson*, 522.
 2. VENDOR CAN NOT ABANDON CONTRACT WITHOUT REFUNDING to the vendee the money paid by the latter in part performance of it. *Id.*
 2. WHERE VENDOR OF LAND GIVES HIS NOTES TO VENDOR, who agrees to convey the land to him upon payment of the notes, the vendor will not be decreed to convey the land until an account is taken of the amount of principal and interest due on the notes, and a day is fixed for the payment of such amount into court for the party entitled. *Id.*
- See EVIDENCE, 6; MECHANIC'S LIEN, 1-3; RESCISSION OF CONTRACTS; WILLS, 12.

VERDICT.

See JURY AND JURORS, 2-4; PLEADING AND PRACTICE, 6, 20-31.

WAIVER.

See AGENCY, 1; EXECUTIONS, 3.

WAREHOUSEMEN.

See COMMON CARRIERS, 11-16.

WARRANTY.

See DEEDS, 5, 6; EVIDENCE, 8; INSURANCE, 6, 7; SALES, 4.

WATERCOURSES.

1. OUR EARLY LEGISLATION IN REGARD TO MILLS shows that they are of great public utility. *McTavish v. Carroll*, 353.
2. MILL-OWNER MAY RECOVER DAMAGES FOR OBSTRUCTION OF STREAM through the erection below of a bridge by a railroad corporation, whereby the water is prevented from passing off from his mill as freely as before. *Blood v. Nashua & L. R. R. Corporation*, 444.
3. MILL-OWNER CAN NOT RECOVER FOR INJURIES SUSTAINED BY BEING IMPEDED and put to increased expense in getting logs to his mill, through the erection below of a bridge by a railroad corporation, whether the stream be or be not navigable for rafts and boats. *Id.*
4. RIPARIAN PROPRIETOR'S CONSTANT USE OF WATERS OF STREAM for mill purposes for fifty years or more does not deprive a proprietor above of the right to enjoy a similar use, provided that use is reasonable and does not deprive the proprietor below of its enjoyment substantially according to its natural flow, although it subjects him to such disturbance as necessarily and unavoidably follows. *Thurber v. Martin*, 468.

WILLS.

1. PERSON COMPETENT TO MAKE WILL MAY DISINHERIT HIS CHILDREN, and his motives therefor can not be called in question. *Addington v. Wilson*, 81.
2. DISINHERITING CHILDREN IS OF NO WEIGHT, further than as a circumstance to be considered with other evidence tending to show insanity or other mental defect. *Id.*
3. BELIEF IN WITCHCRAFT IS NOT ITSELF EVIDENCE OF SUCH INSANITY as disables a person to make a will. *Id.*
4. EVIDENCE THAT TESTATOR DISINHERITED CHILDREN FOR UNDUTIFUL CONDUCT, which he attributed to the fact of their being bewitched, is not evidence of his insanity. *Id.*
5. INTENTION OF TESTATOR IS HIS TESTAMENT. *Armorer v. Case*, 209.
6. DISPOSITION MADE BY TESTATOR, IN ERROR AND IN IGNORANCE OF MATERIAL FACT, WILL NOT BE ENFORCED, when, if carried into effect, his manifest intention will be defeated. *Id.*
7. VOLUNTARY EXECUTION OF WILL BY LEGATEE IS CONCLUSIVE OF HIS RIGHTS IN THE PREMISES, and the interpretation indicated by his execution will not be permitted afterwards to be changed. *Id.*

9. CONVEYANCE BY TESTATOR OF ALL LANDS OWNED BY HIM AT TIME OF MAKING HIS WILL operates as a revocation of the will, and those after acquired will not pass by the will. *Bowen v. Johnson*, 110.
9. INDIANA STATUTE THAT EVERY DEVISE OF ALL TESTATOR'S REAL ESTATE shall pass all the real estate he may be entitled to devise at his death does not apply to a residuary clause in a will where particular pieces of property are devised to particular devisees, but only to cases where the will purports to devise all the property equally or in proportions, to all the devisees named in it. *Id.*
10. DEVISE OF ALL TESTATOR'S PROPERTY TO HIS WIDOW operates only upon such interest as is his to dispose of. She is not bound to elect between the devise and her dower, but may claim dower, as such, in his lands, and take the benefit of the devise besides. *Lewis v. Smith*, 706.
11. LANDS DEVISED TO TESTATOR'S WIDOW FOR LIFE, WITH REMAINDERS OVER, had been sold under foreclosure of a mortgage made by testator during his life-time, in which she did not join: *Held*, that her claim as dowress was not barred. *Id.*
12. POWER OF SALE CONTAINED IN WILL, AUTHORIZING EXECUTORS TO SELL ALL TESTATOR'S "FAST ESTATE," does not embrace lands sold under contract by the testator, purchase money being unpaid, and the title still remaining in him. Vendor's interest in such a case is a right to the money due on the contract, which is not "fast estate," but personal. *Id.*
See CRIMINAL LAW, 21.

WITNESSES.

1. WANT OF RELIGIOUS BELIEF IN WITNESS MUST BE ESTABLISHED by other means than an examination of the witness himself. *Commonwealth v. Smith*, 478.
2. COMPLAINANT IN CHANCERY SUIT IS NOT COMPETENT WITNESS in favor of other complainants to whom he has assigned his interest, he being liable for costs in the event that the suit does not succeed, and therefore interested in the result. *Walker v. McKnight*, 190.
3. WITNESS LIABLE TO DEFENDANT ON COVENANT is competent to testify for him after being released by him. *Wilson v. Wilson*, 227.
See EQUITY, 2; EVIDENCE, 1, 6; JURISDICTION, 4



EXTRA ANNOTATION
TO
PRECEDING VOLUME

NOTES

ON THE

AMERICAN DECISIONS.

CASES IN 61 AM. DEC.

61 AM. DEC. 49, CAMPBELL v. PEOPLE, 16 ILL. 17.

Evidence admissible in homicide.

Cited in notes in 1 A. D. 373, on admissibility of declarations in prosecution for murder; 11 A. R. 776, on admissibility in homicide of evidence of character or disposition of deceased.

— Threats by deceased.

Cited in Siebert v. People, 143 Ill. 571, 32 N. E. 431; Holler v. State, 37 Ind. 57, 10 A. R. 74; Wood v. State, 92 Ind. 269; Neathery v. People, 227 Ill. 110, 81 N. E. 16,—holding that evidence of threats by deceased is admissible in a murder trial even though not shown to have been communicated to the accused; Garner v. State, 28 Fla. 113, 29 A. S. R. 232, 9 So. 835, holding the threats must have been communicated or they are inadmissible except where part of res gestæ or where they tend to show who was the aggressor; Dupree v. State, 33 Ala. 380, 73 A. D. 422, holding that threats made by deceased against accused, and communicated to him by third parties, were admissible in evidence for the prisoner; Allison v. United States, 160 U. S. 203, 40 L. ed. 395, 16 Sup. Ct. Rep. 252; Burns v. State, 49 Ala. 370; Bond v. State, 21 Fla. 738; Leverich v. State, 105 Ind. 277, 4 N. E. 852; Johnson v. State, 54 Miss. 430; Wiggins v. Utah, 93 U. S. 465, 23 L. ed. 941, 2 Cowen, Crim. Rep. 443; Tankersley v. State, 31 Tex. Crim. Rep. 595, 21 S. W. 767,—holding that in a trial for homicide, where the question whether the prisoner or the deceased commenced the encounter, which resulted in death, is in any manner of doubt, it is competent to prove threats of violence against prisoner, made by the deceased, though not brought to the knowledge of the prisoner; Davidson v. People, 4 Colo. 145; Pitman v. State, 22 Ark. 354; Roberts v. State, 68 Ala. 156; Stokes v. People, 53 N. Y. 164, 13 A. R. 492, 1 Cowen Crim. Rep. 557,—holding that under an indictment for murder it may be shown in justification that deceased made violent threats against the prisoner a short time before the occurrence of the homicide, although such threat was not communicated to the prisoner; McHugh v. Terri-

tory, 17 Okla. 1, 86 Pac. 433; *State v. Bartmess*, 33 Or. 110, 54 Pac. 167; *State v. Helm*, 92 Iowa, 540, 61 N. W. 246,—holding that uncommunicated threats are admissible where self-defense is claimed, as tending to show an intent on the part of deceased to carry them out in an encounter between himself and defendant; *State v. Williams*, 40 La. Ann. 168, 3 So. 629, holding that while as a general rule uncommunicated threats are not admissible in evidence, yet they may be admissible to explain the meaning of communicated threats as establishing the purpose with which the deceased provoked the assault and throwing light upon his acts in connection therewith; *State v. Faile*, 43 S. C. 52, 20 S. E. 798, holding that where the plea of self-defense is relied on, and there is conflict of testimony as to who was the aggressor in bringing about the difficulty uncommunicated threats made by the deceased against his slayer are competent to show his attitude toward the prisoner; *State v. Sloan*, 47 Mo. 604; *State v. McNamara*, 100 Mo. 100, 13 S. W. 938 (dissenting opinion); *State v. Alexander*, 66 Mo. 148,—holding that upon a trial for murder, evidence that deceased made threats against the defendant are admissible as conducing to show an assault upon defendant where there is other evidence tending to prove the same; *Little v. State*, 6 Baxt. 492, holding that in trials for homicide, evidence of threats made by the deceased person against the prisoner, but not communicated to him is admissible in all cases where the acts of the deceased in reference to the fatal meeting are of a doubtful character; *Shaw v. People*, 3 Hun, 272, 2 Cowen, Crim. Rep. 200, holding it admissible on a murder trial that deceased had threatened to commit suicide; *Chase v. State*, 46 Miss. 683, holding character of the deceased generally inadmissible.

Cited in reference notes in 71 A. D. 380, on admissibility of threats by deceased and known or unknown to prisoner; 4 A. S. R. 642; 7 A. S. R. 683,—on admissibility of threats and statements of deceased; 19 A. S. R. 832, on admissibility of uncommunicated threats on trial for homicide; 63 A. D. 288; 71 A. D. 168; 73 A. D. 426; 97 A. D. 174; 7 A. S. R. 579; 53 A. S. R. 890,—on evidence of threats by deceased in homicide; 112 A. S. R. 529; 117 A. S. R. 19,—on admissibility of threats in evidence in prosecution for homicide.

Cited in notes in 88 A. D. 524, on admissibility of evidence of prisoner's threats to show malicious intent in murder case; 89 A. S. R. 700, on admissibility of threats by deceased to show aggressor or self-defense; 3 L.R.A.(N.S.) 524, 525, on evidence of antecedent threats on trial for homicide; 40 L. ed. U. S. 1039, on evidence of prior threat by person killed in favor of defendant on trial for homicide.

Necessity of certainty as to guilt as between two defendants.

Cited in *State v. Bishop*, 131 N. C. 733, 42 S. E. 836, holding that where two or more are indicted for murder and the evidence shows that one of the prisoners is guilty, but fails to show which one, all must be acquitted.

Distinguished in *United States v. Camp*, 2 Idaho, 231, 10 Pac. 226, holding it proper to refuse an instruction that the jury must acquit if they believe from the evidence that the circumstances point to some other party as guilty, since if both were equally guilty it permitted an acquittal.

Excuse or justification for homicide.

Cited in *Williams v. People*, 54 Ill. 422, holding that evidence of a conspiracy to injure the defendant was admissible in a trial for murder, to excuse or palliate the conduct of the party charged.

- What the danger must amount to to sustain a justification of self defense.

Cited in *Hopkinson v. People*, 18 Ill. 264; *Schnier v. People*, 23 Ill. 17; *Maher v. People*, 24 Ill. 241; *Adams v. People*, 47 Ill. 376; *Davidson v. People*, 90 Ill. 221; *Steinmeyer v. People*, 95 Ill. 383; *Gainey v. People*, 97 Ill. 270, 37 A. R. 109; *Panton v. People*, 114 Ill. 505, 2 N. E. 411; *Walker v. People*, 133 Ill. 110, 24 N. E. 424; *Cannon v. People*, 141 Ill. 270, 30 N. E. 1027; *Enright v. People*, 155 Ill. 32, 39 N. E. 561; *Appleton v. People*, 171 Ill. 473, 49 N. E. 708; *McCoy v. People*, 175 Ill. 224, 51 N. E. 777; *Steiner v. People*, 187 Ill. 244, 58 N. E. 383; *Mackin v. People*, 214 Ill. 232, 73 N. E. 344; *Kipley v. People*, 215 Ill. 358, 74 N. E. 379; *Locher v. Kluga*, 97 Ill. App. 518; *State v. Ferguson*, 9 Nev. 106; *Barr v. State*, 45 Neb. 458, 63 N. W. 856; *Owens v. United States*, 64 C. C. A. 525, 130 Fed. 279; *Watkins v. United States*, 1 Ind. Terr. 364, 41 S. W. 1044; *Marnoch v. State*, 7 Tex. App. 269; *Roach v. People*, 77 Ill. 25,—holding that if a party is assaulted in such a way as to induce in him a reasonable and well-grounded belief that he is in danger of losing his life or suffering great bodily harm, he will, where acting under such apprehension, be justified in defending himself, whether the danger is real or only apparent; *Kinney v. People*, 108 Ill. 519; *Parrish v. Com.* 81 Va. 1; *Clifford v. State*, 58 Wis. 477, 17 N. W. 304; *Kota v. People*, 136 Ill. 655, 27 N. E. 53,—holding that while actual danger is not necessary to justify a resort to self-defense, yet the circumstances must be such as to induce a reasonable and well-grounded belief or danger of actual loss of life or great bodily harm; *Martin v. State*, 5 Ind. App. 453, 32 N. E. 594, holding threats and abusive language alone no justification for assault; *People v. McGinnis*, 234 Ill. 68, 123 A. S. R. 73, 84 N. E. 687, holding that one need not be reasonably brave or courageous before he can act in self-defense.

Cited in reference notes in 68 A. D. 486, on when homicide is justifiable on ground of self-defense, and when not; 73 A. D. 777, on existence of necessity to prevent commission of felony or great bodily harm, or reasonable belief in such necessity, as requisite to justification for homicide; 80 A. D. 400, on when homicide justifiable on ground of self-defense; 87 A. D. 502, as to what will justify plea of self-defense; 88 A. D. 75, on mere fear, apprehension, or belief being insufficient to justify killing; 5 A. S. R. 887, on right of self-defense; 5 A. S. R. 894, on self-defense in homicide; 26 A. S. R. 85, on slayer's fear as excusing homicide.

Cited in notes in 74 A. S. R. 719-720, on necessity for reasonable belief in imminent danger to make self-defense available; 6 L.R.A. 424, on right of self-defense.

Discrimination against accused because of color.

Cited in *Magness v. State*, 67 Ark. 594, 50 S. W. 554, holding that it was error on the part of the trial court to refuse leave to counsel for defendant to argue that the jury ought not to permit the race or color of the defendant to prejudice them against him, but that such error was not prejudicial where the court instructed the jury to try the cause "the same as if defendant was a white man."

61 AM. DEC. 58, CREWS v. BLEAKLEY, 16 ILL. 21.

Proof of payment under the general issue.

Cited in *Kassing v. International Bank*, 74 Ill. 16, to the proposition that

evidence tending to prove payment may be introduced under the general issue; *O'Brien v. O'Brien*, 75 Ill. App. 263, holding that under a plea of nonassumpsit a defendant is entitled to prove payment.

Cited in reference notes in 61 A. D. 631, on proof of payment under general issue; 68 A. D. 623, on admissibility of plea of payment under general issue; 93 A. D. 679, on pleading and proof of payment; 82 A. S. R. 758, on necessity of specially pleading payment.

61 AM. DEC. 62, PHINNEY v. BALDWIN, 16 ILL. 108.

Rate of interest after maturity of instrument bearing stipulated rate.

Cited in *Starne v. Farr*, 17 Ill. App. 491; *Hand v. Armstrong*, 18 Iowa, 324; *Greenhaw v. Holmes*, 8 Ariz. 94, 68 Pac. 537; *Etnyre v. McDaniel*, 28 Ill. 201,—holding that rate of interest specified will be paid until the principal is paid or judgment rendered on it, when it will bear the statutory rate; *Rentchler v. Kunkelman*, 17 Ill. App. 343, holding that a certificate of deposit will continue to bear the same rate of interest specified in the certificate until the debt is paid; *People ex rel. German Ins. Co. v. Getzendaner*, 137 Ill. 234, 34 N. E. 297, holding that where corporate bonds are issued, payable within a certain time at a fixed rate of interest with coupons attached for the annual interest up to maturity, such bonds will bear same rate after maturity, although no interest coupons are given; *Mt. Morris v. Williams*, 38 Ill. App. 401, holding that where corporate bonds are issued with a fixed interest until maturity evidenced by interest coupons until maturity, the bonds would bear interest after maturity but not the coupons; *Ohio v. Frank*, 103 U. S. 697, 26 L. ed. 531; *United States Mortg. Co. v. Sperry*, 26 Fed. 727 (reversed in 138 U. S. 313, 34 L. ed. 969, 11 Sup. Ct. Rep. 321); *Bolles v. Amboy*, 45 Fed. 168; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. ed. 681,—to the proposition that contracts drawing a specific rate of interest before maturity draw the same rate of interest afterwards; *Union Inst. for Savings v. Boston*, 129 Mass. 82, 37 A. R. 305, to the proposition that if parties contract for a higher rate of interest than the statutory rate, the interest after the breach of the contract is to be measured by the rate stated in the contract to the time of payment or of judgment; *Spencer v. Maxfield*, 16 Wis. 541, holding that stipulated rate of interest will continue so long as money is detained by debtor though obligation silent as to rate after its maturity.

Cited in reference notes in 72 A. D. 116, on whether rate of interest specified in note continues after maturity; 69 A. D. 348; 90 A. D. 484,—as to rate of interest on note after maturity.

Right to interest.

Cited in notes in 6 A. D. 190, on recovery of interest upon special contract; 76 A. D. 601, on interest as damages.

By what law a contract will be governed.

Cited in *Roundtree v. Baker*, 52 Ill. 241, 4 A. R. 597; *Pope v. Hanke*, 155 Ill. 617, 28 L.R.A. 568, 40 N. E. 839; *Schlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302; *Mumford v. Canty*, 50 Ill. 370, 99 A. D. 525,—holding that a contract will be enforced, if valid in the state where it was made, unless it is against the good morals or is repugnant to the policy of this state; *Waters v. Cox*, 2 Ill. App. 129, holding that although as to personal property the general rule may be that the law of the domicile of the contracting parties governs, still if

the contract be in relation to personal property situated at the time of contracting in a foreign jurisdiction, the *lex loci* should govern; *National Bank v. Morris*, 114 Mo. 255, 35 A. S. R. 754, 19 L.R.A. 463, 21 S. W. 511, holding that a chattel mortgage recorded in one state will be enforced in another where the chattels have been taken and sold to an innocent purchaser, when such mortgage does not contravene the public policy of the latter state.

Cited in reference notes in 66 A. D. 464, on enforced ability everywhere else of contract valid where made; 68 A. D. 662, on what law governs validity and construction of contract; 70 A. D. 66, on nation not being bound to recognize or enforce contract injurious to its own interests; 76 A. D. 616, as to what law governs validity of contract; 86 A. D. 374, as to what law governs contract; 97 A. D. 478, on contracts valid where made being valid everywhere; 99 A. D. 530, on control of law of place where made over contracts; 10 A. S. R. 698, as to what law governs the construction and enforcement of contracts.

Cited in note in 62 L.R.A. 77, on applicability of *lex fori* as to interest and usury.

61 AM. DEC. 64, ADAMS v. KING, 16 ILL. 169.

Necessity of a payee to bill or note.

Cited in *Weeger v. Mueller*, 102 Ill. App. 258, holding that an instrument is not a promissory note unless payable to bearer or some person named therein.

— Sufficiency of the designation of payee.

Cited in *Shaw v. Smith*, 150 Mass. 166, 6 L.R.A. 348, 22 N. E. 887, upholding a note which was payable to the "estate" of a certain person, deceased, or other, as a valid promissory note; *Thompson v. Rathbun*, 18 Or. 202, 22 Pac. 837, holding that an instrument with the payee's name left blank is not a promissory note unless filled up by a bona fide holder with his own name.

Cited in reference notes in 64 A. D. 186, on certainty in describing payee in note; 68 A. D. 584, on requisite certainty of designation of payee in promissory note; 32 A. S. R. 304, on certainty of payee of negotiable note; 64 A. D. 412, on *descriptio personae* as surplusage.

Cited in note in 64 A. D. 157, on validity of note made payable to agent for principal.

Necessity of sworn denial of allegations that note payable in another name was to plaintiff.

Cited in *Edgerton v. Preston*, 15 Ill. App. 23, holding that an averment that a check was made payable to the order of the plaintiffs by the style and name of the "Garden City Veneer Mills," is a traversable allegation and must be denied under oath.

61 AM. DEC. 65, CHICAGO & M. R. CO. v. PATCHIN, 16 ILL. 198.

Duty of landowner to erect fences.

Cited as changed by statute in *Bulpit v. Matthews*, 145 Ill. 345, 22 L.R.A. 53, 34 N. E. 525, holding by virtue of a statute that the owner of land can recover for damage which was occasioned by roaming cattle, even though his land was not protected by a fence.

— Duty as to fencing railroad property.

Cited in *Headen v. Rust*, 39 Ill. 186, distinguishing between the duty of a landowner to fence as a protection against animals and the modification as to

railroads or account of public convenience which prevents them from fencing their land at public crossings; *Toledo, W. & W. R. Co. v. Fergusson*, 42 Ill. 449, to the effect that there is a distinction between the duties of a railroad and a private individual in regard to the fencing of their property.

Cited in reference note in 69 A. D. 106, on duty of railroad company to keep its track inclosed.

Care required of passenger carriers.

Cited in reference notes in 63 A. D. 333, on care required of carrier of passengers; 71 A. D. 243, on liability of passenger carriers only where their negligence is proximate cause of injury.

Duty of property owner as to trespassing animals.

Cited in *Noblesville Gas & Improv. Co. v. Teter*, 1 Ind. App. 322, 27 N. E. 635, holding that a party is not liable for an injury received by a cow while he is driving her from his property, using no unnecessarily violent means.

Degree of care required as to animals on railroad right of way.

Cited in *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541, refusing to sustain an instruction which stated that a railroad was bound to use ordinary care to protect stock which had wandered upon its track; *Union P. R. Co. v. Rollins*, 5 Kan. 167, holding that a railroad company is liable for injury to cattle allowed to run on a railroad only in case of the most gross and wanton negligence; *Little Rock & Ft. S. R. Co. v. Trotter*, 37 Ark. 593, holding that the engineer is not required to stop a train or slacken its speed the instant stock is discovered on the track where there is reason to suppose that they will leave the track; *Louisville & F. R. Co. v. Ballard*, 2 Met. (Ky.) 177, holding that it is the duty of a railroad company to avoid unnecessary injury to animals straying upon the road; *Stucke v. Milwaukee & M. R. Co.* 9 Wis. 202, holding that where cattle accidentally get on the railroad track and are killed, the company will be liable if they are wantonly and unnecessarily destroyed.

Cited in reference notes in 64 A. D. 674, on railroad's liability for injuries to trespassing animals; 75 A. D. 212, on liability of railroad company for injury to animals trespassing on track where it is bound to fence and maintain cattle guards; 66 A. D. 574; 89 A. D. 471,—on railroad's liability for killing animals on its track; 71 A. D. 336; 96 A. D. 681,—on liability of railroad company for killing animals trespassing on track.

Cited in note in 27 L.R.A. 187, on liability of railroad company for wilful and malicious acts of servant.

Disapproved in *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190, holding the railroad company liable for injury to cattle on the track where by the exercise of reasonable care the injury could have been avoided.

Cited as overruled in *Chicago & N. W. R. Co. v. Smedley*, 65 Ill. App. 644, holding that a railroad is liable for a failure to use reasonable care to avoid injury to trespassing animals after the discovery of their presence provided such care would have prevented the injury; *Shuman v. Indianapolis & St. L. R. Co.* 11 Ill. App. 472; *Illinois C. R. Co. v. Middlesworth*, 46 Ill. 494,—holding that a railroad is liable for the killing of trespassing stock when the injury could have been prevented by the exercise of ordinary care.

—On unfenced track.

Cited in *Great Western R. Co. v. Thompson*, 17 Ill. 131; *Illinois C. R. Co.*

v. Wren, 43 Ill. 77; Illinois C. R. Co. v. Reedy, 17 Ill. 580,—holding a railroad is not liable for the destruction of stock on its tracks unless its servants were guilty of gross or wilful negligence even though its tracks were unenclosed; Galena & C. Union R. Co. v. Jacobs, 20 Ill. 478, to the same effect; Illinois C. R. Co. v. Phelps, 29 Ill. 447, holding a railroad which is not required to fence its road is only liable for injuries to animals which are caused by wilful or gross negligence.

Cited in reference note in 69 A. D. 106, on railroad company's liability for injuries to trespassing animals where no fence is required by law.

Burden of proving negligence in killing of stock on railroad track.

Cited in Illinois C. R. Co. v. Reedy, 17 Ill. 580, holding that the burden of proof is on the plaintiff to show negligence in an action against a railroad to recover for the destruction of stock by its train; Chicago, R. I. & P. R. Co. v. Huggins, 4 Ind. Terr. 194, 69 S. W. 845, holding that negligence in the management and running of a train is not made out by proof of the killing of stock by it; Atchison, T. & S. F. R. Co. v. Walton, 3 N. M. 530, 9 Pac. 351; Walsh v. Virginia & T. R. Co. 8 Nev. 110,—holding that the mere killing of a domestic animal by a railroad train is not evidence of negligence; Walsh v. Virginia & T. R. Co. 8 Nev. 110, holding that in railroad cases it is necessary to show negligence to sustain an action for damages for injury to stock; Atchison, T. & S. F. R. Co. v. Betts, 10 Colo. 431, 15 Pac. 821, to point that fact of killing of valuable animal by railroad company is not prima facie evidence of negligence.

Cited in reference notes in 70 A. D. 223, as to how far negligence will be presumed from fact of injury; 68 A. S. R. 929, on presumption of negligence from killing of stock on railroad track.

Cited in notes in 58 A. R. 704, on presumption of negligence of railroad company from fact of killing of animal; 2 L.R.A. 821, on effect of happening of accident to establish negligence; 15 L.R.A. 39, on presumption of negligence against railroad company from injury to live stock.

Title acquired in railroad right of way.

Cited in Walker v. Illinois C. R. Co. 215 Ill. 610, 74 N. E. 812, holding that a grant of a right of way to a railroad is absolute for the purposes for which it was conveyed so long as it is used for those purposes, even though the language fails to convey a fee; Illinois C. R. Co. v. Houghton, 126 Ill. 233, 9 A. S. R. 581, 1 L.R.A. 213, 18 N. E. 301, holding that a similar conveyance, though not conveying a fee, will operate to convey a right of possession which will be wholly inconsistent with any subsequent possession by the grantor for grazing purposes; Illinois C. R. Co. v. Houghton, 126 Ill. 233, 9 A. S. R. 581, 1 L.R.A. 213, 18 N. E. 301 (dissenting opinion), contending that the doctrine that the interest of a railroad in its right of way is a sort of ownership in fee is too broadly stated; Edgerton v. Huff, 26 Ind. 35, to the proposition that a railroad company is entitled to the exclusive use of the track; Uhl v. Ohio River R. Co. 51 W. Va. 106, 41 S. E. 340 (dissenting opinion), maintaining that the possession of a railroad in the right of way is as absolute as if it owned the land in fee; Vermilya v. Chicago, M. & St. P. R. Co. 66 Iowa, 606, 55 A. R. 279, 24 N. W. 234, holding that a deed conveying land to a railroad company "for all purposes connected with the construction, use and occupation of said railroad," did not confer on the railroad the right to take sand from the right of way to construct a roundhouse.

Cited in reference notes in 66 A. D. 574, on exclusive right of railroad company to use of land taken for its road; 93 A. D. 730, on interest acquired by condemnation of right of way.

Cited in note in 3 L.R.A. 176, on title to land taken for public use.

Contributory negligence as defense.

Cited in *Chicago City R. Co. v. Canevin*, 72 Ill. App. 81, holding that there can be no recovery for injuries if the plaintiff's negligence contributed in any degree to the injury; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335, 5 A. R. 201, to same effect; *Jackson v. Chicago & N. W. R. Co.* 36 Iowa, 451, holding that a party is not liable for negligence unless the injury complained of is caused by such negligence; *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N. E. 456, holding that there can be no recovery for negligence as a general rule unless the plaintiff alleges and proves that he was exercising due or ordinary care at the time of his injury; *Chicago City R. Co. v. McDonough*, 125 Ill. App. 223 (dissenting opinion), contending the plaintiff's intestate was guilty of negligence which contributed to his injury so as to bar a recovery; *Illinois C. R. Co. v. Goodwin*, 30 Ill. 117, holding that negligence on the part of the plaintiff in an action to recover for injuries to stock will render a defendant railroad liable only for gross negligence which implies a wilful injury.

Cited in reference notes in 63 A. D. 333, on contributory negligence as affecting right to recover for injury; 64 A. D. 675, on contributory negligence relieving defendant; 64 A. D. 771, on contributory negligence affecting injured passenger's right of recovery; 67 A. D. 327, on doctrines of negligence and contributory negligence as applied to railroad companies; 71 A. D. 239, on right of person guilty of contributory negligence proximately causing injury to recover; 78 A. D. 328, on contributory negligence as bar to recovery of damages; 82 A. D. 540, on effect of mutual negligence upon rights of parties to recover for injuries; 19 A. S. R. 179, on contributory negligence in permitting animals on railway track.

Cited in notes in 53 A. D. 388, on effect of contributory negligence of party injured on his right of action; 56 A. D. 474, on contributory negligence of plaintiff defeating action.

Limited in *Galena & C. Union R. Co. v. Jacobs*, 20 Ill. 478; *Chicago, B. & Q. R. Co. v. Dougherty*, 12 Ill. App. 181,—holding that slight negligence of the plaintiff which contributed to the injury will not bar a recovery provided the negligence of the defendant also contributed to the injury and was gross in comparison with that of the plaintiff.

Speed and punctuality in running trains.

Cited in *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242, 75 A. D. 98, holding that speed in the transit and punctuality in the arrival of trains are required and are lawful.

Duty of owner of cattle.

Cited in reference notes in 72 A. D. 720, on rights and obligations of railroad and cattle owner; 73 A. D. 562, as to where common-law rule requiring owner to keep beast within his own close is in force; 73 A. D. 562, as to whether owner of animals is guilty of negligence in permitting them to run at large; 96 A. D. 680, on liability of owner of trespassing cattle who fails to keep them on his own land.

61 AM. DEC. 73, BATES v. PRICKET, 5 IND. 22.**Presumption as to contract of endorsement.**

Cited in *Dawson v. Vaughan*, 42 Ind. 395, holding that undated indorsements are presumed to be made at date of note; *Rosenthal v. Rambo*, 28 Ind. App. 265, 62 N. E. 637, holding that note indorsed in blank will be presumed to have been transferred on day of its date.

How long presumption remains available.

Cited in *Adams v. Slate*, 87 Ind. 573, holding that presumption remains available to party in whose favor it arises until overcome by opposing evidence or countervailing presumption; *Munice Nat. Bank v. Brown*, 112 Ind. 474, 14 N. E. 358, holding that presumption in favor of official acts of notary makes out prima facie case which stands until overthrown; *Briggs v. Fleming*, 112 Ind. 313, 14 N. E. 86, holding that presumption that mortgage was executed and delivered on day of its date stands unless removed by proof; *Hilgenberg v. Northup*, 134 Ind. 92, 33 N. E. 786, holding same as to presumption that one having color of title to land made improvements thereon in good faith; *Old Nat. Bank v. Findley*, 131 Ind. 225, 31 N. E. 62, holding same as to presumption that grantee of one conveying in fraud of creditors acted in good faith; *Louisville, N. A. & C. R. Co. v. Thompson*, 107 Ind. 442, 57 A. R. 120, 8 N. E. 18, holding that where another's pass was found in pocket of one killed while a passenger, burden is on company to show he was trying to ride on it; *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind. 264, 54 A. R. 312, 3 N. E. 836, holding that where passenger proves he was injured by car's leaving track because of broken rail, company must show that accident was not preventable by use of human skill, prudence, and foresight; *Steinkuehler v. Wempner*, 169 Ind. 154, 15 L.R.A.(N.S.) 673, 81 N. W. 482, holding general presumption of sanity sufficient to make out prima facie case for proponents of will in proving their testator sane; *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700, holding that before voters can be compelled to make disclosures presumption that they acted lawfully must be first overcome; *Williams v. Fourth Nat. Bank*, 15 Okla. 477, 2 L.R.A.(N.S.) 334, 82 Pac. 496, 6 A. & E. Ann. Cas. 970, holding that statutory presumption not intended to be conclusive may be rebutted.

Cited in reference notes in 91 A. D. 126, on rule that presumption is available until overcome by evidence; 97 A. D. 530, on presumption standing until overcome by proof.

61 AM. DEC. 74, GRANT v. LEXINGTON F. L. & M. INS. CO. 5 IND. 23.**Limitation clause in insurance contracts.**

Cited in *Amesbury v. Bowditch Mut. F. Ins. Co.* 6 Gray, 596, holding provision in by-laws of mutual insurance company that actions on policies must be brought within four months after determination of loss, valid; *Eagle Ins. Co. v. Lafayette Ins. Co.* 9 Ind. 443, applying contrary principle; *Brown v. Roger Williams Ins. Co.* 5 R. I. 394, holding policy of insurance providing in effect that no suit should be brought thereon after expiration of twelve months from time of loss, valid; *Mickey v. Burlington Ins. Co.* 35 Iowa, 174, 14 A. R. 494, holding insurer estopped to plead delay on assured's part where it promised to consider proofs submitted and notify assured of its conclusions thereon; *Hartford F. Ins. Co. v. Amos*, 98 Ga. 533, 25 S. E. 575, holding failure to sue on

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policy within time allowed excused where delay was procured by insurer; *Fullan v. New York Union Ins. Co.* 7 Gray. 61, 66 A. D. 462; *Merchants Mut. Ins. Co. v. Lacroix*, 35 Tex. 249, 14 A. R. 370 (dissenting opinion),—upon same point; *Steel v. Phenix Ins. Co.* 2 C. C. A. 463, 7 U. S. App. 325, 51 Fed. 715; *St. Paul F. & M. Ins. Co. v. McGregor*, 63 Tex. 399,—holding action not barred by failure to sue within time allowed by policy if delay was caused by agent's promise that loss would be paid; *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019; *Mickey v. Burlington Ins. Co.* 35 Iowa, 174, 14 A. R. 494; *Martin v. State Ins. Co.* 44 N. J. L. 485, 43 A. R. 397,—holding that if insurer delay assured's action by holding out hope of amicable adjustment he cannot take advantage of such delay; *Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11, 4 L.R.A. 458, 11 S. W. 1016, holding limitation clause in policy followed by clause against waiver of any of policy's conditions unless expressed in writing, waived where company so acted as to induce assured to believe loss would be adjusted without suit.

Cited in reference notes in 66 A. D. 464, on validity of limitation in policy as to time within which suit may be brought; 86 A. D. 371, on validity of conditions in insurance policy which require as prerequisite of recovery that action be brought thereon in limited time; 25 A. R. 107, as to what excuses compliance with clause in insurance contract limiting time of commencing action thereon.

Cited in note in 8 L.R.A. 769, on rights under insurance policy limiting right of action to period less than that of statute of limitations.

Liberal construction in favor of assured.

Cited in *Wright v. Sun Mut. Ins. Co.* Fed. Cas. No. 18,095, to point that contracts of insurance are to be construed liberally; *Mark v. Aetna Ins. Co.* 29 Ind. 390, to point that exceptions are to be strictly construed against underwriters; *Supreme Tent, K. of M. v. Volkert*, 25 Ind. App. 627, 57 N. E. 203, holding that where by-law of fraternal insurance company and certificate of membership conflict, a construction favorable to insured will be made.

Cited in reference notes in 72 A. D. 331, on construing exceptions in fire insurance policy strictly against insurer; 75 A. D. 563, on liberal construction of insurance policies in favor of assured; 80 A. D. 579, on interpretation of contract of insurance; 89 A. D. 466, on liberal construction of insurance policies in favor of insured; 93 A. D. 298, on rules for construing insurance contract.

Cited in note in 14 E. R. C. 44, on construction of general terms describing the adventure insured in contract of insurance.

Grounds for avoiding policy.

Cited in *Stout v. Commercial Union Assur. Co.* 11 Biss. 309, 12 Fed. 554, holding policy covering stock of wholesale groceries not avoided because quantity of saltpeter was carried though printed stipulation in policy provided it should be void if assured kept any such article; *Phoenix Ins. Co. v. Benton*, 87 Ind. 132, holding that misstatement in application for insurance as to amount of prior insurance renders policy void from beginning; *Continental Ins. Co. v. Vanlue*, 126 Ind. 410, 10 L.R.A. 843, 26 N. E. 119, holding mortgage upon property conditioned to secure maintenance for mortgagee and which is to be operative only when such maintenance is not furnished, an incumbrance within meaning of insurance policy providing that incumbrances upon property shall avoid policy; *Peoria Marine & F. Ins. Co. v. Walser*, 22 Ind. 73, holding it essential to recovery that provision in marine policy requiring master and crew

to repair to nearest magistrate and make statement of loss be complied with and fact that they did not know ship was insured unavailing.

Cited in reference notes in 71 A. D. 515, on necessity that vessel be officered and manned while in port to render her seaworthy; 79 A. D. 547, on necessity that warranty in insurance policy be strictly fulfilled; 86 A. D. 371, on effect of breach of warranty on insurance policy.

Waiver of conditions in policy.

Cited in *Behler v. German Mut. F. Ins. Co.* 68 Ind. 347, holding requirement that premium note be first paid waived by insurer's delivering policy to assured; *German-American Ins. Co. v. Yeagley*, 163 Ind. 651, 71 N. E. 897, 2 A. & E. Ann. Cas. 275, holding that recovery can be had on policy of insurance on personalty requiring waiver of its conditions to be in writing and which contained condition that it was to be void if property were incumbered, where insurer issued policy and accepted premium knowing of the incumbrance; *Harris v. Iron City Mut. F. Ins. Co.* 3 Lack. L. News, 258, holding that assurances of local agent and special agent who adjusted loss that loss would be paid without suit was waiver of limitation clause.

Cited in reference notes in 66 A. D. 464, on estoppel to set up stipulation in policy limiting time for suit; 23 A. S. R. 618, on waiver of condition in policy as to time of instituting suit.

Cited in note in 9 L.R.A.(N.S.) 656, on waiver of short-limitation period in insurance policy by efforts at compromise extending beyond its termination.

How far local customs are operative.

Cited in *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612, holding that commercial usages to affect contracts need not be coextensive with state; *Traders' Ins. Co. v. Dobbins*, 114 Tenn. 227, 86 S. W. 383, holding custom of hardware dealers of particular locality to keep dynamite in stock binding on insurer.

Cited in reference note in 86 A. D. 500, on usage as affecting construction of contract of insurance.

Distinguished in *Harper v. Pound*, 10 Ind. 32, holding local usage that "to clear" land meant the removing of timber eighteen inches and under not provable. **Insurance company's liability under exemption in policy.**

Cited in reference note in 88 A. D. 248, on insurance company's liability under exemption in policy.

61 AM. DEC. 81, ADDINGTON v. WILSON, 5 IND. 137.

Continuation of term of court.

Cited in reference note in 61 A. D. 95, on continuation of term of court.

Mental capacity to make will.

Cited in *Kingsbury v. Whitaker*, 32 La. Ann. 1055, 36 A. R. 278, to point that one may have capacity to make will though he be given over to eccentricities of conduct; *Coryell v. Stone*, 62 Ind. 307, sustaining will attacked on ground that testator lacked testamentary capacity and was subjected to undue influence; *Re Vedder*, 6 Dem. 92, holding fact that aged testator believed in witchcraft, talked of buried treasures and exhibited other eccentricities, does not necessarily incapacitate her from making will; *Wait v. Westfall*, 161 Ind. 648, 68 N. E. 271, holding that one's insane delusions respecting hidden treasure do not affect his testamentary capacity unless they influence him in disposing of his property; *Durham v. Smith*, 120 Ind. 463, 22 N. E. 333, hold-

ing instruction that one of "unsound" mind is incapable of making will whether or not such unsoundness affects disposition of property, erroneous; citing annotation also on this point.

Cited in reference notes in 62 A. D. 422, as to what constitutes testamentary capacity; 62 A. D. 422, on disinheriting child as showing want of testamentary capacity; 71 A. D. 153, on insanity, imbecility, or dotage to invalidate will; 84 A. D. 240, on testator's disinheritance of relatives as evidence of mental incapacity; 90 A. D. 689, on sufficiency of extreme old age to render testator incompetent; 44 A. S. R. 687, on effect of insane delusions on testamentary capacity.

Cited in notes in 12 L.R.A. 162, on insane delusions affecting testamentary capacity; 16 L.R.A. 677, on belief in spiritualism, witchcraft, etc., as affecting capacity to make will or deed.

—To make contracts.

Cited in *Johnson v. Johnson*, 10 Ind. 387, holding one who believes his wife to be bewitched not necessarily incompetent to make contracts.

—To commit crime.

Cited in *Goodwin v. State*, 96 Ind. 550, to point that fact that one suffers from delusions does not necessarily relieve him from criminal responsibility for his acts.

Limits upon power to dispose of property by will.

Cited in *Noel v. Ewing*, 9 Ind. 37, to point that father may entirely disinherit his children; *Dean v. Lyon*, 8 Ind. 71, holding that husband may dispose by will of all his personal estate except what statute expressly gives to widow.

What are insane delusions.

Cited in notes in 63 A. S. R. 91-92, on insane delusions; 37 L.R.A. 272, 273, on belief in witchcraft as insane delusion.

61 AM. DEC. 85, PERSONS v. McKIBBEN, 5 IND. 261.

Ratification of acts.

Cited in *Lyons v. Wait*, 51 N. J. Eq. 60, 26 Atl. 334, holding that subsequent ratification gives agency force and effect of original express authority; *Schneck v. Jeffersonville*, 152, Ind. 204, 52 N. E. 212, holding that legislature may legalize town's unauthorized bond issue and validate it ab initio; *Johnston v. Milwaukee & W. Invest. Co.* 49 Neb. 68, 68 N. W. 383, holding it competent for defendant in replevin to show that subsequent to suit brought plaintiff ratified his agent's unauthorized sale.

Cited in reference notes in 63 A. D. 704; 69 A. D. 272,—on effect of ratification of agent's act; 71 A. D. 692, on ratification of acts; 86 A. D. 158, on ratification of unauthorized acts; 12 A. S. R. 134, on ratification of unauthorized act made during pendency of an action; 27 A. S. R. 640, on ratification of agent's unauthorized act.

Cited in note in 5 A. S. R. 114, on effect of ratification of contract.

Disapproved in *Graham v. Williams*, 114 Ga. 716, 40 S. E. 790, holding that one cannot after institution of suit deprive defendant of his defense thereto by having third party ratify insufficient deed previously executed by agent citing annotation also on this point.

Effect of admission of immaterial evidence.

Cited in *Phipps v. Hully*, 18 Nev. 133, 1 Pac. 669, refusing to reverse judg-

ment because of admission of improper evidence, not prejudicial to complainant.

Cited in reference notes in 63 A. D. 434, on nonprejudicial error as ground for reversal; 81 A. D. 213, on errors not prejudicial, insufficient ground for new trial.

Right of action where special contract not complied with.

Cited in *Adams v. Cosby*, 48 Ind. 153, holding that one not complying strictly with terms of special contract may recover upon implied contract to extent that contractee is benefited.

Cited in notes in 19 A. D. 277, on quantum meruit under special contract; 58 A. D. 622, on apportionment of contracts and recovery for part performance thereof.

Distinguished in *Eyser v. Weissagerber*, 2 Iowa, 463, holding that one declaring on special contract with terms of which he has not complied cannot recover as upon common counts.

61 AM. DEC. 90, WRIGHT v. STATE, 5 IND. 290.

What constitutes former jeopardy.

Cited in *Re McClaskey*, 2 Okla. 568, 37 Pac. 854, holding that jeopardy does not attach until one is placed on trial before court of competent jurisdiction; *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118 (dissenting opinion), upon point that one is not put in jeopardy if term of court comes to end before trial is finished; *Morgan v. State*, 13 Ind. 215, holding prisoner entitled to discharge where pending trial court made void order of adjournment and thereafter jury returned verdict of guilty; *Logg v. People*, 8 Ill. App. 99, holding where judgment of guilty upon second count in indictment was reversed on appeal and second trial resulted in verdict of guilty on first count such second verdict a nullity; *Hensley v. State*, 107 Ind. 587, 8 N. E. 692, to point that where state against defendant's objection and after trial begun dismisses one count in indictment it may have retrial on other count substantially similar to former.

Cited in reference note in 77 A. D. 696, on plea of once in jeopardy.

Cited in note in 1 L.R.A. 451, as to when jeopardy attaches.

— Discharge of jury generally.

Cited in *Gillespie v. State*, 168 Ind. 298, 80 N. E. 829, holding that jeopardy attaches when accused is given in charge to regular jury on legal indictment and jury is unnecessarily discharged; *People v. Webb*, 38 Cal. 467, to point that discharge of jury duly sworn and impanelled for any cause within control of court operates as acquittal of one placed on trial before it upon valid indictment; *Joy v. State*, 14 Ind. 139, holding that improper discharge of jury after one has been placed on trial before it upon valid indictment operates as acquittal; *State v. Calendine*, 8 Iowa, 288, holding that court's dismissing indictment and discharging jury upon state's witness being objected to because his name was not endorsed on indictment bars subsequent prosecution; *Pizano v. State*, 20 Tex. App. 139, 54 A. R. 511, holding further prosecution barred where state as trial was about to begin asked for postponement because of absence of witnesses and court against defendant's objection discharged jury; *State v. Nelson*, 19 R. I. 467, 61 A. S. R. 780, 33 L.R.A. 559, 34 Atl. 990, holding that discharge of jury against defendant's objection merely upon information communicated by telephone to court officer that juror was sick bars further

prosecution; *Whitten v. State*, 61 Miss. 717, holding that court's discharging jury at close of term without consent of accused bars subsequent prosecution where it appeared it had power to continue case; *Nolan v. State*, 55 Ga. 521, 21 A. R. 281, holding that where jury were discharged during prisoner's involuntary absence after finding him guilty and thereafter verdict was set aside for such error he may plead such matter in bar of further prosecution; *Cheadle v. State*, 110 Ind. 301, 59 A. R. 199, 11 N. E. 426, as to whether discharge of jury pending trial because accused absented himself operates as acquittal; *Adams v. State*, 99 Ind. 244, holding accused entitled to be discharged where after jury was sworn and juror's incompetency in not being freeholder was disclosed, court discharged jury though accused declined to have any change made; *Ex parte Ulrich*, 42 Fed. 587, holding one put jeopardy where after trial began judge adjourned case to take up another and on adjournment day discharged jury because he was ill; citing annotation also on this point; *Hovey v. Sheffner*, 16 Wyo. 254, 125 A. S. R. 1037, 15 L.R.A.(N.S.) 227, 93 Pac. 305, holding that discharge of jury on Sunday will not entitle one subsequently committed for further trial to be discharged on habeas corpus.

Cited in reference notes in 72 A. D. 201, on whether discharge of jury in criminal case equivalent to acquittal; 91 A. D. 778, on effect of unnecessary discharge of jury in criminal case; 38 A. S. R. 151, on wrongful discharge of jury as acquittal; 3 A. S. R. 215, on when discharge of jury with consent of accused discharges from indictment.

— Discharge for inability to agree.

Cited in *Ex parte Maxwell*, 11 Nev. 428, holding that jury's inability to agree may be ground for its discharge; *State v. Walker*, 26 Ind. 346, holding that where jury were discharged against prisoner's objection for inability to agree after being out nineteen hours second trial may be had; *State v. Nelson*, 26 Ind. 366, holding same where jury were out seventy-two hours; *Powell v. State*, 17 Tex. App. 345, holding discharge of jury after being out without agreement for three hours and half tantamount to acquittal; *Miller v. State*, 8 Ind. 325, holding that court's discharging jury without prisoner's consent because of their inability to agree after being out twelve hours operates as acquittal; *Reese v. State*, 8 Ind. 416, applying same rule where jury were discharged on last day of term; *Ex parte McLaughlin*, 41 Cal. 211, 10 A. R. 272, holding one not entitled to discharge on habeas corpus because jury impanelled to try him was discharged by court against his will because of its inability to agree on verdict; *Ex parte Tice*, 32 Or. 179, 49 Pac. 1038, releasing prisoner upon habeas corpus where on Sunday jury before which he was tried was discharged for inability to agree and accused committed to sheriff's custody.

Cited in note in 11 L.R.A.(N.S.) 180, on how long a jury will be permitted to deliberate before ordering a mistrial.

Distinguished in *Morgan v. State*, 12 Ind. 448, holding that order of adjournment to day in vacation made upon jury's reporting their inability to agree void where six hours of term yet remained.

What reviewable on habeas corpus.

Cited in *Farmer v. Lewis*, 92 Ind. 444, 47 A. R. 153, holding that one's guilt or innocence cannot be inquired into in habeas corpus proceedings.

Right to discharge on habeas corpus.

Cited in *Smith v. Hess*, 91 Ind. 424, holding judgment of court of competent

jurisdiction valid on its face and valid commitment under it, an unanswerable return to writ of habeas corpus; *Koepke v. Hill*, 157 Ind. 172, 87 A. S. R. 161, 60 N. E. 1039, holding that writ of habeas corpus will not lie to release one held under conviction by justice for violating unconstitutional ordinance; *Re Mahany*, 29 Colo. 442, 68 Pac. 235, denying writ of habeas corpus to one remanded for new trial where trial court over his objection set aside jury's verdict finding him guilty; *Wright v. State*, 7 Ind. 324, holding that remedy of one improperly held after being put on trial and jury discharged is not by habeas corpus but by motion in court where indictment is pending; *Gillespie v. Rump*, 163 Ind. 457, 72 N. E. 138; *Ex parte Phillips*, 7 Kan. 48; *State ex rel. Noonan v. Hennepin County*, 24 Minn. 87; *Ex parte Maxwell*, 11 Nev. 428,—to same effect; *Wentworth v. Alexander*, 66 Ind. 39, to same point.

Distinguished in *Re Crow*, 60 Wis. 349, 19 N. W. 713, holding that court commissioner may issue writ of habeas corpus and discharge one held after expiration of term fixed by his sentence; *Miller v. Snyder*, 6 Ind. 1, holding that where one was committed to jail by court acting within its jurisdiction and was thereafter tried and committed to state penitentiary by court acting without its jurisdiction, it is proper upon habeas corpus to direct that prisoner be taken from penitentiary and confined in jail.

Court to which application for habeas corpus made.

Cited in *Re Executive Communication*, 14 Fla. 289, to point that one improperly held in confinement after jury is discharged before verdict must apply for relief to court in which indictment is pending.

Right to continue trial beyond term.

Cited in *Bridgewater v. Bridgewater*, 62 Ind. 82, holding that trial commenced during term may be continued beyond it if necessary to complete trial.

Continuing of statute in force.

Cited in *Opp v. Ten Eyck*, 99 Ind. 345, holding that under statute continuing in force after adoption of code laws relating to pleading and practice statute relating to appeal bonds remained in force; *Walker v. State*, 102 Ind. 502, 1 N. E. 856, holding that one statute was inferentially and constructively continued in force by another.

Provision controlling amendment of statute.

Cited in reference note in 93 A. D. 198, on what provision controls amendment of statute.

Repeal of statute by implication.

Cited in reference note in 73 A. D. 380, on repeal of statute by implication.

61 AM. DEC. 96, TABER v. HUTSON, 5 IND. 322.

What constitutes error in respect to instructions.

Cited in *Wolf v. State*, 11 Ind. 231, holding it no error to refuse instructions substantially comprised in others given; *Nelson v. Hardy*, 7 Ind. 364, to same effect; *Ewing v. Gray*, 12 Ind. 64, holding that refusal of instruction virtually covered in court's charge cannot be assigned as error; *Johnson v. Vuthrick*, 7 Ind. 137, holding that giving of erroneous instruction applicable to issues will, in absence of showing to contrary, be presumed prejudicial and warrant reversal.

Cited in reference notes in 64 A. D. 505, on refusal of instruction already virtually given as ground for reversal; 66 A. D. 106, on duty of court to repeat instructions already given; 66 A. D. 305, on refusal to repeat instructions

already given as ground for reversal; 69 A. D. 226, as to whether refusal to repeal instructions already given in substance is ground for reversal.

Cited in note in 99 A. D. 127, on when instructions requested should be refused.

Time to take objection to instructions.

Cited in reference note in 79 A. D. 438, on when objection that instructions were not reduced to writing comes too late.

Cited in note in 99 A. D. 132, on time when objection to instructions should be taken.

Damages in actions of tort.

Cited in *Kepler v. Hyer*, 48 Ind. 499, holding that in action for personal injury to woman injury to her reputation no basis on which to estimate damages.

—Mental anguish.

Cited in *Cox v. Vanderkleed*, 21 Ind. 164, holding that in action for assault and battery jury may in assessing damages consider injuries inflicted, expenses incurred, loss of time and hearing, and plaintiff's peace of mind and individual happiness; *Wright v. Compton*, 53 Ind. 337, holding that in personal injury action suffering and anxiety of mind caused by corporal injuries may be considered in estimating damages; *Indiana Car Co. v. Parker*, 100 Ind. 181, holding it proper in personal injury action to consider pain and suffering endured by injured party, expenses incurred, and injury's effect upon his earning capacity; *Heltonville Mfg. Co. v. Fields*, 138 Ind. 58, 36 N. E. 529, holding in personal injury action damages for resulting mental disability recoverable without special allegation; *Morely v. Dunbar*, 24 Wis. 183, holding it proper to allow damages for mental suffering arising from bodily injuries complained of in action for assault and battery; *Wolf v. Trinkle*, 103 Ind. 355, 3 N. E. 110, holding that female plaintiff in action for indecent assault and battery may have damages for anguish of mind, sense of shame, humiliation and loss of honor; *McCarty v. Kinsey*, 154 Ind. 447, 57 N. E. 108, to point that in action for assault and battery accompanied by slander plaintiff may recover for humiliation, shame, loss of good name and honor, and for mental suffering; *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 45 A. R. 464, holding it proper in assessing damages to consider humiliation and degradation suffered by one wrongfully ejected from train; *Louisville, N. A. & C. R. Co. v. Goben*, 15 Ind. App. 123, 42 N. E. 1116; *Chicago, St. L. & P. R. Co. v. Holdridge*, 118 Ind. 281, 20 N. E. 837,—holding to same effect; *Cleveland, C. C. & St. L. R. Co. v. Beckett*, 11 Ind. App. 547, 39 N. E. 429, in same connection.

Cited in note in 12 L.R.A. 698, on pain and suffering as element of damages for personal injury.

Right to exemplary damages.

Cited in *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, to point that punitive damages cannot be recovered where civil wrong is also punishable criminally; *Baldwin v. Fries*, 46 Mo. App. 288, holding that exemplary damages may be allowed in civil action for wrong punishable criminally; *State ex rel. Scobey v. Stevens*, 103 Ind. 55, 53 A. R. 482, 2 N. E. 214, upholding statute making it misdemeanor for public officer to take excessive fee and making him liable in five times the excess to party injured; *Morford v. Woodworth*, 7 Ind. 83, holding one injured by falling into excavation not entitled to exemplary damages in action on case where it appeared accident would not have occurred had defendant's instructions to his workmen been followed.

Cited in reference note in 90 A. D. 343, as to propriety of awarding exemplary damages.

Cited in note in 50 A. D. 770-771, on exemplary damages for acts punishable criminally.

— **For assault and battery.**

Cited in *Borkenstein v. Schrack*, 31 Ind. App. 220, 67 N. E. 547; *Nossaman v. Rickert*, 18 Ind. 350; *Boyer v. Barr*, 8 Neb. 68, 30 A. R. 814,—holding that in action for assault and battery punishable criminally exemplary damages cannot be had; *Nay v. Byers*, 13 Ind. 412, upon right to recover vindictive damages in action for assault and battery; *Stewart v. Maddox*, 63 Ind. 51, holding that punitive damages cannot be had against persons committing assault under circumstances amounting to offense of rout.

Cited in reference notes in 4 A. S. R. 539, on recoverability of damages in action for assault and battery; 15 A. S. R. 930, on exemplary damages for assault and battery.

Distinguished in *Hendrickson v. Kingsbury*, 21 Iowa, 379, holding that in action for assault and battery damages by way of punishment can be allowed.

Disapproved in *Brown v. Swineford*, 44 Wis. 282, 28 A. R. 582, holding that punitive damages may be allowed in action for assault and battery punishable criminally.

— **For ejection from train.**

Cited in *Chicago, St. L. & P. R. Co. v. Holdridge*, 118 Ind. 281, 20 N. E. 837, to point that if corporation were criminally liable for maliciously ejecting passenger from its train exemplary damages could not be recovered.

— **For trespass.**

Cited in *Humphries v. Johnson*, 20 Ind. 190, holding it improper to allow exemplary damages against one guilty of trespass amounting to riot and punishable criminally; *Butler v. Mercer*, 14 Ind. 479, holding that vindictive damages cannot be had in action for malicious trespass which is punishable criminally; *Moore v. Crose*, 43 Ind. 30, holding it improper to allow vindictive damages in action of trespass where no malice, insult, or deliberate oppression was shown.

— **In civil damage action for sale of liquor.**

Cited in *Struble v. Nodwift*, 11 Ind. 64, holding that vindictive damages cannot be had in civil action for sale of liquor to minor if such sale constituted criminal offense; *Koerner v. Oberly*, 56 Ind. 284, 26 A. R. 34, holding statute allowing wife exemplary damages in civil action for sale of liquor to husband inoperative when sale made under circumstances amounting to crime.

— **For fraud.**

Cited in *Millison v. Hoch*, 17 Ind. 227, holding it proper to allow exemplary damages against one perpetrating fraud on another not punishable criminally; *Sangster v. Prather*, 34 Ind. 504, holding that damages in addition to compensatory damages may be allowed in suits for fraud.

— **For malicious prosecution.**

Cited in *Lytton v. Baird*, 95 Ind. 349, holding that punitive damages may be recovered in action for malicious prosecution; *Sexson v. Hoover*, 1 Ind. App. 65, 27 N. E. 105; *Atkinson v. Van Cleave*, 25 Ind. App. 508, 57 N. E. 731,—in same connection in holding evidence of defendant's pecuniary condition admissible in such action.

— For libel or slander.

Cited in *Wabash Printing & Pub. Co. v. Crumrine*, 123 Ind. 89, 21 N. E. 904, holding that exemplary damages cannot be had against one publishing malicious libel punishable criminally; *Guard v. Risk*, 11 Ind. 156; *Meyer v. Bohlfling*, 44 Ind. 238,—holding that punitive damages may be allowed in action for slander.

Cited in reference note in 71 A. D. 256, on punitive damages in actions for slander or libel.

Cited in note in 8 E. R. C. 379, on necessity of alleging and proving special damage in libel and slander.

Evidence admissible in estimating damages.

Cited in reference note in 90 A. D. 343, as to what jury may consider in estimating damages.

Cited in notes in 67 A. D. 562, on admissibility of pecuniary circumstances of party in action involving exemplary damages; 67 A. D. 564, on admissibility of evidence of defendant's wealth in action for assault and battery.

61 AM. DEC. 101, GILLENWATER v. MADISON & I. R. CO. 5 IND. 339.**Care required of carriers of passengers.**

Cited in *Thayer v. St. Louis, A. & T. H. R. Co.* 22 Ind. 26, 85 A. D. 409, holding that railroad companies owe to passengers utmost care of cautious persons; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 A. R. 168, holding that railroad company is held to highest degree of care in carrying passengers; *Sherlock v. Alling*, 44 Ind. 184, holding same as to carriers by water; *Pennsylvania Co. v. Dean*, 92 Ind. 459, to point that railroad company is liable to passenger who, being compelled by its agents to jump from train, was injured.

Cited in reference notes in 64 A. D. 86, on general liability of carriers; 67 A. D. 327, on railroad company's liability to passengers; 70 A. D. 429, on passenger carriers not being insurers against accidents; 75 A. D. 508, on duty of railroad company to employ competent and skilful agents and servants, and liability for negligence as to same; 62 A. D. 688; 63 A. D. 333; 76 A. D. 698,—on degree of care required of passenger carriers.

Cited in notes in 2 L.R.A. 86, on responsibility of carriers of passengers for defects attributable to fault of manufacturer; 5-A. S. R. 727, on notices limiting liability of carriers of passengers; 77 A. S. R. 27, on diligence required when human life is involved; 2 L.R.A. 522, on plaintiff's violation of Sunday law as defense to action for injuries received on that day.

— As dependent upon collection of fare.

Cited in *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 A. R. 719, to point that railroad company owes one riding on free pass same duty as it does passenger; *Perkins v. New York C. R. Co.* 24 N. Y. 196, 82 A. D. 281; *Welles v. New York C. R. Co.* 26 Barb. 641; *Carroll v. Staten Island R. Co.* 58 N. Y. 126, 17 A. R. 221,—to same effect; *Williams v. Oregon Short Line R. Co.* 18 Utah, 210, 72 A. S. R. 777, 54 Pac. 991, holding that one riding on free pass containing stipulations exempting company from liability for negligence can recover for injuries resulting from gross negligence; *Ohio & M. R. Co. v. Muhling*, 30 Ill. 9, 81 A. D. 336, holding that one lawfully on defendant's train and injured through its negligence may recover though he had paid no fare; *Pennsylvania Co. v. Coger*, 163 Ind. 631, 72 N. E. 875, holding railroad company bound to use

ordinary care as to one riding in caboose of work train with its knowledge though he paid no fare.

Cited in reference notes in 80 A. D. 52, on carrier's liability for negligent injury to free passenger; 69 A. D. 628; 82 A. D. 290,—on payment of fare as affecting liability of carrier of passengers.

Cited in note in 61 A. S. R. 87, on free passengers.

Distinguished in *Moss v. Johnson*, 22 Ill. 633, holding that one voluntarily placing himself on car in dangerous proximity to engine and not received as passenger cannot recover for injury in absence of proof of defendant's negligence.

Who are passengers.

Cited in notes in 61 A. S. R. 98, on employees of carrier as passengers; 2 L.R.A. 166, as to whether freight owner traveling on train is passenger; 31 L.R.A. 323, on railroad employees or officers as passengers while being transported to or from work.

Distinguished in *Higgins v. Hannibal & St. J. R. Co.* 36 Mo. 418, holding one who, when injured, was not in actual employ of railroad company, but was carried on its books as employee, not a passenger where he rode in baggage car with other employees.

Disapproved in *McDonough v. Lanpher*, 55 Minn. 501, 43 A. S. R. 541, 57 N. W. 152, holding that one permitting his employee to ride to her work on fifth floor of his building in freight elevator owes her master's and not carrier's, duty. **Liability of employer for negligence or wrongful acts of servant.**

Cited in reference notes in 62 A. D. 389, on liability of carrier for negligence of employees; 72 A. D. 295, on liability of corporation for agent's negligence; 84 A. D. 684, on master's liability of servant's negligence; 87 A. D. 400, on liability of corporations for wrongful acts of servants; 7 A. S. R. 246, on principal's liability for appearance of agent's power.

Cited in note in 12 L.R.A.(N.S.) 857, as to whether relationship of master or servant still exists where servant goes on master's premises before hours or between hours of actual labor.

Fellow-servant rule.

Cited in *Madison & I. R. Co. v. Bacon*, 6 Ind. 205, holding master not liable for injury to servant caused by coservant's negligence.

Cited in reference notes in 64 A. D. 60, on liability of master to servant for negligence of fellow servant; 67 A. D. 60, on liability of principal or master for acts of agent or servant; 67 A. D. 327, on liability of master for negligence of fellow servants; 75 A. D. 310, on employer's liability to servant for injuries resulting from negligence or misconduct of fellow servant; 85 A. D. 730, on master's liability for injury done by one servant to another; 4 A. S. R. 264, on liability for act of fellow servant.

Cited in note in 67 A. D. 593, on liability of master for negligence of fellow servants as affected by nature of their duties.

— Who are fellow servants generally.

Cited in *Kielley v. Belcher Silver Min. Co.* 3 Sawy. 437, Fed. Cas. No. 7,760, holding one not a fellow-servant of another serving in different and distinct department of master's general business; *Peirce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485, holding that workman injured by fall of jackscrew through negligence of foreman in not watching it cannot recover; *Cole Bros. v. Wood*, 11 Ind. App. 37,

36 N. E. 1074, holding that employee in directing place and manner in which others were to work did not act as fellow servants as to them.

Cited in reference note in 69 A. S. R. 321, on who are fellow servants.

Cited in notes in 67 A. D. 589, on who are fellow servants in common employment; 50 L.R.A. 440, on servants engaged inside and outside of warehouses, factories, etc., as fellow servants; 50 L.R.A. 445, on consociation of duties as test of common employment; 50 L.R.A. 464, on positions of servants while being transported on vehicles belonging to their employers as fellow servants of those in charge of them.

Distinguished in *Malone v. Western Transp. Co.* 5 Biss. 315, Fed. Cas. No. 8,996, holding that one employed in discharging cargo of vessel cannot recover for injury received through master's and mates' negligence in leaving hatchway open.

— Who are fellow servants of railroad company.

Cited in *Atlanta & R. Air Line R. Co. v. Ayers*, 53 Ga. 12, holding that track laborer may recover for injuries received while being carried on company's train from place of work to camp where he stayed nights; *Fitzpatrick v. New Albany & S. R. Co.* 7 Ind. 436, allowing one employed in construction department of railroad and injured through negligence of engineer of locomotive drawing "graveled train" upon which he was riding to his work to recover; *Haas v. St. Louis & Suburban R. Co.* 111 Mo. App. 706, 90 S. W. 1155, holding track laborer riding on company's car from one point to another a passenger and not fellow servant of motormen in charge of its cars; *Chamberlain v. Milwaukee & M. R. Co.* 11 Wis. 239, allowing brakeman injured by engineer's negligence to recover; *Slattery v. Toledo & W. R. Co.* 23 Ind. 81, holding brakeman on train, co-servant of one whose duty it was to attend switch; *Indianapolis & C. R. Co. v. Love*, 10 Ind. 554, holding that engineer of train injured by its running off track not kept in proper condition may under some circumstances recover; *Peterson v. Seattle Traction Co.* 23 Wash. 615, 53 L.R.A. 586, 63 Pac. 539, holding member of construction gang of railway riding home from his work upon pass furnished him under his contract not co-servant of operators of car; *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280, 87 A. D. 391, holding sub-contractor employed in building bridges for defendant not fellow servant of employees of its train which ran over him.

Distinguished in *Whaalan v. Mad River & L. E. R. Co.* 8 Ohio St. 249, holding that track laborer injured by one on locomotive throwing unsuitable wood therefrom cannot recover; *Manville v. Cleveland & T. R. Co.* 11 Ohio St. 417, holding one employed to render services generally upon railroad co-servant of operatives of train upon which he was riding when injured; *Dishon v. Cincinnati, N. O. & T. P. R. Co.* 126 Fed. 194, holding section hand injured while passing after working hours from section house in which he boarded between cars standing on nearby track, fellow servant of train operatives.

Disapproved in *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672, holding railroad company not liable to one employed on locomotive for injury occasioned by negligence of those employed in its machine shops; *St. Louis, A. & T. R. Co. v. Welch*, 72 Tex. 298, 2 L.R.A. 839, 10 S. W. 529, holding foreman of bridge gang engaged in repairing bridges along line of railroad, co-servant of operators of train; *Gormley v. Ohio & M. R. Co.* 72 Ind. 31, holding track laborer riding to his work on hand car co-servant of engineer of freight train running on same road; *Indianapolis & G. Rapid Transit Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145. *Indianapolis & G. Rapid Transit Co. v. Foreman*, 162 Ind. 85, 102 A. S. R. 185.

69 N. E. 669,—holding track laborer injured while riding on work-car home from his work co-servant of operators of passenger car.

61 AM. DEC. 110, BOWEN v. JOHNSON, 6 IND. 110.

Implied revocation of wills by disposal of property.

Cited in *Baacke v. Baacke*, 50 Neb. 18, 69 N. W. 303, to point that will is revoked by sale of entire estate devised by it; *Clayton v. Blough*, 93 Ind. 85, to point that will is revoked where subsequent to its execution testator exchanges land devised by it for other lands.

Cited in reference notes in 90 A. D. 331, on implied revocation of will; 40 A. S. R. 539, on revocation of will by subsequent conveyance.

Cited in note in 28 A. S. R. 357, on sale of property as revocation of will.

Will as passing after-acquired lands.

Cited in reference notes in 67 A. D. 767; 70 A. D. 239,—as to when after-acquired lands pass by will.

61 AM. DEC. 112, RUSSELL v. RUSSELL, 4 G. GREENE, 26.

How alimony is to be allowed.

Cited in *Kusel v. Kusel*, 147 Cal. 57, 81 Pac. 295, holding it error to allow gross sum for separate maintenance where such allowance necessitated husband's selling his property; *Phelan v. Phelan*, 12 Fla. 449, holding it improper to allow by way of alimony and separate maintenance gross sum of two thousand dollars; *Crews v. Mooney*, 74 Mo. 26, holding that decree vesting in wife specified personal property of husband, as alimony in gross, is valid when made in pursuance of agreement of parties; *Henderson v. Henderson*, 37 Or. 141, 82 A. S. R. 741, 48 L.R.A. 766, 60 Pac. 597, to point that decree awarding alimony in gross or out of husband's realty may be sustained if based upon agreement of parties; *Lake v. Bender*, 18 Nev. 361, 7 Pac. 74, holding it proper in decreeing alimony to direct periodical payment of specified sum; *Ross v. Ross*, 78 Ill. 402, holding practice of vesting fee of realty in wife by decree for alimony objectionable; *Cizek v. Cizek*, 69 Neb. 797, 99 N. W. 28, 5 A. & E. Ann. Cas. 464, holding decree 69 Neb. 797, 99 N. W. 28, 5 A. & E. Ann. Cas. 464, holding decree awarding as awarding as alimony husband's realty to wife in fee void and subject to collateral attack; *Zuver v. Zuver*, 36 Iowa, 190, wherein wife was allowed fee in portion of husband's realty as permanent alimony.

Cited in reference notes in 68 A. D. 182, on available means of husband as element in determination of right to alimony; 40 A. S. R. 686, on alimony as lien of husband's realty; 55 A. S. R. 89, on lien on land to enforce payment of alimony; 71 A. S. R. 25, on decree for alimony.

Cited in notes in 60 A. D. 668, on permanent alimony in allowance and in gross; 61 A. D. 117, on vesting of husband's real estate in fee in wife as alimony; 102 A. S. R. 701, on nature of alimony; 102 A. S. R. 704, on power of court to decree lien on real property for permanent alimony; 1 L.R.A. 321, on alimony under statutes.

61 AM. DEC. 117, FOSS v. ISETT, 4 G. GREENE, 76.

Requirement that writ of attachment be under seal of court.

Cited in *Wagoon v. Gillett*, 54 Iowa, 54, 6 N. W. 131, to point that writ of attachment issued without seal of court is null and void; *Shaffer v. Sundwall*,

33 Iowa, 579, holding that writ of attachment issued by circuit court and bearing seal of district court cannot be amended; *Murdough v. McPherrin*, 49 Iowa, 479, holding to contrary after change made in statutory law.

Amendment of writs.

Cited in reference notes in 86 A. D. 148; 92 A. D. 394,—on amendment of writs where defective for want of seal.

Cited in notes in 61 A. D. 128, on amendment of writs of attachment; 20 L.R.A. 428, as to amending process and writs where seal has been omitted.

Validity of writ without signature of clerk.

Cited and explained in *Ambler v. Leach*, 15 W. Va. 677, holding that writ otherwise regular is not absolutely void, because date is blank and not signed by clerk; *Laidley v. Bright*, 17 W. Va. 779, holding that writ not signed by clerk is voidable only.

61 AM. DEC. 118, NEALLY v. WILHELM, 4 G. GREENE, 240.

Liability of unconditional purchaser at price not fixed on loss of property.

See *Wilkinson v. Williamson*, 76 Ala. 163, holding that where price is left open for future adjustment but goods are delivered with intent to complete sale, vendee is liable for reasonable price if goods are lost by his fault.

61 AM. DEC. 120, FURGISON v. STATE, 4 G. GREENE, 302.

Presumptions as to recognizances.

Cited in *State v. Hufford*, 23 Iowa, 579, to point that petition on recognizance need not state facts showing officer's authority to take it; *United States v. George*, 3 Dill. 431, Fed. Cas. No. 15,199, holding it unnecessary that recognizance in connection with declaration state special facts showing officer's authority to take it; *United States v. Eldredge*, 5 Utah, 161, 13 Pac. 673, to point that liability of sureties on bail bond attach moment party is released and objections to officer's authority to take bond come too late when not made until suit brought.

61 AM. DEC. 122, HEICHEW v. HAMILTON, 4 G. GREENE, 317.

Validity of agreement in restraint of trade.

Cited in *Smalley v. Greene*, 52 Iowa, 241, 35 A. R. 267, 3 N. W. 78, holding agreement not to engage in practice of law at particular place not against public policy.

Cited in reference note in 71 A. D. 353, on validity of contract in restraint of trade.

Cited in note in 8 L.R.A. 469, on contracts in partial restraint of trade.

Estoppel by judgment.

Cited in reference notes in 91 A. D. 407, on estoppel by judgment; 31 A. S. R. 897, on *res judicata*.

What damages provable under general averment.

Cited in *Lashus v. Chamberlain*, 6 Utah, 385, 24 Pac. 188, holding it proper in action for breach of contract not to engage in hotel business to prove under averment of general damages, general loss by diversion of customers and patronage.

Cited in reference notes in 78 A. D. 387, on necessity for alleging special damages; 39 A. S. R. 677, as to when nominal damages will be allowed.

61 AM. DEC. 124, BARBER v. SWAN, 4 G. GREENE, 352.

Sufficiency of writ of attachment or affidavit therefor.

Cited in reference notes in 83 A. D. 460, on necessity for writ of attachment showing compliance with statute; 123 A. S. R. 1041, on insufficiency of affidavit upon which attachment obtained.

Cited in note in 79 A. D. 164, on what irregularities and defects will avoid attachment.

Distinguished in *Hays v. Gorby*, 3 Iowa, 203, holding that writ of attachment need not state that bond has been given.

Amendment of writ or process generally.

Cited in reference notes in 65 A. D. 145, as to what amendments are allowable; 2 A. S. R. 189, on amendment of writs by changing name of party; 23 A. S. R. 727, on amendment of affidavit for process.

— In attachment proceedings.

Cited in *Ballard v. Great Western Min. & Mfg. Co.* 39 W. Va. 394, 19 S. E. 510, holding where clerk issued order for attachment of property in excess of amount stated in affidavit it improper after attachment made to allow amendment; *Goodman v. Henry*, 42 W. Va. 526, 35 L.R.A. 847, 26 S. E. 528, to point that void attachment cannot be amended against defendant, intervener or subsequent creditor; *Miller v. Zeigler*, 44 W. Va. 484, 67 A. S. R. 777, 29 S. E. 981, holding that order of attachment not signed by clerk may be amended in such respect; citing annotation also on this point.

Annotation cited in *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. 753, to point that original affidavit in attachment proceeding may be amended as to matters of form.

Cited in reference notes in 61 A. D. 118, on amendment of writ of attachment; 64 A. D. 63, on amendments of writs of attachment by changing name of party; 68 A. D. 290, on amendment of return of attachment; 86 A. D. 148, as to whether seal to writ of attachment can be supplied by amendment; 8 A. S. R. 311, on amendments in attachment proceedings; 54 A. S. R. 793, on amendment of declaration or complaint in attachment; 67 A. S. R. 781, on amendment of affidavit in attachment suit; 67 A. S. R. 781; 92 A. S. R. 424,—on amendment of process in attachment proceedings.

Cited in note in 79 A. D. 174, on amendment of writs of attachment and levy and return thereof.

61 AM. DEC. 131, WALLACE v. MUSCATINE, 4 G. GREENE, 373.

Municipal liability for acts of officers or agents.

Cited in reference notes in 66 A. D. 191, on municipal liability for acts done by officers or agents; 66 A. D. 255, on municipal liability for misfeasance, malfeasance, and nonfeasance of officers; 66 A. D. 442, on municipal liability for negligence of officers and agents in construction and repair of public works.

Cited in notes in 70 A. D. 422, on municipality's liability for officers' acts; 30 A. S. R. 377, on municipal liability for negligence and other misconduct of officers and agents with respect to municipal duties only; 30 A. S. R. 387, on municipal liability for negligence of officers and agents as to public streets.

Liability of municipal corporations.

Cited in reference note in 61 A. D. 221, on municipal liability with respect to private ministerial powers.

Cited in note in 66 A. D. 436, on liability for damages where city ceases to act judicially or legislatively.

— For negligence generally.

Cited in *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 335, 35 S. W. 341, holding city maintaining waterworks for profit liable for damages resulting to one from its failure to supply water upon his property's taking fire; *Galveston v. Posnainsky*, 62 Tex. 118, 50 A. R. 517, holding city having full control over its streets liable to person injured by falling into uncovered ditch near sidewalk.

Cited in reference note in 93 A. D. 139, on liability of municipality for overflow of sewer.

Cited in notes in 1 L.R.A. 298, on liability of municipal corporation for negligent exercise of its power; 65 L.R.A. 271, on liability of municipality for consequential injuries from negligence with respect to surface water.

— For negligence in making public improvements.

Cited in *Cotes v. Davenport*, 9 Iowa, 227, holding that city is liable for damages resulting from carelessness in improving streets upon same principles that individual is liable for his acts; *Beach v. Scranton*, 5 Lack. L. News, 25, holding city liable where it left street in such unfinished condition that water collected and overflowed plaintiff's land; *O'Donnell v. White*, 23 R. I. 318, 50 Atl. 333, holding city liable for damages resulting to property from its negligence in improving its streets; *Hendershott v. Ottumwa*, 46 Iowa, 658, 26 A. R. 182, holding city liable where in raising street's grade it allowed earth to roll over on plaintiff's adjoining lot; *McMahon v. Dubuque*, 107 Iowa, 62, 70 A. S. R. 143, 77 N. W. 517, holding city liable for fire resulting from sparks thrown from steam roller it was using in rolling its streets; *McCord v. High*, 24 Iowa, 336, holding road supervisor who in constructing crossing for road over stream diverted water from plaintiff's land liable for resulting damages.

Cited in reference note in 72 A. D. 314, on liability of municipal corporation for injury from unskillful, improper, or inartificial manner in which work done.

Cited in notes in 29 A. S. R. 740, on municipal liability for negligent construction of sewers; 21 L.R.A. 603, on effect of negligent or illegal action in obstructing natural flow of surface water in making improvements; 23 L.R.A. 658, on liability for negligent or illegal act on first grading and improvement of street.

61 AM. DEC. 134, CORIELL v. HAM, 4 G. GREENE, 455.**Validity of judicial sales.**

Cited in *Newton v. State Bank*, 22 Ark. 19, holding that bona fide purchaser at public resale by sheriff takes good title though such sale be irregular; *Coker v. Dawkins*, 20 Fla. 141, holding that bona fide purchaser at sheriff's sale may presume that sheriff is proceeding according to law; *Pursley v. Hayes*, 22 Iowa, 11, 92 A. D. 350, holding guardian's sale not subject to collateral attack for irregularities not amounting to jurisdictional defects; *Hansen's Empire Fur Factory v. Teabout*, 104 Iowa, 360, 73 N. W. 875, holding that delay of ten years in objecting to sheriff's sale amounted to laches.

Cited in reference note in 59 A. S. R. 572, on power to vacate judicial sale.

— Effect of adjournment.

Cited in reference notes in 85 A. D. 684, on effect of adjourning execution sale; 44 A. S. R. 660, on postponement of execution sale.

Cited in notes in 26 A. D. 538, as to whether new notice is necessary on adjournment of judicial sale; 97 A. S. R. 654, on authority to adjourn execution and judicial sales; 97 A. S. R. 659, on necessity and sufficiency of notice and advertisement of adjournment of judicial sale; 97 A. S. R. 661, on effect of adjournment of judicial sale.

Validity of retrospective legislation.

Cited in *Moore v. Letchford*, 35 Tex. 185, 14 A. R. 363, holding statute making judgment lien on land applicable to judgments previously recovered; *Oliver v. McClure*, 28 Ark. 555, to point that while execution laws may be changed so far as they are remedial they cannot be changed to affect substantial rights of parties to existing contracts.

Cited in reference note in 44 A. S. R. 902, on validity of statute impairing vested rights.

Cited in notes in 49 A. S. R. 277, on statutes impairing obligation of contracts; 1 L.R.A. 359, on stay laws as impairing obligation of contracts.

— Affecting remedy.

Cited in *Watts v. Everett*, 47 Iowa, 269, holding that statute requiring leave to be had before suit on judgment can be brought may have retroactive effect.

Cited in reference notes in 63 A. D. 132, on legislative right to change remedies on contracts; 79 A. D. 538, on extent of legislature's right to change remedies; 90 A. D. 320, on regulation of remedy; 81 A. D. 193; 93 A. D. 782,—on legislative control over remedies.

Protection of judicial sales.

Cited in reference notes in 61 A. D. 194, on policy of law to protect judicial sales; 20 A. S. R. 507; 67 A. S. R. 913,—on protection of judicial sales.

41 AM. DEC. 138, WILSON v. STRIPE, 4 G. GREENE, 551.**Mode of making it apparent that wrongful attachment was made.**

Cited in *Davis v. Cleveland, C. C. & St. L. R. Co.* 146 Fed. 403, to point that it may be made apparent of record that attachment should not have been levied upon property attached by affidavits in support of motion to discharge.

Cited in reference note in 87 A. S. R. 897, on wrongful attachment.

Actions to recover property in custody of law.

Cited in *Gimble v. Ackley*, 12 Iowa, 27, holding that one whose property has been wrongfully seized by officer may maintain replevin; *Upp v. Neuhring*, 127 Iowa, 713, 104 N. W. 350, holding that one may replevy property wrongfully detained though he failed to move for property's discharge in attachment suit; *Berry v. Charlton*, 10 Or. 362, holding, in construing statutes, order for sale of attached property no bar to action by defendant in attachment to recover it on ground that it was exempt from execution; *Buis v. Cooper*, 63 Mo. App. 196, holding that independent of statute replevin does not lie to recover property taken under execution though exempt therefrom; *Mills v. Pryor*, 65 Ark. 214, 45 S. W. 350, holding that by statute tenant may replevin property seized under specific attachment to enforce landlord's lien to which property seized was not subject; *Settles v. Bond*, 49 Ark. 114, 4 S. W. 286, to point that common law

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rule that property taken under execution could not though exempt be replevied was changed by statute.

Cited in reference notes in 71 A. D. 105; 79 A. D. 513,—on replevin for property held by officer under execution; 73 A. S. R. 790, on remedy against officers attaching exempt property.

Cited in notes in 20 A. D. 697, on action for possession of chattels levied upon under execution; 80 A. S. R. 761, on what property is repleviable.

Conclusiveness of judgments.

Cited in reference notes in 64 A. D. 362, on judgment as *res judicata*; 66 A. D. 522, as to when former judgment is conclusive; 79 A. S. R. 148, on former judgment as bar.

Cited in notes in 62 A. D. 550, on conclusiveness of judgment of court of competent jurisdiction; 70 A. D. 605, as to what matters judgment is conclusive; 96 A. D. 776, on conclusiveness of judgment as to issue or point involved; 96 A. D. 779, 780, as to what facts judgment is not *res judicata*; 11 E. R. C. 47, on estoppel by judgment in rem.

61 AM. DEC. 141, FRINK v. COE, 4 G. GREENE, 555.

What admissible as *res gestæ*.

Cited in *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227, holding statement as to accident made by injured person immediately after returning from scene of accident and while bearing marks thereof admissible; *Chicago & N. R. Co. v. Howard*, 6 Ill. App. 569, holding dying statements made by one after having been removed to hotel from scene of accident inadmissible; *Travellers' Ins. Co. v. Mosley*, 8 Wall. 397, 19 L. ed. 437 (dissenting opinion), upon right to prove as part of *res gestæ* that injured person stated that he had fallen down stairs.

Cited in reference notes in 79 A. D. 87, on admissibility as part of *res gestæ* of declarations of party at time of act and explanatory thereof; 79 A. D. 317, on admissibility of evidence as part of *res gestæ*; 63 A. D. 265; 90 A. D. 187,—on declarations as evidence; 94 A. D. 677, on admissibility of parol evidence of negotiations leading to written contract; 2 A. S. R. 39, on contemporaneous expressions and exclamations as part of the *res gestæ*; 7 A. S. R. 201; 10 A. S. R. 306,—as to when declarations are part of the *res gestæ*.

Cited in notes in 95 A. D. 52, defining "*res gestæ*"; 95 A. D. 67, on admissibility of exclamations of pain and declarations respecting injuries; 13 L.R.A. 466, on admissibility of declarations of pain and suffering as evidence; 39 L. ed. U. S. 978, on admissibility of declarations in favor of party making them.

Care required of carriers.

Cited in *Taylor v. Grand Trunk R. Co.* 48 N. H. 304, 2 A. R. 229, holding that railroad company owes to its passengers duty of exercising utmost care and diligence and is responsible for slightest neglect; *Moore v. Des Moines & Ft. D. R. Co.* 69 Iowa, 491, 30 N. W. 51, to same point; *Pershing v. Chicago, B. & Q. R. Co.* 71 Iowa, 561, 32 N. W. 488,—holding that carrier is bound to use highest degree of care and diligence which is reasonably consistent with practical operation of its road; *Grand Rapids & I. R. Co. v. Boyd*, 65 Ind. 526, holding that while railroad company is liable to passenger injured through its negligence it does not insure his safety; *Kellow v. Central Iowa R. Co.* 68 Iowa, 470, 56 A. R. 858, 23 N. W. 740, holding that railroad company is bound to exercise highest care and diligence in anticipating and providing against collisions; *Russ v.*

The War Eagle, 14 Iowa, 363, holding that carriers by water owe to their passengers the utmost diligence and care; Bonce v. Dubuque Street R. Co. 53 Iowa, 278, 36 A. R. 221, 5 N. W. 177, holding that proprietor of hacks must use utmost care and skill in carrying passengers; Treadwell v. Whittier, 80 Cal. 574, 13 A. S. R. 175, 5 L.R.A. 498, 22 Pac. 266, holding that proprietor of passenger elevator must use best known tests reasonably practicable to discover defects in its apparatus; Taillon v. Mears, 29 Mont. 161, 74 Pac. 421, 1 A. & E. Ann. Cas. 613, holding proprietor of stage coach liable to passenger injured by negligence of servant acting beyond scope of his employment; Budd v. United Carriage Co. 25 Or. 314, 27 L.R.A. 279, 35 Pac. 660, holding burden on carrier to prove his freedom from negligence upon proof of injury to passenger resulting from fractiousness of horses which driver could not control.

Cited in reference notes in 64 A. D. 86, on effect of nonpayment of fare upon carrier's liability for negligence of servant; 62 A. D. 688; 76 A. D. 698,—on degree of care required of passenger carriers; 88 A. D. 359, on liability of stage proprietors; 70 A. D. 429, on passenger carriers not being insurers against accidents.

Cited in note in 40 L.R.A. 147, on employment of persons having habits of intoxication.

Right to recover punitive damages.

Cited in Hendrickson v. Kingsbury, 21 Iowa, 379, holding that punitive damages may be recovered in action for assault and battery; Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485, upon right to recover punitive damages in actions of tort.

Cited in reference note in 72 A. D. 295, on liability of principal in exemplary damages for negligence of agent.

Cited in notes in 62 A. D. 388, on liability of natural master or principal in exemplary damages for tort of servant or agent; 101 A. S. R. 764, on employer's liability in exemplary damages for collision on highway through negligence of employee.

Keeping tender good.

Cited in Shugart v. Pattee, 37 Iowa, 422, holding that tender must be kept good by bringing money into court.

Effect of tender.

Cited in Fisher v. Moore, 19 Iowa, 84, enjoining execution issued by plaintiff in action in which judgment was recovered where defendant therein tendered sum more than sufficient to pay judgment recovered and costs.

What admitted by tender.

Cited in Phelps v. Kathron, 30 Iowa, 231, holding that plea of tender admits plaintiff's right to recover to extent of tender; Taylor v. Chicago, St. P. & K. C. R. Co. 76 Iowa, 753, 40 N. W. 84, to point that tender admits liability or indebtedness to amount of sum tendered.

Cited in reference note in 87 A. D. 523, on tender as admission of indebtedness.

Cited in note in 77 A. D. 483, on effect of tender and refusal as admission.

61 AM. DEC. 147, HAWKINS v. COM. 14 B. MON. 395.

Right of officer to break open door — To effect arrest.

Cited in State v. Mooring, 115 N. C. 709, 20 S. E. 182, holding that officer armed

with process who breaks open door of house but does not find accused therein not trespasser ab initio though he had been informed by occupant of house that accused was not there.

Cited in reference notes in 99 A. D. 556, on breaking open doors to effect arrest; 77 A. D. 355, on officer's authority to break open doors to effect arrest.

Cited in note in 8 L.R.A. 533, on authority to break in doors to make arrest.

— To serve civil process.

Cited in reference notes in 78 A. S. R. 892, on right of officer to break open doors of dwelling house to serve civil process; 100 A. S. R. 129, on right of officer to break open outer doors and windows of dwelling to serve civil process.

Right to enter dwelling to make arrest.

Cited in notes in 16 L.R.A. 501, on right of peace officer to enter dwellings to make arrests with warrant; 16 L.R.A. 502, on necessity of notification and demand before entering dwelling to make arrest.

Force or violence permissible in making arrest.

Cited in reference notes in 9 A. S. R. 45, on force or violence which officers may exercise in making arrest; 9 A. S. R. 386, on what force an officer may use in making an arrest.

— Right of officer to kill.

Cited in *State v. Phillips*, 119 Iowa, 652, 67 L.R.A. 292, holding that officer who kills one he is attempting to arrest for misdemeanor is excused if he use no more force than to him acting in prudent manner seemed necessary to effect arrest.

Annotation cited with special approval in *State v. Smith*, 127 Iowa, 534, 109 A. S. R. 402, 70 L.R.A. 246, 103 N. W. 944, 4 A. & E. Ann. Cas. 758, to point that to instruct as matter of law that officer is not justified in taking life of felon is erroneous.

Annotation cited in *Petrie v. Cartwright*, 114 Ky. 103, 102 A. S. R. 274, 59 L.R.A. 720, 70 S. W. 297, holding that peace officer cannot kill fleeing person who refuses to stop where such person was guilty of misdemeanor though officer suspected he had committed felony.

Cited in reference notes in 84 A. D. 361, on justifiability of homicide to effect arrest or prevent escape of prisoner; 14 A. S. R. 544, on justifiable homicide.

Killing of officer while resisting arrest.

Annotation cited in *Brown v. State*, 109 Ala. 70, 20 So. 103, holding that to convict one of murder for killing special officer in resisting arrest it must be shown that he had some notification of officer's authority.

Cited in reference note in 42 A. S. R. 457, on homicide of one resisting arrest by officer.

Right to enter third person's premises to serve process.

Cited in reference note in 42 A. S. R. 388, on entering third person's premises to serve process.

Arrest by private person.

Cited in reference notes in 100 A. D. 651, on arrest of criminal by private citizen; 15 A. S. R. 274, on duty and liability of private person assisting in arrest.

Duty of private citizen to assist in effecting arrest.

Cited in reference note in 80 A. D. 668, on duty of private citizen to assist known public officer to make arrest.

Cited in notes in 44 A. S. R. 137, on indictment for refusal to join posse com-

itatus; 44 A. S. R. 139, on officers calling posse comitatus acting through third person.

Arrest without warrant.

Cited in reference notes in 67 A. D. 253, on arrest without warrant by officer or private person; 1 A. S. R. 616, as to when arrest without warrant is justified; 14 A. S. R. 120, on arrest or attempted arrest of innocent persons, or of persons without warrants; 57 A. S. R. 614, on authority of officer to arrest within warrant; 18 A. S. R. 95; 67 A. S. R. 657,—on arrest without warrant; 62 A. S. R. 845; 69 A. S. R. 521,—on arrest by private person without a warrant; 43 A. S. R. 79; 84 A. S. R. 679,—on arrest.

Effect of fraud in effecting arrest.

Cited in reference note in 88 A. D. 595, on effect of resorting to fraud in effecting arrest.

Duty of officer to show warrant.

Cited in reference notes in 84 A. D. 361, on duty of officer to show warrant upon demand; 18 A. S. R. 95, on notice and proof of official character of officer making arrest.

61 AM. DEC. 164, PERRY v. HENSLEY, 14 B. MON. 474.

Estoppel.

Cited in *Geoghegan v. Ditto*, 2 Met. (Ky.) 433, 74 A. D. 413, holding that one may attack sale made under void execution although he had in writing surrendered the land to sheriff to be sold; *Myers v. Forsythe*, 10 Bush, 394, holding right of widow to claim husband's exemption which devolved on her, not defeated by fact that she was present at sale and made no objection.

—As to bonds.

Cited in *Jacks v. Bigham*, 36 Ark. 481, holding one not precluded from claiming his exemption by reason of giving of delivery bond.

Validity of bonds.

Cited in *Caffrey v. Dudgeon*, 38 Ind. 512, 10 A. R. 126, holding replevin bond received by justice where amount involved exceeded his jurisdiction void; *Leona Irrig. Mfg. & Canal Co. v. Roberts*, 62 Tex. 615, holding bond, exacted under color of office from obligors as condition to their being given certificates to which they were otherwise entitled, void.

Cited in note in 14 A. D. 105, on bonds unauthorized by statute.

Distinguished in *Butler v. Wadley*, 15 Ind. 502, upon point that bonds given without authority of law are void.

Liability of officer selling exempt property.

Cited in reference note in 64 A. D. 246, on liability of officer for levying on and selling exempt property.

Construction of exemption laws.

Cited in reference note in 76 A. D. 224, on construction of exemption laws.

61 AM. DEC. 166, JARVIS v. DAVIS, 14 B. MON. 529.

Vendor's retaining possession of goods as evidence of fraud.

Cited in reference notes in 64 A. D. 655, on private sale of personal property unaccompanied by possession as fraudulent; 67 A. D. 572, on sale of chattels without change of possession as presumption of fraud on creditors; 82 A. D. 556, on

validity of sale of chattels unaccompanied by actual possession; 83 A. D. 142, on effect of sale of personal property without delivery; 85 A. D. 186, on retention of possession by vendor as fraud per se; 30 A. S. R. 484, on retention of possession of chattels by seller as evidence of fraud; 73 A. S. R. 833, on necessity of change of possession to prevent conveyance from being fraudulent.

Necessity for delivery of personalty to pass title.

Cited in reference notes in 65 A. D. 495, on delivery of goods to validate sale as against creditors under statute of frauds; 67 A. D. 742, on necessity for change of possession to validity of sale of chattels as against creditors; 90 A. D. 550, as to necessity of delivery of possession on sale of personal property.

Cited in notes in 97 A. D. 341, on change of possession sufficient as against creditors and subsequent purchasers; 97 A. D. 345, on what delivery sufficient as against creditors and subsequent purchasers.

Possession of personalty as evidence of title.

Cited in *Davis v. Bigler*, 62 Pa. 242, 1 A. R. 393, holding purchaser from a vendor who was allowed by his vendee to take possession of property immediately after sale made by him obtains good title as against such vendee.

61 AM. DEC. 170, YOUNG v. HARRIS, 14 B. MON. 556.

Conflict of laws.

Cited in *United States Sav. & L. Co. v. Harris*, 113 Fed. 27, sustaining validity of loan to resident of Kentucky secured by mortgage upon land therein which was usurious according to its law but valid according to law of Minnesota where lender resided and payments were to be made.

Cited in reference notes in 65 A. D. 660, on governing and construing contract by *lex loci contractus* unless otherwise specified; 66 A. D. 208, on construction of contract according to *lex loci contractus*; 65 A. D. 681; 66 A. D. 464,—on *lex loci contractus* as governing rights and liabilities of parties to contract; 68 A. D. 602, on what law governs validity and construction of contract; 71 A. D. 758, as to when *lex loci contractus* governs rights of parties; 72 A. D. 152, on *lex loci contractus* governing contracts; 77 A. D. 360, as to what law governs construction and validity of personal contracts; 85 A. D. 371, on when *lex loci contractus* governs; 86 A. D. 374, as to what law governs contract; 89 A. D. 281, on law of place where contract is to be performed as controlling its validity; 99 A. D. 530, on control of law of place where made over contracts.

—As to bills and notes.

Cited in *Hyatt v. Bank of Kentucky*, 8 Bush, 193, holding that liability of assignor of note is fixed by law of place where assignment is made; *Carlisle v. Chambers*, 4 Bush, 268, 96 A. D. 304, holding that persons becoming parties to instrument in state in which it operated as bill of exchange will be presumed to know it would so operate; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245, to point that matters relating to payment of sight draft are to be determined by law of place where same made payable; *McGarry v. Nicklin*, 110 Ala. 559, 55 A. S. R. 40, 17 So. 726, holding that where payee made out note payable at his residence containing condition, mailed it to maker to sign who after signing it and striking out condition sent it back to payee who accepted it, law of payee's residence governs; *Barrett v. Dodge*, 16 R. I. 740, 27 A. S. R. 777, 19 Atl. 530, holding note drawn in Baltimore by payee and mailed to New York to maker who signed it there and returned it to payee governed by New York law.

Cited in reference notes in 69 A. D. 386, as to what state governs liability on promissory note; 77 A. D. 87, as to what law governs contract of indorsement; 87 A. D. 230, on law governing promissory notes; 65 A. S. R. 682, on contract of indorsement.

Cited in notes in 121 A. S. R. 872, on law governing demand, protest, and notice of dishonor of bill of exchange; 121 A. S. R. 878, on law governing notice of dishonor of foreign bill; 61 L.R.A. 216, on conflict of laws as to necessity of demand and protest; 61 L.R.A. 217, on conflict of laws as to necessity of notice of dishonor of negotiable paper; 61 L.R.A. 220, on conflict of laws as to necessity of suing primary obligor as condition of holding drawer or indorser.

Distinguished in *Wm. Glenn Glass Co. v. Taylor*, 99 Ky. 24, 34 S. W. 711, holding note signed by one obligor in Washington and by other in Kentucky who mailed it to New York where it was made payable not governed by New York law. **Presumption arising from maker's possession of note.**

Distinguished in *Callahan v. First Nat. Bank*, 78 Ky. 604, holding that where note is found in hands of maker endorsed by payee presumption of law is that it has been paid.

Place of contract of endorsement.

Cited in notes in 99 A. D. 672, on where indorsements of notes or bills are deemed to have been made; 2 L.R.A. (N.S.) 299, on estoppel to deny that note was made in state where it is dated and payable.

Endorsement of note by stranger before delivery.

Cited in note in 72 A. S. R. 684, on indorsement by stranger before delivery of notes payable to maker.

61 AM. DEC. 172, WRIGHT v. ARNOLD, 14 B. MON. 638.

Wife's rights in her choses in action assigned by husband.

Cited in *DeVaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211, to point that husband's assignment of wife's reversionary interest will not avail assignee if husband be dead when interest vests in wife; *Lynn v. Bradley*, 1 Met. (Ky.) 232, holding that wife's right of survivorship is not defeated by husband's deed in which she joined transferring slaves in which she has reversionary interest; *Prather v. Weissiger*, 10 Bush, 117, to point that surviving wife's rights are not defeated by assignment made by husband of note having three years to run, which was held in trust for her.

Distinguished in *Dunn v. Lancaster*, 4 Bush, 581, 96 A. D. 317, holding that one to whom husband assigned legacy which was to be paid his wife "in five years" takes subject to wife's right of survivorship.

Liability of wife's choses in action to husband's creditors.

Cited in *Tobin v. Dixon*, 2 Met. (Ky.) 422, holding that chose in action accruing to wife during coverture and susceptible of immediate reduction can be reached by husband's creditors in action against him and his wife as non-residents.

Estoppel of infants and married women.

Cited in *Frazier v. Gelston*, 35 Md. 298; *Welsch v. Oates*, 9 Phila. 154, 30 Phila. Leg. Int. 320, 1 Legal Chron. 315,—to point that infant or feme covert may be bound by equitable estoppel; *Hopkins v. Stanley*, 43 Ind. 553, to point that married woman may be estopped by same conduct that would estop her if sole; *Rusk v. Fenton*, 14 Bush, 490, 29 A. R. 413, holding that married woman may

by her conduct create estoppel against herself; *Johnson v. Mutual L. Ins. Co.* 113 Ky. 871, 69 S. W. 751, holding that married woman may as against subsequent innocent purchasers estop herself by recitals of essential facts in deed conveying her separate property; *Rosenthal v. Mayhugh*, 33 Ohio St. 155, holding that feme covert believing her husband dead may by representations to that effect bind herself by way of equitable estoppel; *Schmitheimer v. Eiseman*, 7 Bush, 298, holding one estopped to assert her infancy against person whom she induced to accept her deed by swearing in presence of husband that she was of age.

Cited in reference note in 12 A. S. R. 254, as to when wife is estopped to demand settlement in equity of her interest in her father's estate to which husband had immediate right of possession.

Distinguished in *Dunn v. Lancaster*, 4 Bush, 581, 96 A. D. 317, holding wife who reluctantly signed assignment made by husband of legacy she was to receive in future and who to some extent enjoyed assignment's proceeds not estopped after husband's death to assert her equity; *Lynn v. Bradley*, 1 Met. (Ky.) 232, holding wife's right of survivorship in slaves in which she had reversionary interest not defeated by her joining with husband in transferring same where she made no misrepresentations and where sale was not for her benefit.

Dealings by guardian with ward after termination of guardianship.

Cited in note in 89 A. S. R. 304, on dealings by guardian with ward after termination of guardianship.

Fiduciary acting for own interest.

Cited in reference note in 78 A. D. 211, on one undertaking to act for another, acting for himself in same matter.

61 AM. DEC. 177, ROBINSON v. HUFFMAN, 15 B. MON. 80.

Right of husband's creditors as to improvements made by him on wife's lands.

Cited in *Heck v. Fisher*, 78 Ky. 643, holding such part of rents and profits as is proportionate to increase in value may be subjected to payment of husband's debts, where wife acquiesces in improvements and with intent to defraud his creditors; *Dick v. Hamilton*, Deady, 322, Fed. Cas. No. 3,890, holding that husband living with his family upon wife's property may notwithstanding his creditors make expenditures to keep it in repair; *Moore v. Lampton*, 80 Ind. 301, to point that though wife assist husband in expending his means upon her lands in fraud of his creditors, neither she nor her property becomes liable to them; *Maddox v. Summerlin*, 92 Tex. 483, 49 S. W. 1033, holding that husband's creditors cannot sell wife's lands which he improved unless they show she assisted him to thereby defraud them; *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. 410, holding that wife's land is chargeable in favor of husband's creditors for improvements made thereon by him without any actual fraudulent intent; *Re Wyatt*, 2 Nat. Bankr. Reg. 288, Fed. Cas. No. 18,106, upon right of bankrupt's creditors to reach improvements made by him upon wife's land.

Cited in reference note in 78 A. D. 634, on rights of husband's creditors against improvements made by him on wife's lands.

Cited in note in 77 A. S. R. 93, on right of husband's creditors to charge wife's separate estate with amount of husband's money spent in improving same.

— As to property of wife paid for out of husband's earnings.

Cited in *Croup v. Morton*, 49 Iowa, 16 (dissenting opinion) upon right of

husband's creditors to reach home standing in wife's name but paid for in part out of husband's earning.

Right of wife to create liens against her property.

Cited in *O'Malley v. Coughlin*, 3 Tenn. Ch. 431, holding that wife cannot create mechanic's lien on her lands held in absolute right, and not to her separate use.

61 AM. DEC. 179, COLLINS v. CHAMP, 15 B. MON. 118.

Equitable conversion.

Cited in reference notes in 67 A. D. 120, on equitable conversion of realty; 72 A. D. 606, on when equitable conversion occurs.

Cited in notes in 5 A. S. R. 141, on equitable conversion of real estate into personal, and personal into real by will; 7 E. R. C. 24, on equitable conversion.

Objection for first time on appeal.

Cited in reference note in 77 A. D. 102, on right to raise objections for first time in appellate court.

61 AM. DEC. 181, McMILLAN v. MAYSVILLE & L. R. CO. 15 B. MON. 218.

Liability on stock subscription.

Cited in reference notes in 63 A. D. 526, on liability of stockholder on stock subscription; 65 A. D. 771, as to when corporation is sufficiently organized to bind subscription to capital stock.

Cited in note in 93 A. S. R. 393, on defense of limitations in action to enforce liability of subscribers to capital stock.

Conditional subscription contracts.

Cited in *Chamberlain v. Painesville & H. R. Co.* 15 Ohio St. 225, holding provision in subscription contract that freight house was to be built at particular point not a condition precedent; *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 8 S. W. 842, to same effect; *Taggart v. Western Maryland R. Co.* 24 Md. 563, 89 A. D. 760, holding that subscription to stock conditioned upon railroad's taking particular route, is when complied with enforceable contract; *Nashville & N. W. R. Co. v. Jones*, 2 Coldw. 574, to same point; *People ex rel. Hess v. Clark*, 53 Barb. 171, in same connection; *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. 358, to point that subscriber must pay subscription contract made upon express condition when such condition has been performed; *Mississippi O. & R. River R. Co. v. Gaster*, 20 Ark 443, holding one having general and unconditional subscription to stock of railroad cannot to escape liability prove statements made by its agent as to place where road would be located; *Memphis, K. & C. R. Co. v. Thompson*, 24 Kan. 170, holding that under subscription contract providing that railroad was to be constructed between two towns according to specifications and to be in operation by named date, company cannot recover unless it show road was substantially completed in accordance with specifications by such date.

Cited in reference notes in 63 A. D. 526, on effect of conditional subscription to corporate stock; 89 A. D. 772, on validity of subscriptions upon condition; 39 A. S. R. 401, on conditional subscriptions to corporate stock; 56 A. S. R. 910, on stock subscription to induce construction of railroad on particular route.

Cited in note in 81 A. D. 399, on subscription upon condition.

Validity of conditional agreement to convey land to railroad company.

Distinguished in *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 A. D. 369, holding agreement whereby one was to deed railroad company land for speculative purposes in consideration of its locating station at particular point unenforceable. **Release of subscriber to stock.**

Cited in note in 9 A. D. 101, on release of subscriber to stock.

61 AM. DEC. 184, ALLEN v. VANCELEAVE, 15 B. MON. 236.**Admissibility of one's statements as to his mental or physical condition.**

Cited in *Livingston v. Com.* 14 Gratt. 592, holding one's complaints as to his sufferings made two hours after he had been beaten provable; *State v. Blydenburg*, 135 Iowa, 264, 112 N. W. 634, holding that physician may testify as to patient's statements concerning history of his ailment; *Steel v. Shafer*, 39 Ill. App. 185, holding statements made by one relating to past condition of his mind inadmissible.

Cited in reference note in 84 A. D. 348, on admissibility of declarations of person injured as to cause and extent of injuries.

61 AM. DEC. 188, SWEENEY v. SMITH, 15 B. MON. 325.**Personal judgments against married women.**

Cited in *Turner v. Gill*, 105 Ky. 414, 49 S. W. 311 (dissenting opinion) upon right to render personal judgment against married woman.

Cited in reference note in 67 A. D. 579, on personal liability of married women on their contracts.

Married woman's power of disposition of her separate estate.

Cited in reference note in 71 A. D. 595, on power of married woman over disposition of her separate estate.

Liability of married woman's separate estate on her contracts.

Cited in reference note in 67 A. D. 579, on liability of married woman's separate estate on her contracts.

61 AM. DEC. 190, WALKER v. McKNIGHT, 15 B. MON. 467.**Protection of purchaser at own execution sale.**

Cited in notes in 79 A. S. R. 948, on protection of purchaser at his own execution sale against unrecorded deed; 79 A. S. R. 950, on protection of purchaser at his own execution sale against secret equities.

Validity of irregular judicial sales.

Cited in *Jennings v. Monk*, 4 Met. (Ky.) 103, holding that purchaser at judicial sale made to satisfy debts of owner of land takes title to all land sold though parties did not know land contained as many acres as it did; *Owen v. Navasota*, 44 Tex. 517, upon validity of sale made after judgment has been satisfied in full; *Berry v. Gates*, 175 Mass. 373, 56 N. E. 581, holding sale made upon execution erroneously stating amount due on judgment valid.

Cited in reference notes in 63 A. D. 361, on execution purchaser's title as affected by absence of, or irregularities in, return; 73 A. D. 528, on title of purchaser of real estate at sheriff's sale as not depending upon return.

Distinguished in *Davie v. Long*, 4 Bush, 574, holding it proper to quash sale where execution plaintiff purchased under execution taken out by him for full amount of judgment without giving credit for amount paid thereon.

Execution on void judgment.

Cited in reference note in 27 A. S. R. 300, on execution on void judgment.

Execution plaintiff purchasing at sale, as holding as trustee.

Cited in reference note in 80 A. D. 645, on when execution plaintiff purchasing land at sheriff's sale should be regarded as holding title in trust.

61 AM. DEC. 195, CAMPBELL v. HILLMAN, 15 B. MON. 508.**Personal liability of agent — For fraud.**

Cited in *Reed v. Peterson*, 91 Ill. 288, to point that court of law will hold one responsible for fraud perpetrated by him though he acted as agent; *Fidelity Funding Co. v. Vaughn*, 18 Okla. 13, 10 L.R.A.(N.S.) 1123, 90 Pac. 34, holding that one who as agent fraudulently induces another to invest in illegal lottery scheme is equally liable with principal; *Riley v. Bell*, 120 Iowa, 618, 95 N. W. 170, holding agent who in bad faith misrepresents title to land he is selling personally liable; *Hamlin v. Abell*, 120 Mo. 188, 25 S. W. 516, holding one who in sale of notes perpetrates fraud liable though he act as agent; *Crosby v. Meeks*, 108 Ga. 126, 33 S. E. 913, to point that one selling property as agent is liable to purchaser for any fraud he commits in connection with sale; *Strayhorn v. Giles*, 22 Ark. 517, holding that agent selling slave in name of principal knowing he had begun suit for his freedom becomes liable to vendee if he fail to inform him of such suit; *Roberts v. Holliday*, 10 S. D. 576, 74 N. W. 1034, holding that one induced to purchase land through agent's misrepresentations may recover value of all that agent received and retained as consideration for property.

Cited in notes in 48 A. S. R. 921, on liability of agent or officer of corporation to third persons for fraud committed or wilful misrepresentations made; 50 L.R.A. 647, on liability of servant or agent for assault, fraud, or other wrongful act against third party under orders of employer.

— For nonfeasance and misfeasance.

Cited in note in 22 A. S. R. 514, on agent's personal liability to third person for nonfeasance and misfeasance.

Principal's liability for agent's misrepresentations.

Cited in note in 85 A. S. R. 372, on principal's liability for misrepresentations by agent.

What constitutes fraud.

Cited in reference notes in 72 A. D. 641, on what constitutes fraud; 90 A. D. 425, on suppression and concealment of material facts as rendering sale fraudulent.

Cited in notes in 35 L.R.A. 420, on statements as to title as fraud; 12 E. R. C. 295, 296, on what constitutes fraud.

— When misrepresentations amount to.

Cited in *Righter v. Roller*, 31 Ark. 170, holding that misrepresentation is not fraudulent unless made with knowledge of its falsity; *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862, holding that equity will not set aside deed for false representations unless party knew of their falsity when making them; *Livermore v. Middleborough Town Lands Co.* 106 Ky. 140, 50 S. W. 6, holding that fact that land developing company's performances did not come up to its published expectations did not entitle purchaser of land to rescission of his contract.

Cited in reference notes in 64 A. D. 559, on proof of scienter in action for false representations; 81 A. D. 58, as to what false representations amount to

fraud; 81 A. D. 376, on elements of fraudulent representation; 86 A. D. 760, as to what misrepresentations will avoid sale of personal property; 89 A. D. 216, on need for proof of scienter in action for false representations in sale of chattel; 94 A. D. 296, as to what constitutes misrepresentation; 36 A. S. R. 591, on innocent misrepresentations.

Cited in notes in 11 A. S. R. 350, on false representations which will vitiate or avoid contract; 18 A. S. R. 559, on knowledge of falsity in action for false representations; 37 L.R.A. 608, on positive assurance and express reliance on representations made to effect contract as basis of charge of fraud.

Measure of damages for fraud.

Cited in reference notes in 79 A. D. 467, on measure of damages for fraud in sale of real or personal property; 81 A. D. 58, on measure of damages for vendor's false representations; 97 A. D. 745, on recovery of damages adequate to injury sustained in actions for fraud; 47 A. S. R. 502, on recovery of damages for misrepresentation; 55 A. S. R. 675, on measure of damages for false representation.

Cited in notes in 11 A. S. R. 351; 18 A. S. R. 562,—on measure of damages in false representations.

61 AM. DEC. 202, PIPES v. HARDESTY, 9 LA. ANN. 152.

Alteration of writings.

Cited in *Messi v. Frechede*, 113 La. 679, 37 So. 600, holding burden on party relying on instrument to explain any material interlineations appearing therein; *Wheadon v. Turregano*, 112 La. 931, 36 So. 808, holding burden on lessor to explain material erasures which appeared in duplicate copy of lease retained by him but not in lessee's copy; *Bell v. Keefe*, 13 La. Ann. 524, holding bond containing erasures which were satisfactorily explained valid.

Cited in reference notes in 85 A. D. 177, on presumption against validity of deed which presents material interlineations on its face; 27 A. S. R. 886, on effect of interlineations; 72 A. S. R. 223, on presumption as to erasure or interlineation in deed.

61 AM. DEC. 204, SCHNEIDER v. COCHRANE, 9 LA. ANN. 235.

Notarial protests as evidence.

Cited in *Abott v. Borge*, 20 La. Ann. 372, holding that proof of notice of dishonor must be made to hold endorser of note; *Schorr v. Woodlief*, 23 La. Ann. 473, holding statement in foreign notary's certificate of protest that notice of protest of foreign bill of exchange was given insufficient to prove such fact.

Cited in reference notes in 63 A. D. 717, on effect of notarial protests as evidence; 69 A. D. 54, on notarial certificate of protest as evidence of notice; 74 A. D. 77, on necessity for proof of official character of notary; 54 A. S. R. 295, on admissibility in evidence of notarial protests.

Cited in notes in 96 A. D. 603, on protest of foreign bill of exchange as evidence; 96 A. D. 608, as to what law governs effect of protest as evidence; 96 A. D. 609, on effect of certificate of protest as evidence of notice to drawer and indorsers.

What is foreign bill of exchange.

Cited in reference notes in 85 A. D. 371, on bills drawn from one state on another as foreign bills requiring protest; 85 A. D. 634, on when bill of exchange foreign and when inland.

61 M. DEC. 205, GOODLOE v ROGERS, 9 LA. ANN. 273.**Loss of profits as damages.**

Cited in reference notes in 63 A. D. 476, on loss of profits as measure of damages; 65 A. D. 606, on recovery of prospective profits as damages.

Cited in notes in 69 A. D. 725, on loss of profits as damages; 52 L.R.A. 232, on loss of profits of sale or purchase as damages on breach by vendor of articles to be manufactured as applied to remoteness, contingency, and uncertainty; 53 L.R.A. 43, on necessity that profits should have been within contemplation of parties to entitle one to recover for same for breach of contract.

Damages in action for breach of contract for sale of chattel.

Cited in *Livermore Foundry & Mach. Co. v. Union Compress & Storage Co.* 105 Tenn. 187, 53 L.R.A. 482, 58 S. W. 270, holding that rental value of machinery for season may be recovered where machinery furnished, because of defects, could not be used and manufacturer had agreed to have it ready by named date knowing it could be used only for limited season; *Whitney Iron Works v. Reuss*, 40 La. Ann. 112, 3 So. 500 (dissenting opinion), upon right of vendee to recoup where machinery furnished him was defective.

Cited in note in 57 L.R.A. 201, on measure of damages for breach by vendor of contract for sale of article having no market price when purchased for use.

61 AM. DEC. 209, ARDMORE v. CASE, 9 LA. ANN. 288.**When property is community property.**

Cited in *Waterer's Succession*, 25 La. Ann. 210, to point that prior to certain statute no community existed in property acquired in Louisiana in favor of married persons resident abroad.

Conflict of laws as to matrimonial property.

Cited in notes in 85 A. S. R. 564, on conflict of laws as to community property; 57 L.R.A. 358, on conflict of laws as to matrimonial property when *lex domicilii* is opposed to *lex rei sitæ* or *lex fori*.

Giving effect to testator's intention.

Cited in *Lake v. Copeland*, 82 Tex. 464, 17 S. W. 786, holding that where testator's intention was to provide equally for his wife and daughter and title to land given latter failed she has action against mother for contribution.

Cited in reference notes in 73 A. D. 276, on testator's intention governing in construction of will; 77 A. D. 679, on effect of testator's intention in construing will; 94 A. D. 155, on controlling effect of intention of testator.

61 AM. DEC. 214, DAMONT v. NEW ORLEANS, & C. R. CO. 9 LA. ANN. 441.**Contributory negligence.**

Cited in *Schwartz v. Crescent City R. Co.* 30 La. Ann. 15, holding that plaintiff who was guilty of contributory negligence cannot recover by showing defendant's negligence.

Cited in reference notes in 63 A. D. 333, on contributory negligence as affecting right to recover for injury; 64 A. D. 412, on recovery where negligence is mutual; 64 A. D. 675, on contributory negligence relieving defendant; 75 A. D. 346, on doctrine of contributory negligence; 78 A. D. 328, on contributory negligence as bar to recovery of damages.

— Of passenger generally.

Cited in *Mercier v. New Orleans & C. R. Co.* 23 La. Ann. 264, denying recovery to one injured in street car collision where with reasonable care he could have avoided accident; *Barnhill v. Texas & P. R. Co.* 109 La. 43, 33 So. 63, holding one who stepped suddenly from behind box car onto main track and was killed by approaching train guilty of contributory negligence; *Bemiss v. New Orleans City & Lake R. Co.* 47 La. Ann. 1671, 18 So. 711, denying recovery to one who while stepping from one car to another of moving train was injured by sudden jerking of train.

Cited in reference notes in 64 A. D. 771, on contributory negligence affecting injured passenger's right of recovery; 90 A. D. 343, on care required of passengers.

Cited in note in 43 A. D. 364, on passenger's contributory negligence as affecting his right to recover for injury.

— Getting on train.

Cited in *Knight v. Pontchartrain R. Co.* 23 La. Ann. 462, denying recovery to persons who tried to board train as it was pulling out of station though negligence upon part of company was proved; *Blair v. Grand Rapids & I. R. Co.* 60 Mich. 124, 26 N. W. 855, holding one attempting to board train when moving across country guilty of contributory negligence; *Central R. & Bkg. Co. v. Letcher*, 69 Ala. 106, 44 A. R. 505, holding same as to one who boarded train for temporary purpose and stepped therefrom as it pulled out of station.

— Getting off moving train.

Cited in *Walker v. Vicksburg, S. & P. R. Co.* 41 La. Ann. 795, 17 A. S. R. 417, 7 L.R.A. 111, 6 So. 916, holding one who to avoid being carried beyond his destination jumped from moving train guilty of contributory negligence; *Bon v. Railway Pass. Assur. Co.* 56 Iowa, 664, 41 A. R. 127, 10 N. W. 225, holding one not entitled to recover upon accident insurance policy requiring compliance with rules of company where he was thrown from car steps which position he took before train arrived at station; *Odom v. St. Louis S. W. R. Co.* 45 La. Ann. 1202, 23 L.R.A. 152, 14 So. 734, holding that where train started forward and woman who with child in her arms was on step ready to alight stepped therefrom she was not guilty of contributory negligence.

Cited in reference note in 92 A. D. 328, on right of recovery of one who jumps from moving train to avoid being carried beyond destination.

Cited in notes in 37 A. R. 385, on negligence in leaving cars while in motion; 21 L.R.A. 360, on injuries to person getting off where train does not stop.

Distinguished in *Brashear v. Houston, C. A. & N. R. Co.* 47 La. Ann. 735, 49 A. S. R. 382, 28 L.R.A. 811, 17 So. 260, holding that where plaintiff was called to platform by train officials as it slowed up and was thrown from steps by its sudden starting he can recover, *McCaslin v. Lake Shore & M. S. R. Co.* 93 Mich. 553, 53 N. W. 724, holding one who attempts to alight from slowly moving train at invitation of brakeman who stands ready to assist her not guilty of contributory negligence.

61 AM. DEC. 218, STEWART v. NEW ORLEANS, 9 LA. ANN. 461.

Liability of municipal corporations.

Cited in *Gianfortone v. New Orleans*, 24 L.R.A. 592, 61 Fed. 64, holding that in absence of statute city is not liable for its failure to protect human life; *Bennett v. New Orleans*, 14 La. Ann. 120, holding city not liable where because of

defective condition of draining machine plaintiff's property was overflowed; *Arms v. Knoxville*, 32 Ill. App. 604, holding city not liable where one was injured by discharge of cannon by crowd of persons who had assembled in its streets.

Cited in reference notes in 63 A. D. 699, on municipal enjoyment of government exemptions; 25 A. S. R. 654, on municipality's liability for negligence in performance of public duty.

Cited in notes in 66 A. D. 434, on tests for determining city's liability for damages occasioned in execution of governmental or sovereign powers; 70 A. D. 511, on municipality's liability with respect to its public governmental powers.

— **For acts of officers or agents generally.**

Cited in *Territory ex rel. Choteau County v. Cascade County*, 8 Mont. 396, 7 L.R.A. 105, 20 Pac. 809, to point county is not liable for wrongful act of its officer in respect to governmental duty imposed by positive law; *Caspary v. Portland*, 19 Or. 496, 20 A. S. R. 842, 24 Pac. 1036, holding that for city to be liable for acts of officer it must appear that he was not independent public officer and that he was performing some duty of corporate nature; *Fischer Land & Improv. Co. v. Bordelon*, 52 La. Ann. 429, 27 So. 59, holding that parish cannot be treated as municipal corporation and made liable for tort of its agents; *Brown v. Guyandotte*, 34 W. Va. 299, 11 L.R.A. 121, 12 S. E. 707, holding town not liable where one confined in jail for violating its ordinances was injured in its burning resulting from wrongful acts of its officers; *Lewis v. New Orleans*, 12 La. Ann. 190, holding city not liable for death of slave occasioned by negligence and wrongful conduct of jailors who had him in charge; *Richmond v. Long*, 17 Gratt. 375, 94 A. D. 461, holding same where delirious slave escaped from city's hospital through attendants' negligence and met its death; *Murtaugh v. St. Louis*, 44 Mo. 479, holding same where free patient of city's hospital was injured through negligence and misfeasance of attendants; *Givens v. Paris*, 5 Tex. Civ. App. 705, 24 S. W. 974, holding same where city's special officer in impounding cow recklessly ran it into plaintiff; *Culver v. Streater*, 130 Ill. 238, 6 L.R.A. 270, 22 N. E. 810, holding city not liable for injuries caused by negligence of one of its officers employed to enforce dog ordinance.

Cited in note in 30 A. S. R. 383, on municipal liability for negligence and other misconduct of officers and agents in performing public duties voluntarily assumed.

— **For acts of police officers or sheriffs.**

Cited in *Cook v. Macon*, 54 Ga. 468, holding city not liable for illegal arrest made by its police officer; *New Orleans v. Kerr*, 50 La. Ann. 413, 69 A. S. R. 442, 23 So. 384, to same effect; *Pollock v. Louisville*, 13 Bush, 221, 26 A. R. 260, holding city not liable for willful negligence of police officer in making arrest for felony; *Dargan v. Mobile*, 31 Ala. 469, 70 A. D. 505, holding same where slave was injured through negligence of city's officers in taking him into custody for violating ordinance; *McKay v. Buffalo*, 9 Hun, 401, holding city not liable to one injured by negligence of police officer in shooting supposedly mad dog in streets; *Sherman v. Vermillion Parish*, 51 La. Ann. 880, 25 So. 538, holding that no action arises against parish where juror was injured through negligence of sheriff who had him in charge by falling into pit dug by permission of police jury.

Cited in notes in 30 A. S. R. 401, on municipal liability for negligence or misconduct of police department; 15 L.R.A. 783, on liability of municipal corpora-

tion for acts of policemen; 44 L.R.A. 796, 798, on municipal liability for false imprisonment and unlawful arrest; 12 L.R.A.(N.S.) 538, on municipal liability for torts of police officers.

— **For acts of mob.**

Cited in *New Orleans v. Abbagnato*, 26 L.R.A. 329, 10 C. C. A. 361, 23 U. S. App. 533, 62 Fed. 240, holding that in absence of statute city is not liable for killing of person by mob permitted by negligence of its officers.

Liability of officers.

Cited in *Carter v. Worcester County*, 94 Md. 621, 51 Atl. 830, holding county commissioners not liable where their road supervisor made illegal arrest; *Symonds v. Clay County*, 71 Ill. 355, holding county commissioners whose agent negligently set out fire on poor-farm not liable for resulting damages to adjoining property.

Pleading in actions against municipalities.

Cited in *Bennett v. New Orleans*, 14 La. Ann. 120, holding city's exemption from suit for nonperformance of discretionary powers available under general issue plea; *Conway v. Beaumont*, 61 Tex. 10, holding that as each case of municipal liability for tort is determined upon particular facts pleader must state his case in detail.

Nature of government of New Orleans.

Cited in *State ex rel. Nicholls v. Shakespeare*, 41 La. Ann. 156, 6 So. 592 (dissenting opinion), to point that city of New Orleans possesses sovereign powers; *Duffy v. New Orleans*, 49 La. Ann. 114, 21 So. 179, in same connection.

61 AM. DEC. 221, SARPY v. MUNICIPALITY NO. 2, 9 LA. ANN. 597.

What amounts to a dedication.

Cited in *McNeil v. Hicks*, 34 La. Ann. 1090, holding dedication of open space established where land company in making final partition of land remaining unsold did not include it.

Cited in reference notes in 79 A. D. 591, on what is sufficient evidence of owner's intention to dedicate, from plans furnished and acts done; 92 A. D. 460, on what constitutes and upon what dedication founded; 72 A. D. 369; 96 A. D. 368,—as to what constitutes dedication.

Distinguished in *Delord v. New Orleans*, 11 La. Ann. 699, holding mere omission to account for an alluvion upon plan purporting to represent land belonging to one's estate insufficient to establish abandonment to public; *David v. New Orleans*, 10 La. Ann. 404, 79 A. D. 586, holding that where plaintiffs asserted title to locus in quo and made no sales of lots bounding upon it as a public place, no dedication was established.

Right to interfere with land dedicated.

Cited in *Moose v. Carson*, 104 N. C. 431, 17 A. S. R. 681, 7 L.R.A. 548, 10 S. E. 689, holding that easement which abutting owner has in street with respect to which he purchased his lot cannot be substantially interfered with; *Tilton v. New Orleans City R. Co.* 35 La. Ann. 1062, to point that estoppel in pais arises against original owner where land is set apart as public and others acquire rights relying thereupon.

Cited in reference notes in 67 A. D. 240, on estoppel of owner from revoking dedication; 97 A. D. 221, on dedication being irrevocable where property is set apart to public use.

61 AM. DEC. 227, WILSON v. WILSON, 38 ME. 18.**Conveyances upon condition subsequent.**

Cited in reference note in 68 A. D. 649, on validity and effect of conveyances upon condition subsequent.

— Personal character of obligation.

Cited in reference note in 72 A. D. 302, on personal character of obligation where father conveys to son in consideration that latter maintain father.

— Who bound by.

Cited in note in 44 A. D. 745, on duration of condition subsequent and who bound by.

Distinguished in *Ridley v. Ridley*, 87 Me. 445, 32 Atl. 1005, holding that where one conveyed land to his son upon condition that son support him thereon during life, son's heirs cannot demand possession as against mortgagee; *Greenleaf v. Grounder*, 86 Me. 298, 29 Atl. 1082, holding that purchaser under execution against one to whom farm was conveyed on condition that he support grantor on such farm cannot have possession during life of grantor.

— Re-entry upon breach of condition.

Cited in *Gilchrist v. Foxen*, 95 Wis. 428, 70 N. W. 585, holding that mother who conveyed daughter land in consideration that she pay mortgage thereon and support mother for life may upon her failure to do so enter as for breach of condition subsequent.

61 AM. DEC. 229, WILLIAMS v. MORTON, 38 ME. 47.**Sales by guardians.**

Cited in reference notes in 51 A. S. R. 401, on jurisdiction to sell infant's property; 76 A. S. R. 77, on sales by guardian.

— Validity of as dependent upon his giving bond.

Cited in *Bachelor v. Korb*, 58 Neb. 122, 76 A. S. R. 70, 78 N. W. 485, holding guardian's sale void where his bond was not properly approved; *Tracy v. Roberts*, 88 Me. 310, 34 Atl. 68, holding guardian's sale made without petition, license, bond and notice of sale, void.

Cited in reference note in 68 A. D. 603, on when guardian's deed is void.

Cited in note in 33 L.R.A. 761, on necessity of bond by domestic guardians on sale or mortgage of land.

Disapproved in *Watts v. Cook*, 24 Kan. 278; *Hughes v. Goodale*, 26 Mont. 93, 91 A. S. R. 410, 66 Pac. 702,—holding guardian's sale not void because of his failure to give security required by statute.

Liability on general bond for performance of acts for which special bond is required.

Cited in *Madison County v. Johnston*, 51 Iowa, 152, 50 N. W. 492; *Morris v. Cooper*, 35 Kan. 156, 10 Pac. 588; *Probate Judge v. Toothaker*, 83 Me. 195, 22 Atl. 119; *State use of Martin v. Harbridge*, 43 Mo. App. 16; *Henderson v. Coover*, 4 Nev. 429,—holding general bond of guardian not liable for his acts in sale of realty for which special bond was required; *Kester v. Hill*, 42 W. Va. 611, 26 S. E. 376, to same effect; *Allen v. Kelly*, 55 App. Div. 454, 67 N. Y. Supp. 97 (dissenting opinion), upon same point; *Milwaukee County v. Ehlers*, 45 Wis. 281, holding treasurer's general bond not liable for misappropriation of particular fund for which special bond was required; *People use of Sterling v. Huffman*, 182 Ill. 390, 55 N. E. 981; *Com. ex rel. Lancaster County v. Hershey*, Am. Dec. Vol. VIII.—75.

19 *Lanc. L. Rev.* 33,—to point general bond not liable for faithful performance of particular duties for which special bond required.

Distinguished in *Wann v. People*, 57 Ill. 202, holding guardian's general bond liable where land was leased under order of court and special bond which was required was not given.

Liability on bond of officer making void sale for proceeds thereof.

Cited in *Johnson v. Ayres*, 18 App. Div. 495, 46 N. Y. Supp. 132, holding bond of committee of lunatic not liable for proceeds of sale made under circumstances which rendered it void.

When limitations accrue against purchaser at guardian's void sale.

Cited in *Furlong v. Stone*, 12 R. I. 437, holding that limitations run against one purchasing at guardian's void sale from time he pays over purchase money to guardian.

61 AM. DEC. 234, KNOWLES v. ATLANTIC & ST. L. R. CO. 38 ME. 55.

Liability of carrier.

Cited in reference notes in 63 A. D. 320, on what is sufficient delivery by carrier; 71 A. D. 290, on railroad company's liability as carrier ceasing when goods have reached destination and been stored in warehouse; 86 A. D. 776, as to when carrier's liability as such terminates; 95 A. D. 657, on carrier's liability.

Liability of bailees.

Cited in *Parker v. Union Ice & Sale Co.* 59 Kan. 626, 68 A. S. R. 383, 54 Pac. 672, holding that where bailor knew as much about character of warehouse in which bailee stored his goods as bailee did, he cannot recover for injury thereto resulting from warehouse's construction.

Cited in reference notes in 65 A. D. 764, on liability of gratuitous bailee for fraud or gross negligence only; 88 A. D. 126, on degree of care required of gratuitous bailee; 30 A. S. R. 791, on liability of bailee of naked deposit; 35 A. S. R. 831, on liability of gratuitous bailee.

Cited in note in 9 E. R. C. 285, on degree of care required of bailee for safe-keeping.

Distinguished in *Russell v. Lynch*, 28 Mo. 312, holding that one who placed his slave in private prison may complain of proprietor's negligence in leaving place in charge of negro boy, although he had on several occasions seen such boy about the place opening and closing doors.

81 AM. DEC. 237, BUCKNAM v. THOMPSON, 38 ME. 171.

What absence from state will interrupt running of limitations.

Cited in *Venable v. Paulding*, 19 Minn. 488, Gil. 422, holding that statute providing that time defendant is absent from state shall form no part of limitation period has reference to such absence as constitutes change of domicile.

Cited in reference notes in 64 A. D. 205, on meaning of "reside without state" in statute of limitations; 64 A. D. 380, on construction of "reside without state" in statute providing that limitations shall not run; 77 A. D. 550, as to what is absence from state and effect upon running of statute of limitations; 9 A. S. R. 675, on meaning of term "residing without the state" in statute of limitations; 36 A. S. R. 647, on suspension of limitations by absence from state.

Cited in notes in 36 A. D. 74, on effect of absence from state on limitation of actions; 83 A. D. 644, on what constitutes absence from the state and effect of on running of limitations; 17 L.R.A. 226, on what constitutes residence out of the state within meaning of statute of limitations.

What constitutes domicil or change thereof.

Cited in reference notes in 65 A. D. 116, on domicile and change thereof; 69 A. D. 74, as to what constitutes, and distinction between, residence, domicil and dwelling place; 69 A. D. 74, on change of domicil or residence; 83 A. D. 509, on continuance of old domicil until new one is acquired.

Cited in note in 9 E. R. C. 808, on necessity of *animus manendi* to constitute domicil.

61 AM. DEC. 239, MOODY v. WHITNEY, 38 ME. 174.**Damages recoverable for wrongful conversion of property.**

Cited in *Robinson v. Barrows*, 48 Me. 186, holding that for wrongful seizure of liquors their value at time conversion occurred is recoverable with interest; *Sturges v. Keith*, 57 Ill. 451, 11 A. R. 28, holding that in trover for conversion of stock, its market value at time of conversion with interest to date of trial proper measure of damages; *Hendricks v. Evans*, 46 Mo. App. 313, holding that in trover against purchaser of horse from owner's bailee, measure of damages is horse's value at time demand made and not at time of purchase though it had increased in value in meantime; *Buckley v. Buckley*, 12 Nev. 423, to point that when, for conversion of property, money damages are allowed innocent wrongdoer is to be compensated for his expenditure.

Cited in reference notes in 65 A. D. 219; 73 A. D. 106-308; 90 A. D. 266; 8 A. S. R. 691,—on measure of damages in trover; 10 A. S. R. 431; 34 A. S. R. 589; 39 A. S. R. 651,—on measure of damages for conversion.

Cited in notes in 24 A. D. 75-76, on right to recover enhanced value in case of wilful wrong; 24 A. D. 78-80, on measure of damages where property is taken or converted by mistake under bona fide belief of right.

—Timber.

Cited in *Noyes v. Stone*, 163 Mass. 490, 40 N. E. 856, holding that proper measure of damages for wrongful conversion of timber is its value at time of conversion; *White v. Yawkey*, 108 Ala. 270, 54 A. S. R. 159, 32 L.R.A. 190, 19 So. 360, holding that damages recoverable in action against innocent purchaser from inadvertent trespasser are measured by logs' value immediately after severance; *Beede v. Lamprey*, 64 N. H. 510; 10 A. S. R. 426, 15 Atl. 133, holding same in trover against one who wrongfully but not maliciously cut timber; *Ward v. Carson River Wood Co.* 13 Nev. 44, holding owner of wood wrongfully converted entitled to recover its value at time of conversion and not its value at place where it was when he demanded it of bailee of converter; *Winchester v. Craig*, 33 Mich. 205, to same effect; *Weymouth v. Chicago & N. W. R. Co.* 17 Wis. 550, 84 A. D. 763, holding that in trover for conversion of wood measure of damages against one acting innocently is its value at place where taken and not at place to which it was removed and demand made; *Gaskins v. Davis*, 115 N. C. 85, 44 A. S. R. 439, 25 L.R.A. 813, 20 S. E. 188, holding that in trespass against one innocently cutting timber measure of damages is its value in woods from which it was taken together with injury incident to its removal; *Foote v. Merrill*, 7 Legal Gaz. 308, holding that in trespass q. c. f. and for cutting down and carrying away trees measure is amount of injury suffered from whole trespass taken as continuous act; *Foote v. Merrill*, 54 N. H. 490, 20 A. R. 151, holding that in action of trespass q. c. f. with counts for cutting and removing trees their increased value occasioned by defendant's con-

verting them into lumber cannot be considered in estimating damages; *Powers v. Tilley*, 87 Me. 34, 47 A. S. R. 304, 32 Atl. 714, holding that in trover against purchaser of sleepers from trespasser who manufactured them from logs cut by him on plaintiff's lands, measure of damages is value of sleepers at time purchaser converted them; *Wing v. Milliken*, 91 Me. 387, 64 A. S. R. 238, 40 Atl. 138, holding that where defendant's conversion occurred after trees wrongfully cut from plaintiff's land had been manufactured into spool stock, damages are measured by trees' enhanced value; *Wright v. Skinner*, 34 Fla. 453, 16 So. 335, holding that in action against one innocently cutting logs from another's land no deduction for labor bestowed anterior to removal is to be made; *Webster v. Moe*, 35 Wis. 75, holding that in trespass for cutting of timber measure of damages is highest value of stumpage at any time between the cutting and commencement of suit.

Cited in note in 19 L.R.A. 655, on measure of damages for injuring or destroying trees.

Doubted in *Bly v. United States*, 4 Dill. 464, Fed. Cas. No. 1,581, holding that where logs have been knowingly and wrongfully cut from public lands government may recover their value in boom.

— Minerals.

Cited in *McLean County Coal Co. v. Long*, 81 Ill. 359, holding that in trover for wrongful conversion of coal taken from another's land its value when it first became a chattel is recoverable; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 43 A. R. 560, applying same principle; *Forsyth v. Wells*, 41 Pa. 291, 80 A. D. 617, holding that in trover against one innocently mining coal on another's land measure of damages is its value in place; *Omaha & G. Smelting & Ref. Co. v. Tabor*, 13 Colo. 41, 16 A. S. R. 185, 5 L.R.A. 236, 21 Pac. 925, holding that in trover for conversion of ore sold, its value when first severed from realty, is measure of damages; *Alta Min. & Smelting Co. v. Benson Min. & Smelting Co.*, 2 Ariz. 362, 16 Pac. 565, holding in action for conversion of ore, its value when broken down at mine without allowance for labor expended in its mining, measure of damages.

Disapproved in *Austin v. Huntsville Coal & Min. Co.*, 72 Mo. 535, 37 A. R. 446, holding that where one innocently mines another's coal measure of damages is its value at mouth of shaft less cost of severing and cost of delivering it to such point.

Recovery of property wrongfully converted.

Cited in *Missouri Lumber & Min. Co. v. Zeiting*, 45 Mo. App. 114 (dissenting opinion) to point that timber becomes personal property of owner of land as soon as it is felled and replevin may be maintained for its removal.

Cited in notes in 4 A. D. 370, on owner's right to claim property; 26 A. R. 529, on owner's right to take property in changed form upon proof of identity of original materials.

Title by accession where property wrongfully converted.

Cited in note in 32 L.R.A. 428, on title by accession to crops, fruit, and timber, severed and converted with wrongful intent.

Evidence of conversion.

Cited in reference note in 69 A. D. 90, on demand and refusal as evidence of conversion.

Trover for cutting and carrying away timber.

Cited in reference note in 63 A. D. 665, on when trover is maintainable for cutting and carrying away timber.

Confusion of goods.

Cited in *Wright v. Skinner*, 34 Fla. 453, 16 So. 335, holding that plaintiff in trover alleging conversion of definite number of logs cannot recover upon proof of loss of an indefinite few which had become so intermingled with defendant's logs as not to be capable of identification.

61 AM. DEC. 243, KIMBALL v. BATH, 38 ME. 219.**Liability of municipal corporation.**

Cited in notes in 66 A. D. 437, on liability for damages where city ceases to act judicially or legislatively; 66 A. D. 438, on municipal liability for consequential damages resulting from act done under authority of valid statute or charter; 66 A. D. 439, on municipal liability for negligent execution of statutory power.

— For negligence of its officers or agents.

Cited in note in 30 A. S. R. 386, on municipal liability for negligence of officers and agents as to public streets.

— For negligence of independent contractor.

Cited in note in 76 A. S. R. 418, on liability for negligence of independent contractors in performing work for cities.

— For defects in highway generally.

Cited in reference notes in 66 A. D. 284, on liability of towns for injuries arising from defects in highway; 66 A. D. 466, on liability of cities and towns for injuries arising from defective highways; 98 A. D. 587, on defects in streets and highways for which cities and towns are liable; 4 A. S. R. 111, on municipal liability for defects in streets and sidewalks.

Cited in note in 63 A. D. 350, on municipal liability for failure to repair streets and highways.

— For unsafe highway while improvements are being made.

Cited in *Paris Gaslight Co. v. McHam*, 2 Tex. App. Civ. Cas. (Willson) 569, holding gas company liable for injury resulting from its failure to guard properly ditch dug in public street; *Wilson v. Wheeling*, 19 W. Va. 323, 42 A. R. 780, to point that obstructions consequent on repair of streets create no liability if there is no negligence.

Cited in reference notes in 65 A. D. 527, on liability of municipality for injuries to passengers while street is undergoing repairs; 2 A. S. R. 212, on duty of municipal corporation to maintain guards and lights about excavations while repairing streets and sidewalks; 51 A. S. R. 744, on liability of municipality for obstruction of street; 69 A. S. R. 780, on municipal liability for unsafe highway while improvements are being made.

Excessive damages as ground for new trial.

Cited in reference notes in 71 A. D. 692, as to when verdict of jury as to damages may be reviewed; 74 A. D. 790, on interference with verdict on ground of excessive damages; 85 A. D. 381, on setting aside verdict on ground of excessive damages; 97 A. D. 288, on when verdict will be disturbed on ground of excessive damages.

Cited in notes in 26 L.R.A. 396, on granting new trial by appellate court for excessive damages; 8 E. R. C. 460, on excessive damages as ground for new trial.

61 AM. DEC. 245, MCGILVER v. STACKPOLE, 38 ME. 283.

Powers and duties of shipmasters in foreign ports.

Cited in note in 63 A. D. 638, on powers and duties of shipmasters in foreign ports.

61 AM. DEC. 248, PIKE v. BALCH, 38 ME. 302.

Power of master to sell ship or cargo.

Cited in *Astrup v. Lewy*, 19 Fed. 536; *Moore v. Hill*, 38 Fed. 330,—to point that notice to owner where practicable is essential condition to master's authority to sell ship or cargo.

Cited in reference notes in 61 A. D. 248, on power of master to sell ship and cargo in cases of emergency; 83 A. D. 633, on power and duty of master regarding sale of insured vessel.

Cited in notes in 63 A. D. 638, on powers and duties of shipmasters in foreign ports; 63 A. D. 641, on master's power to sell cargo; 2 E. R. C. 542, on what necessity authorizes master to sell goods carried as agent for owners of goods.

Application of statute of frauds to public sales.

Cited in *O'Donnell v. Leeman*, 43 Me. 158, 69 A. D. 54, holding that auction sales are as much within statute of frauds as other sales; *Dunham v. Hartman*, 153 Mo. 625, 77 A. S. R. 741, 55 S. W. 233, holding that bidder at sheriff's sale may withdraw his bid at any time before proper memorandum of sale has been made and memorandum made thereafter does not bind him; *Gwathney v. Cason*, 74 N. C. 5, 21 A. R. 484, in support of same principle where sale was auction sale.

Cited in reference notes in 69 A. D. 56, as to whether statute of frauds applies to auction sales; 69 A. D. 56, on sufficiency of auctioneer's memorandum of sale under statute of frauds; 70 A. D. 381, on auction sales being within statute of frauds.

When auction sale is complete.

Cited in reference note in 77 A. S. R. 746, as to when auction sale is complete.

Validity of auction sales where competition is stifled.

Cited in reference note in 75 A. D. 792, on employment of by-bidders and puffers at auction sales, and its effect on the validity of sales.

Cited in notes in 96 A. D. 270, on effect of combinations tending to stifle competition at auctions; 20 L.R.A. 545, on effect of preventing or checking bids on validity of sale at auction.

61 AM. DEC. 256, DONAHOE v. RICHARDS, 28 ME. 379.

School government and discipline generally.

Cited in *Indianapolis v. State*, 129 Ind. 14, 13 L.R.A. 147, 28 N. E. 61 (dissenting opinion), upon right of school commissioners to restrict teaching of German to certain grades; *State v. Jackson*, 71 N. H. 552, 60 L.R.A. 739, 53 Atl. 1021, upholding statute requiring parents to send their children to school. Cited in note in 36 L.R.A. 279, on adoption of text-books for public schools.

Reading from Bible in public schools.

Cited in *Stevenson v. Hanyon*, 7 Pa. Dist. R. 585, 9 Kulp, 256, 4 Lack. L.

News, 215, holding constitutional provision securing freedom of worship not violated by reading of King James' version of Bible in public schools; *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 117 A. S. R. 599, 69 L.R.A. 592, 87 S. W. 792, 9 A. & E. Ann. Cas. 36, holding King James' version of Bible not sectarian book within meaning of statute prohibiting use of sectarian books in public schools; *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250, holding constitutional provision securing freedom of worship not violated by reading of extracts from Bible inculcating precepts of the commandments, such reading being in nature of supplementary reading lesson and no child being required to attend during such exercises.

Cited in reference notes in 76 A. D. 173, on requirement that Bible be read in school; 76 A. D. 173, on requirement that Bible be read in school; 20 A. S. R. 69, on Bible reading in common schools.

Cited in note in 105 A. S. R. 153, on reading from Bible in public schools.

Distinguished in *State ex rel. Weiss v. District Board*, 76 Wis. 177, 20 A. S. R. 41, 7 L.R.A. 330, 44 N. W. 967, holding that use of Bible as text-book and stated reading thereof in public schools without restriction constitutes "sectarian instruction," to which persons aggrieved may object, though pupils are not required to attend upon such exercises.

Grounds for suspension or exclusion of pupils.

Cited in *Ferriter v. Tyler*, 48 Vt. 444, 21 A. R. 133, holding that public school authorities may suspend pupil for non-attendance, though he was kept away by his parents to attend church on religious feast day; *Dritt v. Snodgrass*, 66 Mo. 286, 27 A. R. 343, holding public school authorities not civilly liable for expelling pupil for attending social affair during school term in violation of rule established by them; *Burdick v. Babcock*, 31 Iowa 562, holding pupil who is suspended for violating a parent's command rule as to regular attendance has no action against school authorities; *State ex rel. Andrew v. Webber*, 108 Ind. 31, 58 A. R. 30, 8 N. E. 708, holding that public school authorities may suspend pupil who at parent's request refuses to take music course of school.

Distinguished in *State ex rel. Stallard v. White*, 82 Ind. 278, 42 A. R. 496, holding that officers of public university cannot make membership in Greek letter fraternity, a disqualification for admission or require that candidates take oath to disconnect themselves with such societies during college term.

—Noncompliance with rule as to reading from Bible.

Cited in *McCormick v. Burt*, 95 Ill. 263, 35 A. R. 163, holding public school directors not acting maliciously not liable for suspending pupil for non-compliance with rule permitting King James' version of Bible to be read.

Liability of public officers or governing boards for their official acts.

Cited in *McKenna v. Bodine*, 6 Phila. 582, 25 Phila. Leg. Int. 109, holding flour inspector not responsible for honest mistake of judgment but for reckless disregard of his duty and for negligence he is responsible; *Van Deusen v. Newcomer*, 40 Mich. 90, upon liability of superintendent of insane asylum who in good faith accepts or detains sane person.

Cited in reference notes in 65 A. D. 490, on nonliability of public boards and officers acting judicially for their acts; 68 A. D. 750, on liability of judicial officers.

Cited in note in 95 A. S. R. 83, on liability of county boards, boards of supervisors, and other governing bodies for judicial acts.

—Expulsion of pupil.

Distinguished in *Board of Education v. Purse*, 101 Ga. 422, 65 A. S. R. 312, 41 L.R.A. 593, 28 S. E. 896, upon point that for wrongful expulsion of child from public school right of action is in child and not parent.

Operation of constitutional provision securing freedom of worship generally.

Cited in *Hale v. Everett*, 53 N. H. 9, 16 A. R. 82, to point that object of constitutional provision securing freedom of worship was to protect all persons no matter what their religious persuasion in the practice of their belief.

What constitutes sectarian institution.

Cited in note in 8 A. S. R. 412, on what constitutes a sectarian institution or school.

Public aid to sectarian institutions.

Cited in note in 14 L.R.A. 419, on public aid to sectarian institutions.

Constitutionality of Sunday laws on religious grounds.

Cited in note in 49 A. D. 619, on constitutionality of Sunday laws on religious grounds.

Inquiry by courts into wisdom or propriety of legislative act.

Cited in reference note in 64 A. D. 573; 67 A. D. 296,—on right of courts to inquire into wisdom or propriety of legislative acts; 88 A. D. 725, on legislative act not being void on ground of policy or expediency.

61 AM. DEC. 276, MOALE v. BALTIMORE, 5 MD. 314.**Nature of powers of eminent domain and of taxation.**

Cited in *Graff v. Baltimore*, 10 Md. 544, to point that power of eminent domain is not to be used capriciously to injury of citizen; *Cherokee Nation v. Southern K. R. Co.* 33 Fed. 900, to point that such power is an inherent and essential element of sovereignty; *Groff v. Frederick City*, 44 Md. 67, holding statute extending taxable limits of city so as to take in farming lands valid; *Kimball v. Grantsville City*, 19 Utah, 368, 45 L.R.A. 628, 57 Pac. 1, to point that limitation upon power of eminent domain that compensation must be made has no application to taxing power; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 A. R. 147, holding it no defence in action against railroad company for removing natural barrier which protected plaintiff's land from floods that it acted under legislative authority; *District of Columbia v. Armes*, 8 App. D. C. 393, holding that recording of maps in accordance with act of Congress providing for extension of highways in District of Columbia does not amount to taking of property.

Cited in reference notes in 64 A. D. 746, on right to exercise eminent domain without affording compensation; 67 A. D. 296, on distinction between taxation and eminent domain; 69 A. D. 396, on eminent domain as portion of state's inherent sovereignty; 71 A. D. 519, on right to take private property for private purpose; 73 A. D. 583, on compensation as condition precedent to taking under power of eminent domain.

Cited in notes in 46 A. D. 637, on state's right to appropriate private property for public use, upon making just compensation; 102 A. S. R. 812, on effect of right of eminent domain; 102 A. S. R. 812, on distinction between eminent domain and the taxing or police powers.

Damages and compensation recoverable for lands taken for public use.

Cited in *Newby v. Platte County*, 25 Mo. 258, holding that in compensating one whose land is taken for public use deduction may be made for resulting increase in value of part retained; *Buffalo Bayou, B. & C. R. Co. v. Ferris*, 26 Tex. 588, holding owner of land taken for public use entitled to such land's intrinsic value without reference to profit he may derive from proposed improvement; but in estimating any damages that may accrue to remainder of tract the resulting advantages thereto are to be considered; *Norris v. Baltimore*, 44 Md. 598, holding that for unnecessary delays caused by city in taking condemned property owner may recover interest for such time upon market value of his property as found by the inquisition where such property was vacant land yielding no rents; *McCormick v. Baltimore*, 45 Md. 512, holding that in assessing compensation to owner of lot lying in bed of unopened street, land to be taken is to be valued as if no street were to be opened over it; *Hall v. Baltimore*, 56 Md. 187, holding owner of land abutting on both sides of unopened street who subsequently acquired title to fee in bed thereof entitled to substantial damages upon such street being condemned.

Cited in reference notes in 66 A. D. 153, on Constitution guarantying to citizens right of acquiring and protecting property; 66 A. D. 153, on amount of compensation necessary for land taken for public use.

Cited in notes in 88 A. D. 119, on damages in eminent-domain cases; 4 A. S. R. 402, on damages for establishing railroad on highway where fee of street is in abutting landowner; 85 A. S. R. 294, on elements of damages for property actually taken under eminent domain.

What constitutes a dedication of land.

Cited in *Steuart v. Baltimore*, 7 Md. 500, holding mere fact that commissioners in pursuance of their power to designate lands which were to be held for public purposes had marked out particular tract as public square insufficient to establish its character as such; *Baltimore v. Hook*, 62 Md. 371, holding that such action by such commissioners did not take the place of condemnation proceedings.

— By plat or map generally.

Cited in *Northern C. R. Co. v. Baltimore*, 46 Md. 425, holding that where street exists only on city plat owners may use their land as if no such street were contemplated.

— Reference to street as boundary on sale of land.

Cited in *Hanson v. Campbell*, 20 Md. 223, to point that sale of city property with respect to street implies that purchaser shall have use of same as such; *Baltimore & O. R. Co. v. Gould*, 67 Md. 60, 8 Atl. 754, to point that where land is called for as binding on streets laid off on city's plat such streets are thereby dedicated to public; *Pitts v. Baltimore*, 73 Md. 326, 21 Atl. 52, holding that such rule will not apply if circumstances show parties did not intend a dedication; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 A. D. 749, holding that one purchasing lot with respect to streets laid out on plat has right to have all such streets kept open as such; *Cook v. Totten*, 49 W. Va. 177, 87 A. S. R. 792, 38 S. E. 491, holding that where lots are sold as marked off upon plat upon which streets are laid down purchaser acquires right to immediate use of all such streets as are necessary to full enjoyment of his property; *Patterson v. Miller*, 52 Md. 388, to point that if lots be sold as fronting on projected street marked off on plat, such street is thereby dedicated to public; *Peabody Heights Co. v. Willson*, 82 Md. 186, 36 L.R.A. 393, 32 Atl. 1077 (dissenting opinion), in same

connection; *Burbach v. Schweinler*, 56 Wis. 386, 14 N. W. 449, holding that grantee of land buys with full notice of and takes subject to such streets as are marked off on plat with reference to which he purchased; *Baltimore v. Frick*, 82 Md. 77, 33 Atl. 435, holding that where land is called for as binding on unopened street marked off on private plat such street is thereby dedicated though plat was not referred to in deed; *Flersheim v. Baltimore*, 85 Md. 489, 36 Atl. 1098, holding that where one conveyed land as gift to another and described it as binding on unopened street marked off on city's plat such street was thereby dedicated to public; *Hawley v. Baltimore*, 33 Md. 270, holding that where one sells lot with respect to streets laid out by him only so much of such streets is dedicated as is required to enable purchaser to pass from his lot to some public street; *Carroll v. Asbury*, 28 Pa. Super. Ct. 354, holding that where one sold lot as fronting on street rights of grantee in such street depended in no manner upon public's accepting or rejecting it as public street; *Van Witsen v. Gutman*, 79 Md. 405, 24 L.R.A. 403, 29 Atl. 608, holding that easement of abutting owner in public alley, laid out by original grantor who conveyed with reference to alley as a boundary cannot be taken away for private use by ordinance closing alley; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530, to point that grantee of land is entitled as against grantor and his assigns to have street with reference to which deed was made kept open either as incident to the grant or by force of implied covenant; *McCormick v. Baltimore*, 45 Md. 512, holding no dedication established where land was partitioned off with reference to unopened streets marked off on city plat and provision made for temporary use of ways along center of such streets.

Cited in reference note in 121 A. S. R. 1063, on implied covenant that way exists, raised by description bounding upon it.

Cited in notes in 14 L.R.A.(N.S.) 878, on right of grantee to claim an easement by implication or estoppel as against grantor by call in deed for street or alley in which grantor owns the fee; 14 L.R.A.(N.S.) 881, on right of grantee to claim easement, implied covenant, or estoppel, as against grantor, by call in deed for street or alley in which grantor owns the fee, where the description is by reference to plat.

Distinguished in *Baltimore v. White*, 62 Md. 362, upon point that where land is called for as binding on streets as mentioned on plat such streets are dedicated to public; *Vaughan v. Lewis*, 89 Va. 187, 15 S. E. 525, holding that where street is referred to in deed merely for purpose of locating lot no dedication thereof occurs; *Baltimore v. Northern C. R. Co.* 88 Md. 427, 41 Atl. 911, holding that where land was described as beginning in center of unopened street marked off on city's plat and running along center thereof no dedication to public was intended.

—Reference to park.

Distinguished in *Canton Co. v. Baltimore*, 106 Md. 69, 11 L.R.A.(N.S.) 129, 66 Atl. 679, holding mere reference in deed to unpublished plat on which park is shown as part of tract does not constitute dedication thereof to public where all land sold is separated from park by streets.

Right of land owner to acquire fee in abutting street.

Cited in *Peabody Heights Co. v. Sadtler*, 63 Md. 533, 52 A. R. 519, to point that purchaser of lot binding on street may acquire fee in bed thereof.

Cited in reference note in 54 A. D. 681, on conveyance of lot on street as passing interest or right in street.

Damages and compensation on abandonment of highway.

Cited in note in 26 L.R.A. 664, on damages and compensation on abandonment of highway.

Assessment for improvements according to benefits.

Cited in reference notes in 64 A. D. 573, on assessments for public improvements according to benefits conferred; 67 A. D. 296, on assessment for street improvement according to benefits; 73 A. D. 522, on assessments for local improvements according to benefits.

61 AM. DEC. 283, YATES v. DONALDSON, 5 MD. 389.**Contribution between joint obligors.**

Cited in reference notes in 63 A. D. 708, on contribution between joint obligors; 73 A. D. 493, on right to contribution between joint principals.

Effect of bill or note as payment.

Cited in *Haines v. Pearce*, 41 Md. 221, holding it for jury to determine from circumstances whether giving of order on third person was intended to extinguish original liability; *Ecker v. New Windsor First Nat. Bank*, 59 Md. 291, applying same principle where money and note were given in place of other notes; *Mailhouse v. Frazier*, 25 Md. 96, to point that in action at law it would be for jury to say whether in accepting notes of one party for those of another original contract was abandoned; *Berry v. Griffin*, 10 Md. 27, 69 A. D. 123, holding receiving note in payment of an account insufficient of itself to extinguish original claim; *Herman v. Williams*, 36 Fla. 136, 18 So. 351, holding that acceptance of note for antecedent debt operates to extend time of payment of such debt until note's maturity; *American Iron & Steel Co. v. Beall*, 101 Md. 423, 61 Atl. 629, 4 A. & E. Ann. Cas. 883, to same effect.

Cited in reference notes in 77 A. D. 613, as to when acceptance of negotiable paper is payment of pre-existing debt; 8 A. S. R. 841, on taking note of debtor or third party as payment of precedent debt.

Release of sureties.

Cited in *Schaeffer v. Bond*, 72 Md. 501, 20 Atl. 176, to point that equity holds surety discharged if contract be materially changed without his consent; *Vanderford v. Farmers' & M. Nat. Bank*, 105 Md. 164, 10 L.R.A.(N.S.) 129, 66 Atl. 47, holding signer of joint and several promissory note is not though known to payee to be surety discharged under negotiable instrument law by granting extension of time to principal debtor; *George v. Andrews*, 60 Md. 20, 45 A. R. 706, holding mortgagor, who had after purchaser's assumption of mortgage become mere surety, discharged from liability thereon where holder and such purchaser extended time of payment of mortgage.

Cited in reference notes in 63 A. D. 380; 79 A. D. 517,—on discharge of surety by giving time to principal; 90 A. D. 416, on valid agreement for delay as discharging surety; 97 A. D. 780, on discharge of surety by accepting note in lieu of former debt; 50 A. S. R. 716, on acceptance of new security as extinction of old debt.

Effect of releasing one of several joint debtors.

Cited in *Campbell v. Booth*, 8 Md. 107, to point that where several persons are bound jointly claimant may release one and reserve his remedy against others with their consent; *Whittemore v. Judd Linseed & Sperm Oil Co.* 124 N. Y. 565, 21 A. S. R. 708, 27 N. E. 244, holding that legal operation of release of one

of several persons jointly bound may be restrained by express provision that it shall not operate as to others; *People's Bank v. Keech*, 26 Md. 521, 90 A. D. 118, holding that if one indorser be released because not notified of note's dishonor another jointly bound with him is likewise released.

Cited in reference notes in 84 A. D. 343, on effect of release by or to one jointly interested; 1 A. S. R. 476, on release of one joint debtor releasing all; 2 A. S. R. 227, on effect of release of one of joint obligors; 21 A. S. R. 715, on effect of release of one of two joint debtors.

Distinguished in *Valley Sav. Bank v. Mercer*, 97 Md. 458, 55 Atl. 435, holding that parol release of one of several joint debtors all liable as principals does not operate as release of all.

Liability of parties to accommodation paper.

Cited in *Washington Bank v. Krum*, 15 Iowa, 53, holding that one who signs note for another's accommodation becomes bound thereon as principal to third persons; *Rhinehart v. Schall*, 69 Md. 352, 16 Atl. 126, to point that true relation which parties to accommodation note bear to one another may be proved to rebut presumption that they are liable in order in which they indorse.

Cited in reference notes in 71 A. D. 695, on liability to holder of maker of accommodation note; 79 A. D. 571, on similitude of accommodation notes and those negotiable for value.

Parol evidence to show liability on instrument.

Cited in reference note in 79 A. D. 517, on admissibility of extrinsic evidence to show that apparent liability on note is not real liability.

Cited in note in 20 L.R.A. 711, on parol evidence to show who is principal and who surety in instruments under seal.

61 AM. DEC. 294, ATWELL v. MILLER, 6 MD. 10.

Entries in books of account as evidence.

Cited in *Romer v. Jaecksch*, 39 Md. 585, holding entries made in course of business by deceased partner incompetent evidence in action by surviving partner against firm's debtor.

Cited in reference notes in 66 A. D. 714, on admissibility of memorandum and account books; 71 A. D. 155, on want of date to item as affecting admissibility of account book; 81 A. D. 249, as to when bank books are admissible in evidence; 83 A. D. 726, on books of account as evidence.

Cited in note in 52 L.R.A. 558, on entries made by party in his books of account as evidence in his own favor.

Instruction to disregard irrelevant testimony not followed up and connected with issue.

Cited in *Jones v. Peterson*, 44 Or. 161, 74 Pac. 661, holding that if irrelevant testimony be not followed up and connected with issue it becomes duty of opposite party to move to strike it out or to have jury instructed to disregard it.

Sufficiency of notice to produce.

Cited in *Jack v. Rowland*, 98 Ill. App. 352, holding notice given to counsel at trial to produce writing of which he theretofore had no knowledge, and his client being out of state, insufficient.

What constitutes valid delivery of personality.

Cited in *Perkins v. Dacon*, 13 Mich. 81, holding it no sufficient delivery where

owner of wheat in railroad's elevator gave vendee order on consignee who had neither actual nor constructive possession of it; *Thompson v. Baltimore & O. R. Co.* 28 Md. 396, holding sufficient delivery established where iron lying at furnace and along road was pointed out to vendee and charged to him on books of vendor; *Hall v. Richardson*, 16 Md. 396, 77 A. D. 303, holding same where flour was marked with purchaser's initials and delivered to agent of vessel for shipment abroad; *Bowe v. Ellis*, 3 Misc. 92, 22 N. Y. Supp. 369, holding actual delivery not necessary to satisfy statute of frauds where ponderous bar being upon third person's premises was sold.

Cited in reference notes in 65 A. D. 495, on delivery of goods to validate sale as against creditors under statute of frauds; 99 A. D. 690, on constructive delivery; 100 A. D. 260, on delivery on sale as question for jury; 53 A. S. R. 303, on symbolical delivery.

Cited in note in 49 A. D. 336, on symbolical delivery and constructive acceptance of goods under verbal sale within statute of frauds.

Distinguished in *Jones v. Mechanics' Bank*, 29 Md. 287, 96 A. D. 533, holding vendee's merely designating carrier who received goods as carrier upon their delivery to him insufficient acceptance and receipt to satisfy statute of frauds.

Right to instruction as to effect of particular portion of evidence.

Cited in *Union Bank v. Kerr*, 7 Md. 88, holding that parties may ask instructions of court as to legal effect of any particular facts which may be offered to jury; *Burgess v. Lloyd*, 7 Md. 178; *Blackburn v. Beall*, 21 Md. 208,—to same effect; *Johnson v. Harvey*, 30 Md. 259, to point that party may segregate any portion of evidence and ask of court instruction as to its legal force and effect; *Fusting v. Sullivan*, 41 Md. 162, applying same principle.

Effect of admitting competent evidence out of order.

Cited in reference note in 82 A. D. 213, on effect of admitting competent evidence out of its order.

Use of memoranda to refresh memory.

Cited in reference note in 74 A. D. 558, on right of witness to use memoranda to refresh memory.

41 AM. DEC. 300, STUMP v. HENRY, 6 MD. 201.

Chancery pleadings as evidence.

Cited in *Mobberly v. Mobberly*, 60 Md. 376, holding record in chancery suit admissible, in subsequent suit between same parties relating to same inquiry, for purpose of proving admissions.

Acquisition of title by adverse possession.

Cited in reference notes in 65 A. D. 144, on acquisition of title by adverse possession for prescribed period; 72 A. D. 632, on title by adverse possession for period prescribed by statute; 74 A. D. 189, on acquisition of title by adverse possession; 83 A. D. 497, on possession of disseisor that will confer title; 90 A. D. 454, as to acquiring title to land by adverse possession; 95 A. D. 209, on vesting of title in one holding adversely for statutory period.

Cited in note in 70 A. D. 540, on adverse possession uninterrupted for twenty years raising presumption of ownership.

What constitutes adverse possession.

Cited in *Dean v. Brown*, 23 Md. 11, 87 A. D. 555, holding that one who enters and holds under contract to purchase cannot claim to hold adversely; *Hull v.*

Chicago, B. & Q. R. Co. 21 Neb. 371, 32 N. W. 162; Nebraska R. Co. v. Culver, 35 Neb. 143, 52 N. W. 886,—holding that one cannot claim to hold adversely where within statutory period he instituted condemnation proceedings against another as owner and deposited money in court as such other's damages.

Cited in reference notes in 65 A. D. 633, on what constitutes adverse possession; 67 A. D. 495, on what constitutes and effect of adverse possession; 72 A. D. 142, on period adverse possession must continue to vest title.

Cited in note in 15 L.R.A. (N.S.) 1190, on essential elements in adverse possession.

Title acquired at execution sale.

Cited in reference notes in 69 A. D. 757, on right acquired by purchaser at sheriff's sale; 82 A. D. 616, on title acquired by purchaser at execution sale.

Presumption as to payment of mortgage indebtedness.

Cited in Brown v. Hardcastle, 63 Md. 484, holding that presumption that mortgagor in possession over twenty years has paid mortgage debt may be rebutted.

Cited in reference notes in 70 A. S. R. 93, on limitation of action to foreclose mortgage; 88 A. S. R. 228, on limitation of actions as to mortgages.

Statute of limitations applicable to deeds of trust.

Cited in Peters v. Suter, 2 MacArth, 516, holding statute limiting time within which suits on specialties could be brought inapplicable to deeds of trust.

61 AM. DEC. 305, McDOWELL v. GOLDSMITH, 6 MD. 319.

Applicability of statute of limitations.

Cited in reference note in 65 A. D. 545, on application of statute of limitations to equity suits.

Cited in note in 104 A. S. R. 767, on right of purchasers at private sale to plead statute of limitations.

— To trusts.

Cited in Weaver v. Leiman, 52 Md. 708; Kennedy v. Baker, 59 Tex. 150,—holding that trust raised by implication of law is within statute of limitations.

Cited in reference notes in 62 A. D. 401, as to what trusts are within statute of limitations; 65 A. D. 144, as to when statute of limitations is bar to trust; 66 A. D. 183, on bar of limitations as to trusts created by operation of law; 77 A. D. 166, as to what trusts are and are not within statute of frauds.

Cited in note in 99 A. D. 390, on statute of limitations as between trustee and cestui que trust.

Right of fraudulent grantee to rely upon limitations.

Cited in reference notes in 70 A. D. 196, on reliance on statute of limitations by fraudulent grantee where grantor's creditor seeks to set aside deed; 92 A. D. 713, on when statute of limitations runs in favor of grantee of fraudulent grantor.

Presumption as to date of indorsement.

Cited in Hopkins v. Kent, 17 Md. 113, holding that indorsee will be presumed to have come into possession of note before its maturity.

Cited in reference note in 69 A. D. 112, on presumption of time of indorsement of note.

Declarations as evidence.

Cited in *New Winsor v. Stocksedale*, 95 Md. 196, 52 Atl. 596, holding statement by owner of lot made shortly after obstructing alley that he had closed it to prevent public's acquiring right to use it provable.

Cited in reference notes in 90 A. D. 187, on declarations as evidence; 7 A. S. R. 201, on admissibility of declarations as part of the *res gestæ*; 9 A. S. R. 865, on admissibility of declarations not taking place immediately with occurrence of main act; 10 A. S. R. 306, as to when declarations are part of the *res gestæ*; 19 A. S. R. 891, as to when declarations are admissible as *res gestæ*.

Cited in note in 95 A. D. 54, on admissibility of circumstances and declarations characterizing transaction in question as part of *res gestæ*.

—As to fraud in conveyance.

Cited in *Curtis v. Moore*, 20 Md. 93, holding statements made by one indicating his fraudulent purpose in doing act about which he was engaged provable.

Cited in reference notes in 65 A. D. 394, on declarations concerning fraudulent conveyances; 71 A. D. 489, on admissibility of declarations of grantor concerning fraudulent conveyances; 79 A. D. 717, on admissibility of grantor's declarations as to fraud in conveyance.

—Respecting title to land.

Cited in reference notes in 6 A. D. 509, on admissibility of grantor's declarations respecting title; 95 A. D. 245-246, on admissibility as evidence of acts of ownership and declarations of grantor remaining in possession; 1 A. S. R. 306, on admissibility of declarations by grantor in disparagement of title.

—To impeach prior conveyance.

Cited in reference notes in 68 A. D. 648, on admissibility of declarations of vendor after conveyance, to impeach it; 85 A. D. 177, on declarations of party not permitted to contradict his prior deed.

Necessary averments in bill to vacate fraudulent conveyance.

Cited in *Sinclair v. Auxiliary Realty Co.* 99 Md. 223, 57 Atl. 664, holding that bill to vacate conveyance need not set forth evidence of defendant grantor's indebtedness to plaintiff.

Res adjudicata.

Cited in *Trayhern v. Colburn*, 66 Md. 277, 7 Atl. 459, holding decree in suit wherein question of indebtedness of one party to another was raised and decided conclusive as to such matter in subsequent suit, between same parties.

Cited in reference note in 73 A. D. 693, on right to impeach judgment in collateral proceeding.

Presumption as to consideration.

Cited in *Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 238, 6 A. R. 402, holding that where declaration avers assignment under seal accompanied by delivery of certificates of stock court will presume, on motion in arrest of judgment, that assignment was made for bona fide consideration.

Function of appellate court in respect to claims not passed on by chancellor.

Cited in *Williams v. Bank*, 11 Md. 198, holding that appellate court will express no opinion as to claims of creditors which chancellor has reserved for further consideration.

Right to creditor's bill.

Cited in note in 25 A. D. 313, on creditor's right to resort to equity to reach assets.

61 AM. DEC. 318, BOWIE v. STONESTREET, 6 MD. 418.**Contracts between husband and wife.**

Cited in *Stocket v. Holliday*, 9 Md. 480, holding that contract which equity can enforce may be entered into between husband and wife for transfer of property from former to latter for bona fide and valuable consideration; *Sims v. Ricketts*, 35 Ind. 181, 8 A. R. 679, to same point; *Jones v. Jones*, 18 Md. 464, refusing to disturb husband's executed conveyance to wife founded on valuable consideration; *Farmers' & M. Nat. Bank v. Jenkins*, 65 Md. 245, 3 Atl. 302, to point that husband may become wife's debtor by receiving her separate estate under promise to repay it to her; *Oswald v. Hoover*, 43 Md. 360, holding that equity will give effect to relation of debtor and creditor existing between husband and wife; *Mayfield v. Kilgour*, 31 Md. 240, holding that husband in pecuniary difficulty may make preference in favor of wife who is his creditor; *Crane v. Barkdoll*, 59 Md. 534, holding to same effect; *Abshire v. State*, 53 Ind. 64, holding that survivorship attaches to note made payable to husband and wife given upon sale of separate real estate of wife.

Cited in reference note in 25 A. S. R. 536, on enforceability of agreements between husband and wife in equity.

Admissibility of admissions.

Cited in *Cross v. Iler*, 103 Md. 592, 64 Atl. 33, holding statements of husband recognizing wife's claim against him admissible in her favor against his heirs.

Cited in reference note in 89 A. D. 251, on opposite party's right to whole admission where part has been admitted against him.

When equity will decree compensation.

Cited in *Bussey v. McCurley*, 61 Md. 436, holding that where specific execution of covenant is attended with difficulty equity in special cases may instead award compensation; *Powell v. Young*, 45 Md. 494, holding that equity may decree compensation to party for what he paid under contract not specifically enforceable; *Girault v. Adams*, 61 Md. 1, in same connection; *Green v. Drummond*, 31 Md. 71, 1 A. R. 14, holding that equity will decree compensation to one who under verbal agreement became joint purchaser of land with another; *Cross v. Iler*, 103 Md. 592, 64 Atl. 33, awarding compensation to widow who had advanced husband money with which to purchase land under his oral promise to make conveyance to her.

What claims within statute of limitations.

Cited in *Oswald v. Hoover*, 43 Md. 360, holding that wife's claim against husband as his creditor cannot be barred by any lapse of time less than twenty years.

Distinguished in *Drummond v. Green*, 35 Md. 148, to point that claim of one to compensation for advancing money under verbal contract to purchase land jointly with another is within statute of limitation.

When wife guilty of laches in asserting claim against husband.

Cited in *Cross v. Iler*, 103 Md. 592, 64 Atl. 33, holding wife failing to assert her claim against husband until after his death not necessarily guilty of laches.

Husband's estate in wife's land.

Cited in reference notes in 63 A. D. 225, on husband's right to rents, issues, and profits of wife's realty; 68 A. D. 620; 71 A. D. 116,—on husband's estate in wife's land; 76 A. D. 417, on husband's estate in wife's real property during their joint lives.

Rights of one advancing money under unenforceable contract to purchase land.

Cited in *Green v. Drummond*, 31 Md. 71, 1 A. R. 14, holding that one who paid money under verbal contract to purchase land jointly with another is entitled where such agreement cannot be enforced to come in as general creditor.

Power of trial court as to amendments of pleadings.

Cited in *Calvert v. Carter*, 18 Md. 73, holding that no appeal lies from court's refusal to allow amendment though statute authorized amendments to be made at any time before final decree.

61 AM. DEC. 327, ELLICOTT v. MARTIN, 6 MD. 509.

Rights of holders of negotiable instruments.

Cited in *Clark v. Pease*, 41 N. H. 414, holding that bona fide holder of note for value may recover upon it though it was originally procured by duress; *Hamilton v. Vought*, 34 N. J. L. 187, holding that in absence of proof of fraud, carelessness of one in taking note under suspicious circumstances will not defeat his title; *Dyer v. Sebrell*, 135 Cal. 597, 67 Pac. 1036, holding that cashier's prima facie right to sue on notes in his possession cannot in absence of proof of bad faith be rebutted by evidence of debtor that title is in bank; *Kunkel v. Spooner*, 9 Md. 462, 66 A. D. 332, holding that possessor of note endorsed in blank has prima facie right to sue thereon in absence of proof of bad faith; *Long v. Crawford*, 18 Md. 220, holding same as to one who received note after its maturity and protest.

Cited in reference notes in 68 A. D. 696, on fraud and irregularity in origin of negotiable instrument as affecting purchaser; 86 A. D. 340, on possession of negotiable instrument as evidence of ownership; 90 A. D. 695, on mala fides in holder of note; 96 A. D. 403, on possession of negotiable note as evidence of title.

Cited in notes in 26 A. D. 157, on right of bona fide holder to recover on negotiable instrument; 70 A. D. 330, on possession of note as evidence of title; 5 A. R. 267, as to whether the taking of negotiable paper under suspicious circumstances will vitiate the title.

Burden of proof as to bills and notes.

Cited in *Murphy v. Gumaer*, 12 Colo. App. 472, 55 Pac. 951, holding burden on defendant to show that holder of accommodation note paid no consideration for it; *Hinkley v. Fourth Nat. Bank*, 77 Ind. 475, holding that acceptor of bill of exchange cannot shift burden of proof to endorsee by showing he received no consideration for his acceptance; *Lane v. Krekle*, 22 Iowa, 399; *Fotten v. Bucy*, 57 Md. 446,—holding burden on plaintiff to show that he is bona fide holder of note where same was procured by fraud.

Cited in reference notes in 39 A. D. 658, on presumption that holder is owner with right to fill indorsement; 93 A. D. 451, on burden of proof of bona fide holding by indorsee of note fraudulent or illegal at inception.

Cited in note in 11 A. S. R. 324, 326, on burden of proof as to bona fide ownership of negotiable instrument.

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Sufficiency of answer denying plaintiff's ownership of negotiable instrument.

Cited in reference note in 86 A. D. 340, on necessity of alleging mala fides in action on bill of exchange where plaintiff has it in his possession.

Cited in note in 66 L.R.A. 517, on sufficiency of answers denying ownership of plaintiff in actions by third parties on negotiable instruments.

Signing and sealing bills of exceptions.

Cited in *Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711; *Tall v. Baltimore Steam Packet Co.* 90 Md. 248, 47 L.R.A. 120, 44 Atl. 1007,—to point that each independent bill of exception must be signed and sealed by trial court.

Single bill of exceptions to series of instructions.

Cited in *McCosker v. Banks*, 84 Md. 292, 35 Atl. 935, holding that only one bill of exception need be taken to courts ruling upon series of consecutive propositions of law submitted at one time.

Mode of presenting error to appellate court.

Cited in reference note in 65 A. D. 73, on proper mode of presenting supposed error to appellate court.

Extrinsic evidence to show consideration for note.

Cited in reference note in 24 A. S. R. 428, on admissibility of extrinsic evidence to show consideration for note.

61 AM. DEC. 331, DAVIS v. STATE, 7 MD. 151.**Implied repeal of statutes.**

Cited in *Bogardus v. Gordon*, 53 N. J. Eq. 40, 30 Atl. 812, to point that general statute intended to prescribe the only rule will impliedly repeal special legislation; *Churchill v. Hill*, 59 Ark. 54, 26 S. W. 378; *Albert v. White*, 33 Md. 297,—holding that one statute may, without referring to another, amend or repeal it, if the two be inconsistent; *Pace v. J. S. Merrill Drug Co.* 2 Ind. Terr. 218, 48 S. W. 1061, to same point.

Cited in reference notes in 72 A. D. 738, on whether repeals by implication are favored; 74 A. D. 317, on repeal of statute by implication; 82 A. D. 167, on repeal by implication.

Constitutional requirement that statutes refer to but one subject which shall be expressed in title.

Cited as leading case in *Queen Anne's County v. Talbot County*, 99 Md. 13, 57 Atl. 1, holding that constitutional provision requiring that subject of every law be described in its title not violated by law "to limit and control expenditure of money upon public highways" by commissioners of named county though act took from them power formerly conferred to improve bridge outside of county.

Cited in *Irwin's Succession*, 33 La. Ann. 63, holding that title "Act to provide for drainage of New Orleans" does not indicate that act provided for creation of new drainage district and collection of assessments by summary proceedings; *Hubbard v. Woodsum*, 87 Me. 88, 32 Atl. 802, holding proposition submitted to voters for their approval to allow commissioners to construct public buildings upon particular site at specified price not objectionable as covering more than one subject; *State ex rel. Goodsill v. Woodmansee*, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970, holding constitutional provision that no bill shall embrace more than one subject which shall be expressed in its title not violated by act which purported to relate to state banks and which prohibited private banking; *Drennan v.*

Banks, 80 Md. 310, 30 Atl. 655, holding such requirement satisfied if different provisions of statute are germane to same subject-matter which is described in its title; *Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702, holding that similar provision does not require that details of legislation and means by which its object is to be effectuated shall be stated in title; *Fout v. Frederick County*, 105 Md. 545, 66 Atl. 487, to same effect; *Mealey v. Hagerstown*, 92 Md. 741, 48 Atl. 746, holding in construing similar provision that "Act to provide for establishment of electric light plant in Hagerstown" is not invalid because its title failed to show plant was to be municipal plant; *Catholic Cathedral Church v. Manning*, 72 Md. 116, 19 Atl. 599, holding under similar provision that act designed to permit opening of streets through cemetery may provide for removal of bodies therefrom and for sale of the land; *Phinney v. Sheppard & E. P. Hospital*, 88 Md. 633, 42 Atl. 58, holding similar provision not violated by statute which in purporting to change corporation's name provided that it should possess all powers conferred by its original charter and that it should hold all property it might acquire under changed name; *Keller v. State*, 11 Md. 525, holding same as to "Act raise additional revenue . . . by increasing rates of license to ordinary keepers and traders" though such act required vendors of beer manufactured by themselves to take out license; *Blood v. Marcelliott*, 53 Pa. 391, holding same as to "Act to increase boundaries of Forrester county" which provided for extending borders of county, locating county seat and accepting donations for public buildings; *Washington County v. Franklin R. Co.* 34 Md. 159, holding that under similar provision statute purporting "to provide for general valuation and assessment of property" may in effect repeal particular corporation's charter exemption from taxation; *Dorchester County v. Meekins*, 50 Md. 28, holding in construing similar provision statute which purported to provide for government of county valid though in its practical operation it required several officers holding office under different appointments; *Annapolis v. State*, 30 Md. 112, holding that under similar provision "Act to amend and alter charter" of city may provide that acts of city in respect to closing of its streets be ratified; *Miles v. State*, 40 Ala. 39, sustaining under similar provision statute enacted to "more effectually prevent offenses of grand larceny, arson and burglary;" *State v. Morgan*, 2 S. D. 32, 48 N. W. 314, sustaining under similar provision act regulating "business of commercial agencies, credit companies and guaranty associations" and which in its body imposed gross earnings tax; *Allopathic State Bd. of Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 So. 809, sustaining under similar provision "Act to regulate practice of medicine, surgery and midwifery, to create State Boards of Medical Examiners, to regulate fees . . . thereof, to prevent practice of medicine by unauthorized persons, to provide for trial and punishment of violators . . . ;" *Parkinson v. State*, 14 Md. 184, 74 A. D. 522, holding in construing similar provision that "giving" away of liquor to minors may be prohibited under act to prohibit "sale" of liquors to minors; *State v. Davis*, 14 Nev. 439, 33 A. R. 563, holding in construing similar provision it competent to legislate upon offense of escape under act "supplementary to act entitled 'act concerning crimes and punishments;'" *State ex rel. Drury v. Hallock*, 19 Nev. 384, 12 Pac. 832, holding in construing similar provision act which amended former act regulating salaries of public officers void where it embraced class of officers not included in former; *Stewart v. Tenant*, 52 W. Va. 559, 44 S. E. 223, holding that act which contravenes such provisions is void; dissenting opinions in *State v. Young*, 47 Ind. 150; *State ex rel.*

Yancey v. Hyde, 121 Ind. 20, 22 N. E. 644; *Cutlip v. Calhoun County*, 3 W. Va. 588,—in construing similar provision; *Strauss v. Heiss*, 48 Md. 292, holding under similar provision that so much of act's title as is repugnant to and inconsistent with act itself, will be rejected as surplusage; *Second German Bldg. Asso. v. Newman*, 50 Md. 82, holding under similar provision that statute adding section to specified article of Code need not state in its title subject to which it related; *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821, sustaining under similar provision "Act to amend sections 790, 795 . . . of fifth division of Compiled Statutes," where but one general subject was treated; citing annotation also on this point.

Annotation cited with special approval in *Harland v. Territory*, 3 Wash. Ter. 31, 13 Pac. 453, holding provision of organic law that every law shall embrace but one object, which shall be expressed in title violated by amendatory act whose object is indicated in title only by reference to Code section intended to be amended.

Annotation cited in *State ex rel. Turner v. Hocker*, 36 Fla. 358, 18 So. 767, sustaining under similar provision "Act to amend (named statute) defining fifth and sixth judicial circuits" though it operated in practice to transfer two counties from the one circuit to the other; *State v. Street*, 117 Ala. 203, 23 So. 807, sustaining under similar constitutional provision act for "improvement of roads and bridges" where but one general subject was treated of; *State ex rel. Winter v. Sayre*, 118 Ala. 1, 24 So. 89, holding "Act to authorize governor to appoint judge of city court" sufficiently broad title to include section authorizing him to fill vacancies that might occur in such judgeship.

Cited in reference notes in 69 A. D. 232, on construction of constitutional provision that every law shall embrace but one subject and that to be expressed in title; 69 A. D. 648, on constitutionality of statute embracing subjects not expressed in title; 74 A. D. 119, on construction of constitutional provision that private and local laws shall embrace but one subject which shall be expressed in title; 73 A. D. 217; 74 A. D. 534,—on necessity that legislative act embrace but one subject which is expressed in title; 63 A. D. 518; 82 A. D. 110,—on constitutional provision that act of legislature shall embrace but one subject and that expressed in the title; 85 A. D. 356, on validity of statutes under constitutions requiring that every act shall embrace but one subject; 90 A. D. 284, on constitutional requirements as to subject and title of statute; 11 A. S. R. 188, on operation of constitutional requirement that statute shall embrace only one subject expressed in title; 28 A. S. R. 389, on requirement that statute shall embrace but one subject; 31 A. S. R. 601; 41 A. S. R. 310,—on statutes containing more than one subject; 44 A. S. R. 576, on constitutional prohibition against enacting laws embracing more than one subject; 41 A. S. R. 421; 46 A. S. R. 335,—on title of statute embracing more than one subject; 50 A. S. R. 598, on limitation of statute to one subject expressed in title; 40 A. S. R. 885; 55 A. S. R. 161,—on validity of statute whose title embraces more than one subject; 64 A. S. R. 70, on unity of subject of statute to be expressed in title.

Cited in notes in 64 A. S. R. 70, on unity of subject of statute to be expressed in title; 64 A. S. R. 71-72-73, on sufficiency of title to statute; 64 A. S. R. 78, on comprehensive and restrictive titles to statutes.

Constitutional requirement that amending statute set forth amended statute.

Cited in *Norton County v. Shoemaker*, 27 Kan. 77, holding that constitutional provision requiring that new act set forth act repealed or revised has no appli-

cation to statute which repeals or modifies inconsistent legislation by implication; *State ex rel. Van Riper v. Parsons*, 40 N. J. L. 123, 29 A. R. 210, to same effect; *Re Dietrick*, 32 Wash. 471, 73 Pac. 506, holding same under similar provision where statute in question was designed to be complete law upon subject of conducting gambling games; *Quinlan v. Houston & T. C. R. Co.* 89 Tex. 356, 34 S. W. 738, holding similar provision not violated by section of railroad company's charter which extended to it benefits of a former law conferring lands on railroads; *St. Louis, I. M. & S. R. Co. v. Paul*, 64 Ark. 83, 62 A. S. R. 154, 37 L.R.A. 504, 40 S. W. 705, holding provision of constitution requiring amended statute to be set out in revising statute inapplicable to statutes which repeal or revise others by implication; *Ex parte Pollard*, 40 Ala. 77, to same point; *Tuskaloosa Bridge Co. v. Olmstead*, 41 Ala. 9, holding that statute contravening such provision is void; *Second German Bldg. Asso. v. Newman*, 50 Md. 62, holding provision that no law should be amended by reference to its title or section only not violated by "Act to amend article 95 of (Code) by adding additional section thereto;" *Home Ins. Co. v. Shelby County Taxing Dist.* 4 Lea, 644, holding provision that repealing or amending laws shall state in their caption substance of law repealed or amended inapplicable to act which repeals or modifies another by implication; *Ballou v. Black*, 17 Neb. 389, 23 N. W. 3, holding that provision requiring new act to contain sections of amended act does not require that act complete within itself and being amendatory of entire legislation relating to mechanics' liens set forth specially the several sections of amended act.

Annotation cited in *State ex rel. Turner v. Hocker*, 36 Fla. 358, 18 So. 767, to point that requirement that amending statute set forth amended statute has no application to amendments and repeals by implication; *State v. Mitchell*, 17 Mont. 67, 42 Pac. 100, holding in construing similar provision and after reviewing particular legislation that title: "Act to amend Chapter IX. of Penal Code" was insufficient.

Cited in reference note in 12 A. S. R. 695, on amendment of statute by mere reference to title in amending act.

Distinguished in *Smails v. White*, 4 Neb. 353, holding provision requiring new act to contain sections of amended act applicable to act incomplete in itself and clearly amendatory of some other statute.

Constitutional requirement that amending statute repeal amended sections of former statute.

Cited in *Lehman v. McBride*, 15 Ohio St. 573, holding that constitutional provision requiring that amended sections of former act be repealed is merely directory to legislature and does not abolish theory of repeals by implication.

Constitutional requirement that statutes be enacted into articles and sections.

Cited in *Hardesty v. Taft*, 23 Md. 512, 87 A. D. 584; *Anderson v. Baker*, 23 Md. 531,—holding that constitutional provision that statutes be enacted into articles and sections in same manner as Code is arranged is merely directory.

Partial invalidity of statutes.

Cited in *Record Pub. Co. v. Geyer*, 29 Pittsb. L. J. N. S. 70; *State v. Beddo*, 22 Utah, 432, 63 Pac. 96, holding so much of statute as is properly indicated by title sustainable if it form complete enactment in itself and is independent of faulty portion; *People ex rel. Rochester v. Briggs*, 50 N. Y. 553, to same effect; *Maxwell v. State*, 40 Md. 273 (dissenting opinion), upon point that irrelevant

matter in law may be rejected as void and its principal subject sustained; *Baltimore v. Howard*, 15 Md. 376; *State v. Consolidation Coal Co.* 46 Md. 1,—holding that void portion of statute may be expunged and remainder held valid; *Hagerstown v. Dechert*, 32 Md. 369, holding statute conferring upon mayor all powers of justice of peace valid except to extent it conferred upon him judicial power.

Cited in note in 64 A. S. R. 77, on invalidity in entirety of statute void in part.

Resolving doubt in favor of validity of statute.

Annotation cited in *State ex rel. Moodie v. Bryan*, 50 Fla. 293, 39 So. 929, holding that any reasonable doubt as to statute's constitutionality must be resolved in favor of its validity.

Appointing power.

Cited in *People ex rel. Klokke v. Wright*, 70 Ill. 388, holding it within legislative discretion to provide how commissioners of board shall be selected where board is creature of legislation; *Re Inman*, 8 Idaho, 398, 69 Pac. 120, sustaining statute creating board of examiners and authorizing governor to appoint members thereof without concurrence of senate; *Scholle v. State*, 99 Md. 729, 50 L.R.A. 411, 46 Atl. 326, holding that statute creating medical board may confer power of appointing its members upon incorporated medical societies; *Baltimore v. Howard*, 15 Md. 376, sustaining statute establishing police department under control of commissioners appointed by legislature; *State ex rel. Rosenstock v. Swift*, 11 Nev. 128, naming in act of incorporation persons who are to constitute provisional board of trustees not exercise of power intrinsically executive; *Peupie v. Harper*, 91 Ill. 357, holding that officers in respect of whom constitution speaks of fees and salaries fixed by law are only those specifically named in that instrument.

Cited in reference note in 74 A. D. 595, on constitutional provision that governor shall appoint all officers not otherwise provided for, as affecting legislature's right to provide mode of filling office created by it.

Nature of public official's right to hold office.

Cited in *Warfield v. Baltimore County*, 28 Md. 76, holding that legislature may at any time modify or repeal law creating public office; *Duer v. Dashiell*, 91 Md. 600, 47 Atl. 1040, to point that one cannot acquire vested right to hold public office for any specified time.

Construction of constitution.

Cited in *Hovey v. State*, 119 Ind. 395, 21 N. E. 21, holding that in construing clause respecting appointments that construction placed upon former constitution will be followed in construing similar provisions in new constitution.

Statutory constructions.

Cited in reference note in 61 A. D. 409, on statutory constructions.

Effect of error in publication of statute.

Cited in note in 85 A. D. 360-361, on effect of error in publication of statute.

61 AM. DEC. 346, WILDEY v. COLLIER, 7 MD. 273.

Contracts in violation of public policy.

Cited in *William Deering & Co. v. Cunningham*, 63 Kan. 174, 54 L.R.A. 410, 65 Pac. 263, holding that agreement for pecuniary consideration to withdraw opposition to granting of pardon and to endeavor by solicitation and personal influence to induce granting of same is void; *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 A. S. R. 793, 21 L.R.A. 617, 26 Atl. 978, holding agreement between newspapers in respect to government advertising void and unenforceable where it con-

travened provisions of law; *Chippewa Valley & S. R. Co. v. Chicago*, St. P. M. & O. R. Co. 75 Wis. 224, 6 L.R.A. 601, 44 N. W. 17, holding agreement by railroad company not to make effort to procure grant of public lands from legislature but to assist another in obtaining such grant in consideration of being allowed to share therein void; *Basket v. Moss*, 115 N. C. 448, 44 A. S. R. 463, 48 L.R.A. 842, 20 S. E. 733, holding that injunction may issue against exercise of power of sale under mortgage given in compensation for services in procuring appointment to public office; *Stroemer v. VanOrsdel*, 74 Neb. 132, 121 A. S. R. 713, 4 L.R.A. (N.S.) 212, 103 N. W. 1053, holding contract between attorney and client looking to procurement of legislative action valid though contract provided for contingent fee; *Wakefield v. Van Tassell*, 202 Ill. 41, 95 A. S. R. 207, 65 L.R.A. 511, 66 N. E. 830, holding condition in deed of small parcel of land that no grain was ever to be handled thereon, the land containing no facilities for handling grain at time deed was executed, valid.

Cited in reference note in 71 A. D. 721, on what contracts are in restraint of trade and void as against public policy.

Cited in notes in 66 A. D. 512, on invalidity of contracts to pay for procuring pardons and commutation of sentences; 117 A. S. R. 520, on enforceability of contracts involving improper influence of executive officers; 30 L.R.A. 738, on validity of contract for services to procure legislation.

Distinguished in *Gotwalt v. Neal*, 25 Md. 434, refusing to set aside deed executed for purpose of compounding threatened prosecution for embezzlement.

61 AM. DEC. 350, FARMERS' & P. BANK v. MARTIN, 7 MD. 342.

Applicability of rule of caveat emptor to chancery sales.

Cited in *Bolgiano v. Cooke*, 19 Md. 375, to point that doctrine of caveat emptor applies to chancery sales; *Sansbury v. Belt*, 53 Md. 324, to point that chancery sales are presumed to be made subject to incumbrances and that doctrine of caveat emptor applies; *Downin v. Sprecher*, 35 Md. 474, applying rule caveat emptor where one purchased under decree inoperative to bind after-born children; *Bowen v. Gent*, 54 Md. 555, holding that one purchasing under chancery decree takes interest only of those who are made parties to cause; *Farmers' Bank v. Thomas*, 37 Md. 246, holding that purchaser at chancery sale takes subject to lien of judgment creditor who was not made party to chancery suit; *Slothower v. Gordon*, 23 Md. 1, holding that purchaser at trustee's sale can claim no relief on ground that property was not what it was advertised to be where no fraud upon trustee's part is shown.

Cited in reference notes in 83 A. D. 230, on caveat emptor as rule at judicial sale; 90 A. D. 424, on application of rule of caveat emptor to sale by trustee under power; 33 A. S. R. 118, on application of caveat emptor to judicial sales.

Cited in notes in 70 A. D. 573, as to when purchaser at execution or judicial sale may obtain release from bid; 70 A. D. 575, on defect of title and outstanding equities as ground for relief in equity sales; 21 L.R.A. 47, objections to completing purchase at execution or judicial sale on account of encumbrances.

Enforcement of liability of bidder at equity sale.

Cited in note in 69 A. D. 369, on modes of enforcement of liability at equity sale.

Re-sales by executor and trustees.

Cited in *Mealey v. Page*, 41 Md. 172, holding that where executor resells at

risk of person who refused to complete his contract of purchase such person is entitled to benefit of increased price secured for property.

Liability of first purchaser at execution sale.

Cited in reference note in 65 A. S. R. 342, on liability of first purchaser at execution sale.

Objection to title after confirmation of sale.

Cited in note in 70 A. D. 580, on objection of defect in title after confirmation coming too late.

61 AM. DEC. 353, McTAVISH v. CARROLL, 7 MD. 352, Later appeals in 13 Md. 429 and 17 Md. 1.

Right of easement in own property.

Cited in reference note in 78 A. D. 120, on creation of easement upon one of two tracts by owner of both.

When easement is implied.

Cited in *Wettlaufer v. Ames*, 133 Mich. 201, 103 A. S. R. 449, 94 N. W. 950, holding that easement over one lot in favor of another which was merged upon one person's acquiring title to both was revived upon his conveying same to different persons; *Brown v. Berry*, 6 Coldw. 98, to point that upon owner's conveying portions of tract to different persons, way over one portion in favor of another may pass as way of necessity; *Jay v. Michael*, 92 Md. 198, 48 Atl. 61, to point that if owner of two closes sells one he has implied right to use way running from close retained over close sold to highway; *Du Val v. Du Val*, 21 Md. 149, holding that union of dominant and servient tenements does not necessarily destroy right of way, for it may be one of necessity.

Cited in reference notes in 64 A. D. 77, on retention by grantor of way of necessity over land granted; 64 A. D. 749, on when way of necessity created by implication; 94 A. D. 264, as to whether grantor retains way of necessity over lands granted; 25 A. S. R. 425, on when grantee entitled to right of way of necessity.

Cited in notes in 85 A. D. 675, on ways from necessity; 85 A. D. 677, on cases in which ways of necessity exist; 85 A. D. 680, on when way by necessity is appurtenant to land and when passes as incident to grant; 8 L.R.A.(N.S.) 329, on creation of easements by implication by necessity.

Distinguished in *Oliver v. Hook*, 47 Md. 301, upon point that upon severance of an estate a grant will be implied of ways necessary to enjoyment of the several portions; *Mitchel v. Seipel*, 53 Md. 251, 36 A. R. 404, holding that there can be no reservation of easement by implication except upon principles of strict necessity.

Rights of mill owners.

Cited in reference note in 66 A. D. 490, on mill owners and their rights.

Use of easements.

Cited in reference notes in 87 A. D. 546, as to whether road easement over land for certain purposes can be used for other purposes; 16 A. S. R. 805, on rights of landowner and way owner in land across which right of way has been granted.

Cited in note in 88 A. D. 281, on use of private ways.

Obstruction of easement.

Cited in notes in 95 A. S. R. 319, on right to obstruct private way; 95 A. S. R. 320, on right to maintain fence or gate across private way.

Correctness of prayers and instructions.

Cited in *Walsh v. Taylor*, 39 Md. 592, holding that party cannot have prayer based on his own evidence when evidence of opponent, if believed, would establish proposition inconsistent with such prayer's theory; *Williams v. Woods*, 16 Md. 220; *Blackburn v. Beall*, 21 Md. 208; *Adams v. Capron*, 21 Md. 186, 83 A. D. 566,—to same point; *Haines v. Pearce*, 41 Md. 221, holding prayer which instructs jury that party is entitled to recover notwithstanding certain facts, erroneous where other matters explaining such facts are ignored; *Winner v. Penniman*, 35 Md. 163, 6 A. R. 385, holding that conclusion arrived at in instruction segregating particular facts must be consistent with other facts in evidence.

Cited in reference note in 83 A. D. 572, on necessity that instructions be based on all the evidence of the case.

Distinguished in *Newman v. McComas*, 43 Md. 70, holding prayer segregating particular facts and instructing jury that they might infer another fact therefrom good.

61 AM. DEC. 364, MARTIN v. MARTIN, 7 MD. 368.**Rent not due as incident of reversion.**

Cited in reference note in 100 A. D. 597, on rent not due as incident of reversion.

Apportionment of rents.

Cited in *English v. Key*, 39 Ala. 113, holding that there is no apportionment of rent where during term land is sold under execution against lessor; *Kirkpatrick v. Boyd*, 90 Ala. 449, 7 So. 913; *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74 (dissenting opinion),—upon point that upon public judicial sale of leased property rent not then due passes as realty to purchaser; *Townsend v. Isenberger*, 45 Iowa, 670, holding purchaser at execution sale entitled to rent which did not fall due until after execution of sheriff's deed; *Whited v. St. Anthony & D. Elevator Co.* 9 N. D. 224, 81 A. S. R. 562, 50 L.R.A. 254, 83 N. W. 238, to same point; *Dailey v. Grimes*, 27 Md. 440, holding purchaser at sheriff's sale who is not delivered possession entitled to rent which falls due after day of sale; *Keesee v. Sloan*, 69 Miss. 369, 11 So. 631, holding purchaser at partition sale entitled to rent falling due after his purchase even though claim therefor had been assigned by lessor; *Hand v. Liles*, 56 Ala. 143, holding that where before rent was due land was sold under chancery decree, lessor is entitled to no rent though sale was not reported or confirmed until after expiration of lease; *Porter v. Sweeney*, 61 Tex. 213, holding that rent of homestead which falls due after father's death passes with land out of which it issues to children free from claims of creditors; *Getzandaffer v. Caylor*, 38 Md. 280, holding that rents accruing after lessor's death go to his executor he under will being entitled to estate out of which they issued.

Cited in reference note in 81 A. S. R. 575, on apportionment of rent.

Cited in notes in 10 A. S. R. 564, on rights and remedies of parties after the assignment of lease; 15 E. R. C. 709, on apportionment of rent where lease assigned.

Distinguished in *Abrams v. Sheehan*, 40 Md. 446, holding that one who purchased reversion with full knowledge that accruing rent had been assigned is estopped to claim it.

Rights secured by judgment and mortgage liens.

Cited in *Manton v. Hoyt*, 43 Md. 254, holding that alienees of judgment debtor take subject to lien of judgment; *Shanklin v. Franklin L. Ins. Co.* 77 Ind. 268, to point that title of purchaser at execution sale relates back to date of judgment and carries title therefrom; *Cockey v. Milne*, 16 Md. 200, holding that in proceeding in rem by attachment, lien of judgment of condemnation is specific lien which relates back to time when attachment was laid; *Oliver v. McClure*, 28 Ark. 555, holding that purchaser of lands sold under execution to satisfy judgment is entitled to rights and privileges of judgment creditor; *Loring v. Bartlett*, 4 App. D. C. 1, holding that purchaser at sale of mortgaged premises made under power in mortgage upon mortgagor's default becomes substituted to mortgagee's rights in respect to possession; *Wootton v. White*, 90 Md. 64, 78 A. S. R. 425, 44 Atl. 1026, holding purchaser at foreclosure sale entitled to crops growing on mortgaged premises as against one to whom mortgagor had made bill of sale thereof; *Johnson v. Hines*, 61 Md. 122, holding that devisee's prior claim to proceeds arising from sale of land cannot be defeated by any lease or mortgage purchaser might execute of same.

Cited in reference notes in 84 A. D. 162, on rule that execution purchaser acquires only such land as debtor had; 20 A. S. R. 919, on judgment lien.

Distinguished in *Ahern v. White*, 39 Md. 409, holding that mortgage forming one transaction with execution of ninety-nine year lease and given by lessee to secure advances made to him by lessor for improving leased property has precedence over prior judgment against lessee.

Assignment of rent.

Cited in reference note in 75 A. D. 304, on assignment of rent.

Estoppel to deny landlord's title.

Cited in reference note in 65 A. D. 452, on right of tenant to set up title acquired under judgment after he became tenant.

Purchaser at judicial sale as substituted in place of landlord.

Cited in reference note in 81 A. S. R. 575, on substitution, in place of landlord, of purchaser at judicial sale of leased lands.

What constitutes eviction.

Cited in note in 37 A. S. R. 185, on what constitutes eviction of tenant.

Liability for rent after eviction.

Cited in reference note in 37 A. S. R. 258, on effect of eviction on liability for rent.

Application of doctrine of relation.

Cited in notes in 15 A. D. 249, on application of doctrine of relation to execution sales; 15 A. D. 252, on doctrine of relation as affecting possession.

61 AM. DEC. 371, SHIPLEY v. RITTER, 7 MD. 408.**Grounds for injunction.**

Cited in *Indian River S. B. Co. v. East Coast Transp. Co.* 28 Fla. 387, 29 A. S. R. 258, 10 So. 480, to point that though injunction will not lie to restrain trespass, as such it will lie where injury is irreparable or action at law inadequate; *Lemmon v. Guthrie Centre*, 113 Iowa, 36, 86 A. S. R. 361, 84 N. W. 986, enjoining town's wrongful act in removing plaintiff's tool shed beyond fire lines; *Heagy v. Black*, 90 Ind. 534, holding that land owners may enjoin defendant's unauthorized act in opening highway over their lands; *Scully v. Rose*, 61 Md.

408, holding that injunction will lie to prevent wrongful removal of ore from complainant's ore-beds; *Long v. Ragan*, 94 Md. 462, 51 Atl. 181, holding same where one is about to erect building which will encroach upon complainant's land; *Reese v. Wright*, 98 Md. 272, 56 Atl. 976, holding same where one maintains continuing nuisance in alley to use of which complainant is entitled; *Schaidt v. Blaul*, 66 Md. 141, 6 Atl. 669, holding same where one is prevented from using alley in the accustomed and most advantageous mode; *Gilbert v. Arnold*, 30 Md. 29, holding that injunction will lie to prevent wrongful interference with complainants in their use of building set apart to them for religious worship; *Baughner v. Crane*, 27 Md. 36, holding that injunction will lie to restrain lessee from so remodeling leased building as to constitute material alteration thereof; *Garrett v. Lake Roland Elev. R. Co.* 79 Md. 277, 24 L.R.A. 396, 29 Atl. 830 (dissenting opinion), upon right of property owner to have maintenance of elevated railway structure in abutting street enjoined; *McCreery v. Sutherland*, 23 Md. 471, 87 A. D. 578 (dissenting opinion), upon question whether injunction will lie to stay wrongful taking under execution of goods constituting complainant's stock-in-trade; *Nicodemus v. Nicodemus*, 41 Md. 529, holding mere entry upon and use of complainant's land for purpose of constructing stone culvert over race belonging to defendant no ground for injunction.

Cited in reference notes in 64 A. S. R. 921, on injunction against waste; 65 A. D. 84, as to when injunction will issue against apprehended trespass; 72 A. D. 78, on injunction granted to restrain irreparable injury; 74 A. D. 554, on injunction to prevent irreparable damage; 54 A. D. 632; 64 A. D. 746; 68 A. D. 117; 69 A. D. 734; 91 A. D. 460,—on injunction against trespass; 7 A. S. R. 546, as to when injunction lies against trespass or waste.

Cited in notes in 11 A. D. 498, on injunction against trespass; 11 A. D. 501, on trespass destructive of estate; 1 A. S. R. 376, on injury tending to destruction of estate as irreparable injury; 1 A. S. R. 377, on injunction against cutting down ornamental or fruit trees as irreparable injury; 99 A. S. R. 732-733, on jurisdiction to enjoin trespass on realty.

—Against wrongful cutting of timber.

Cited in *Powell v. Rawlings*, 38 Md. 239, holding that injunction will not lie to restrain trespasser from cutting ordinary pine trees on complainant's land; *Carney v. Hadley*, 32 Fla. 344, 37 A. S. R. 101, 22 L.R.A. 233, 14 So. 4, holding that injunction will not lie upon allegation that trees are valueless except for turpentine and timber and that land would be of little value without them in condition to produce such articles and that acts of defendant trespasser in extracting turpentine from the trees greatly lessened their timber value; *Wiggins v. Williams*, 36 Fla. 637, 30 L.R.A. 754, 18 So. 859; *Cowan v. Skinner*, 52 Fla. 486, 42 So. 730,—to point that in absence of statute equity cannot enjoin wrongful cutting of timber unless irreparable injury or inadequacy of remedy at law be shown; *Echert v. Ferst*, 10 Phila. 514, 30 Phila. Leg. Int. 352, 5 Legal Gaz. 349, 1 Legal Chron. 329, holding that equity will enjoin wrongful cutting of timber where it is necessary to prevent multiplicity of suits and where defendant is insolvent; *Fulton v. Harman*, 44 Md. 251, holding same where trespass complained of goes to destruction of that which is essential to value of the estate; *Griffith v. Hilliard*, 64 Vt. 613, 25 Atl. 427, granting temporary injunction to restrain cutting of timber until settlement of question of title; *Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67, holding it proper

to grant temporary injunction until question of ownership is settled upon allegation in bill that defendant was wrongfully cutting timber from plaintiff's mining claim.

Cited in notes in 99 A. S. R. 750, on injunction against cutting and removing trees and timber; 22 L.R.A. 235, on injunction against trespass to cut timber where remedy at law is inadequate.

61 AM. DEC. 375, FEIGLEY v. FEIGLEY, 7 MD. 537.

Supplemental bills.

Cited in *Fleischner v. First Nat. Bank*, 36 Or. 553, 60 Pac. 603, holding that filing of supplemental complaint in creditor's suit to avoid fraudulent conveyance showing that subsequent to commencement of suit judgment was recovered cures any objection on account of suits being prematurely brought.

Distinguished in *Schwab v. Schwab*, 93 Md. 382, 52 L.R.A. 414, 49 Atl. 331, holding that facts showing ground for absolute divorce arising after institution of suit for limited divorce cannot be brought into that suit by supplemental bill.

When wife may avoid husband's conveyance.

Cited in *Bishop v. Redmond*, 83 Ind. 157, holding that wife suing for divorce and alimony may maintain bill to avoid husband's conveyance made with view to defrauding her; *De Ruiter v. De Ruiter*, 28 Ind. App. 9, 91 A. S. R. 107, 62 N. E. 100; *Byrnes v. Volz*, 53 Minn. 110, 54 N. W. 942; *Morrison v. Morrison*, 49 N. H. 69; *Lott v. Kaiser*, 61 Tex. 665,—to same effect; *Holland v. Holland*, 121 Mich. 109, 79 N. W. 1102, holding that wife may maintain creditor's bill to avoid husband's fraudulent conveyance made immediately before institution of divorce proceedings to avoid paying alimony; *Twell v. Twell*, 6 Mont. 19, 9 Pac. 537, holding that wife who has been decreed alimony may maintain creditor's bill against husband's fraudulent grantee; *Murray v. Murray*, 115 Cal. 266, 66 A. S. R. 97, 37 L.R.A. 626, 47 Pac. 37, holding it proper to appoint receiver at commencement of action by deserted wife to avoid husband's conveyances made to defeat her rights to maintenance; *Green v. Adams*, 59 Vt. 602, 59 A. R. 761, 10 Atl. 742, holding wife within protection of statute against fraudulent conveyances where husband anticipating that she would obtain divorce conveyed his property to defraud her of alimony; *Walker v. Walker*, 66 N. H. 390, 49 A. S. R. 616, 27 L.R.A. 799, 31 Atl. 14, holding wife within class of "creditors and others" in statute against fraudulent conveyances in respect to her distributive share in husband's estate; *Redmond v. Redmond*, 112 Ky. 760, 66 S. W. 745, to point that conveyance made in fraud of rights of wife is void; *Sanborn v. Lang*, 41 Md. 107, holding that widow's right to avoid husband's conveyance depends upon fact as to whether it was made with fraudulent intent; *Stewart v. Stewart*, 105 Md. 297, 66 Atl. 16, to point that husband may, if he act bona fide alienate all his property though he strip himself of all means of maintaining his wife; *Dutera v. Babylon*, 83 Md. 536, 35 Atl. 64, to point that husband cannot part with his personality to wife's detriment if transaction be colorable or attended with circumstances indicative of fraud; *Rabbitt v. Gaither*, 67 Md. 94, 8 Atl. 744, to point that husband's absolute conveyance made with view of defeating wife's marital rights, is valid where grantee does not participate in his fraudulent purpose; *Collins v. Collins*, 98 Md. 473, 103 A. S. R. 408, 57 Atl. 597, 1 A. & E. Ann. Cas. 856, holding wife entitled to relief against husband's voluntary conveyance of all his property made on even of his marriage with intent of defeating her marital rights.

Cited in reference notes in 3 A. S. R. 168, on effect as against wife of con-

veyance to defeat alimony; 4 A. S. R. 215, on conveyance fraudulent as against intended marriage.

Cited in notes in 52 A. D. 115, on claims of married woman against her husband under marriage contract entitled to protection against fraudulent conveyances; 3 L.R.A.(N.S.) 776, on gifts of husband's personal property in fraud of wife; 18 L.R.A.(N.S.) 1156, on right of wife to relief against a conveyance or transfer made or contemplated by her husband in fraud of her support.

Distinguished in *Wright v. Holmes*, 100 Me. 508, 3 L.R.A.(N.S.) 769, 62 Atl. 507, 4 A. & E. Ann. Cas. 583, upon point that gift made in fraud of wife's right to separate maintenance or to alimony is void.

Fraudulent conveyances.

Cited in reference notes in 67 A. D. 401, on conveyances fraudulent as to creditors; 71 A. D. 711, on difference between conveyance in fraud of creditors and in fraud of wife.

Cited in note in 52 A. D. 113, on claims against which voluntary conveyances may be avoided.

Evidence to prove fraud.

Cited in *Schaferman v. O'Brien*, 28 Md. 565, 92 A. D. 708; *Williams v. Snebly* 92 Md. 9, 48 Atl. 43,—holding that where deed is attacked for fraud all facts, no matter how trivial, must be looked to to discover motive and design of parties; *Elbin v. Wilson*, 33 Md. 135, in same connection in holding in action against election judges for wrongfully refusing to allow plaintiff to vote, evidence that they knew him to be of different politics from themselves admissible.

— Inadequacy of consideration.

Cited in *Downs v. Miller*, 90 Md. 602, 53 Atl. 445, holding that where deed is attacked for fraud inadequacy of consideration is a circumstance to be considered; *Crooks v. Brydon*, 93 Md. 640, 49 Atl. 921, holding that for conveyance to be set aside for inadequacy of consideration, the inadequacy must be such as of itself to stamp transaction with fraud; *Fuller v. Brewster*, 53 Md. 358, holding that there was not such inadequacy of consideration as to justify inference of fraud where for consideration of about three thousand dollars thirty-five hundred dollars worth of property was conveyed.

Cited in notes in 57 A. D. 217, on inadequacy of consideration as evidence of fraud; 14 A. S. R. 744, on what creditors may attack voluntary transfer as fraudulent.

Power to decree lien for alimony.

Cited in note 102 A. S. R. 706, on effect of mere commencement of suit for divorce on power of court to decree lien for alimony.

Answer responsive to bill in equity as evidence.

Cited in *Day v. Jones*, 40 Fla. 443, 25 So. 275, holding responsive answer under oath binding on complainant unless overcome by testimony of two witnesses or by one witness and corroborating circumstances.

Cited in reference notes in 64 A. D. 182, on answer in equity as evidence for defendant; 76 A. D. 661; 84 A. D. 162,—on conclusiveness of answer in chancery responsive to bill; 85 A. D. 276, on how far responsive answer conclusive.

Right to decree alimony against one having no estate.

Criticized in *Campbell v. Campbell*, 37 Wis. 206, upon point that where there is no estate there can be no alimony.

Applicability of rule of lis pendens.

Cited in *White v. Perry*, 14 W. Va. 66, holding rule of lis pendens inapplicable where pending action to obtain judgment for debt bona fide purchase of land was made.

Cited in reference note in 19 A. S. R. 164, on lis pendens.

Cited in note in 56 A. S. R. 865, on necessity that property must be directly affected to be subject to law of lis pendens.

Distinguished in *Powell v. Campbell*, 20 Nev. 232, 19 A. S. R. 350, 2 L.R.A. 615, 20 Pac. 156, holding rule of lis pendens applicable to one purchasing realty from husband with actual notice of pending divorce suit in which wife seeks decree giving her title to property.

Rights of purchasers for valuable consideration.

Cited in reference note in 31 A. S. R. 817, on rights of purchasers for valuable consideration.

61 AM. DEC. 381, FISHER v. MCGIRR, 1 GRAY, 1.**When statute will be held unconstitutional.**

Cited in *Stockton & R. Co. v. Stockton*, 41 Cal. 147, holding that for statute to be declared unconstitutional, it must be clearly subversive of the constitution; *Morrison v. Springer*, 15 Iowa, 304, holding in sustaining statute regulating right of franchise, that any reasonable doubt as to statute's validity is to be resolved in its favor; *State ex rel. Weir v. Davis County Judge*, 2 Iowa, 280, holding it to be court's duty to give statute, if possible, such construction as will make it consistent with constitution; *Stewart v. Polk County*, 30 Iowa, 9, 1 A. R. 238, to same effect in sustaining statute authorizing taxation for purpose of aiding railroad construction; *Pleuler v. State*, 11 Neb. 547, 10 N. W. 481, in holding liquor law valid to point that unless law be clearly repugnant to constitution it should be sustained; *Re North Milwaukee*, 93 Wis. 616, 33 L.R.A. 638, 67 N. W. 1033 (dissenting opinion), upon point that statute that has been long acquiesced in should not be set aside but for very strong reasons.

Cited in reference note in 63 A. D. 519, on powers and duties of courts as to determining validity of statutes.

Effect of partial invalidity of statute.

Cited in *State ex rel. Webster v. Baltimore County*, 29 Md. 516, holding that because part of statute is void it does not follow statute is void in its entirety; *Sanders v. Cabaniss*, 43 Ala. 173; *State ex rel. Woodson v. Brassfield*, 67 Mo. 331,—to same point; *Com. v. Hitchings*, 5 Gray, 482, holding that where part only of statute or section thereof is void remainder if not dependent upon void portion may be sustained; *Barbour v. Camden*, 51 Me. 608, holding that that which is unconstitutional in statute may be adjudged void and rest sustained; *State v. Robb*, 100 Me. 180, 60 Atl. 874, 4 A. & E. Ann. Cas. 275, holding that if after striking out void portion of statute remainder be complete in itself, it will be held constitutional; *Andrews v. Saucier*, 13 La. Ann. 301, to same effect; *Edwards v. Bruorton*, 184 Mass. 529, 69 N. E. 328, holding whole of statute regulating laying out of highways not invalidated by unconstitutionality of provision for assessment of betterments; *East Kingdom v. Towle*, 48 N. H. 57, 2 A. R. 174, 97 A. D. 575, holding part of law giving town right of action for damages done by dog, valid; *Copp v. Henniker*, 55 N. H. 179, 20 A. R. 194, holding part of statute empowering court to commit certain cases to referees for trial, valid; *Gustavel v. State*, 153 Ind. 613, 54 N. E. 123, holding section of

statute regulating fisheries not affected by possible invalidity of another section of same statute; *Cole v. Cumberland County*, 78 Me. 532, 7 Atl. 397, holding in respect to act authorizing condemnation of property for highway purposes that so much of statute as is void may be rejected and rest sustained; *Eureka City v. Wilson*, 15 Utah, 67, 62 A. S. R. 904, 48 Pac. 150, holding ordinance regulating erection of buildings within fire limits of city not wholly invalidated by void proviso empowering building committee to make particular provisions in particular cases; *State v. Santee*, 111 Iowa, 1, 82 A. S. R. 222, 53 L.R.A. 703, 82 N. W. 445, holding statute prohibiting use of lighter products of petroleum except when gas is generated outside of building, or when they are used in particular lamp, not wholly void because of unconstitutionality of latter exception; *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884, holding city grant of exclusive ferry privilege void only to extent that grant was exclusive; *Neosho City Water Co. v. Neosho*, 136 Mo. 498, 38 S. W. 89, holding ordinance granting exclusive water privilege for term of years valid, though provision for renewal of such privilege was void; *McCready v. Sexton*, 29 Iowa, 356, 4 A. R. 214, holding that statute making tax deed conclusive evidence of certain fact could be sustained to extent of making it prima facie evidence; *State v. Addington*, 12 Mo. App. 214, holding statute though void in so far as it was retroactive, valid as to future offenses; *Morford v. Unger*, 8 Iowa, 82, upon point that though so much of statute as provided for its taking effect upon its acceptance by city council may be void, remainder may be valid; *Little Miami R. Co. v. Greene County*, 31 Ohio St. 338, holding that statute may be valid to extent it confers right of action but invalid in attempting to deprive one of his right to plead limitations; *State v. Wiley*, 4 Or. 184, holding statute conferring jurisdiction upon police judge not wholly void because of unconstitutional provision limiting his jurisdiction to criminal matters when acting as justice of peace; *Leach v. Smith*, 25 Ark. 246, holding that part of statute cannot be sustained if void portion be so dependent upon it that both parts operate together for one purpose; *Meshmeier v. State*, 11 Ind. 482, to same effect; *Eckhart v. State*, 5 W. Va. 515, holding that portion of statute which deprived one court of jurisdiction in certain cases cannot be held valid when other portion conferring such jurisdiction upon another court is void.

Cited in reference notes in 63 A. D. 519, on right to declare part of statute void and remainder valid; 97 A. D. 586, on statute being partly valid and partly void; 31 A. S. R. 601, on statutes unconstitutional in part.

Distinguished in *Warren v. Charlestown*, 2 Gray 84, holding that part of statute cannot be held valid, if another part dependent thereon be void; *State ex rel. Corey v. Curtis*, 9 Nev. 325, holding that single entire clause of by-laws cannot be good in part and void in part; *Jones v. Robbins*, 8 Gray, 329, upon point that so much of statute as violates constitution may be rejected and remainder sustained; *White v. Gove*, 183 Mass. 333, 67 N. E. 359, upon same point in holding statute providing for sewer assessments void in toto.

— Statutes regulating sale of liquor.

Cited in *State v. Wheeler*, 25 Conn. 290, holding section of statute providing penalties for keeping of intoxicants for illegal sale not affected by possible invalidity of section which provided for forfeiture thereof; *Com. v. Petranich*, 183 Mass. 217, 66 N. E. 807, holding statute concerning sales of intoxicants valid except to extent it favored domestic manufacturers; *Com. v. Rock*, 10 Gray, 4, holding that if part of liquor law be valid it will be given effect, though other parts, not connected with it, be void; *People v. Quant*, 12 How. Pr. 83, 2 Parker

Crim. Rep. 410; *Re Vaucene*, 31 How. Pr. 289, to same effect; *Com. v. Gagne*, 153 Mass. 205, 10 L.R.A. 442, 26 N. E. 449, holding liquor statute, which failed to negative exception to which it could not constitutionally apply, valid; *Santo v. State*, 2 Iowa, 165, 63 A. D. 487, holding statute regulating sale of intoxicants valid though section thereof submitting it to voters for their approval be invalid.

Exercise of police power.

Cited in *Com. v. Pear*, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719, sustaining compulsory vaccination statute; *Com. v. Huntley*, 156 Mass. 236, 15 L.R.A. 839, 30 N. E. 1127, holding statute denouncing sale of oleomargarine made in imitation of yellow butter valid though it apply to article imported from another state; *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 A. R. 113, 11 N. E. 929, holding regulation of board of health requiring that all rags imported into city be disinfected at owner's expense valid; *Levy v. State*, 161 Ind. 251, 68 N. E. 172, holding statute requiring transient merchants to procure license, a legitimate exercise of state's police power; *Com. v. Crowell*, 156 Mass. 215, 30 N. E. 1015, sustaining statute whose object was protection of public from frauds of itinerant vendors; *Hulton v. Camden*, 39 N. J. L. 122, 23 A. R. 203, holding order of board of health declaring a lot a nuisance null and void where owner was given no hearing; *Bancroft v. Cambridge*, 126 Mass. 438, holding that where land is filled up to prevent nuisances owner cannot claim damages for inconveniences caused in consequence thereof; *Sohier v. Trinity Church*, 109 Mass. 1, holding it competent for legislature to require that use of cemetery in church building be discontinued; and bodies may be removed as statute directs without regard to opinions expressed by committees and physicians; *Watertown v. Mayo*, 109 Mass. 315, 12 A. R. 694, sustaining statute prohibiting use of buildings within towns having population of 4,000 inhabitants for purpose of slaughter houses without permission of public authorities; *Harrington v. Providence*, 20 R. I. 233, 38 L.R.A. 305, 38 Atl. 1, holding notice and opportunity to be heard need not be given one before passage of ordinance requiring him to connect his drainage with sewer and destroy any cesspool on his property; *Waters-Pierce Oil Co. v. New Iberia*, 47 La. Ann. 863, 17 So. 343, holding town ordinance prohibiting storage of explosives within limits of town in large quantities valid, and applicable to persons who take every precaution to prevent accident; *State v. Cate*, 58 N. H. 240, holding that prohibition of unusual traffic within two miles of any public assembly convened for public worship is constitutional; *Lawton v. Steele*, 119 N. Y. 226, 16 A. S. R. 813, 7 L.R.A. 134, 23 N. E. 878, holding it competent for legislature to declare setting of nets for purpose of taking fish from specified waters, a nuisance.

Cited in reference note in 59 A. S. R. 636, on validity of statutes as to keeping or using dangerous agencies.

Cited in notes in 16 A. D. 196, on power of municipality to determine what is a nuisance; 42 A. R. 457, on validity of statute regulating sale of merchandise within certain distance of assembly for public worship; 51 A. R. 347, on validity of health ordinances; 20 L.R.A. 52, on validity of statute making it criminal to have possession of property which is capable of criminal use; 38 L.R.A. 161, on extent of municipal power over buildings as nuisances; 39 L.R.A. 525, on municipal power as to nuisance relating to intoxicating liquors.

—As to garbage.

Cited in *State v. Robb*, 100 Me. 180, 60 Atl. 874, 4 A. & E. Ann. Cas. 275,

sustaining municipal ordinance providing that none but regularly appointed authorities should collect house offal and refuse matter; *River Rendering Co. v. Behr*, 77 Mo. 91, 46 A. R. 6, holding ordinance granting one exclusive right to remove carcasses of all dead animals found within city limits and appropriate same to his use void as applied to carcasses of animals found in stock yard within city.

— **Destruction or forfeiture of property generally.**

Cited in *Woods v. Cottrell*, 55 W. Va. 476, 104 A. S. R. 1004, 65 L.R.A. 616, 47 S. E. 275, 2 A. & E. Ann. Cas. 933, holding statute against gaming may authorize seizure and forfeiture of gaming tables if owner be given his day in court; *Lowry v. Rainwater*, 70 Mo. 152, 35 A. R. 420, holding statute authorizing police commissioner or judge before whom any gaming device, summarily seized, is brought to forthwith publicly destroy it, void; *McConnell v. McKillip*, 71 Neb. 712, 115 A. S. R. 614, 65 L.R.A. 610, 99 N. W. 505, 8 A. & E. Ann. Cas. 898, holding statute authorizing game wardens to seize and forfeit all guns being used by persons in violation of game laws void in not providing hearing to owners thereof; *Boggs v. Com.* 76 Va. 989, holding statute providing punishment for violators of "oyster law" and for forfeiture of vessels employed in such violation, inoperative as to owner of vessel who was neither proceeded against nor given opportunity for judicial hearing; *Daniels v. Homer*, 139 N. C. 219, 3 L.R.A. (N.S.) 997, 51 S. E. 992 (dissenting opinion), upon validity of statute providing for forfeiture of nets used in fishing contrary to statute, where owner is not given notice or hearing; *Boggs v. Com.* 76 Va. 989, holding it competent for legislature to provide for forfeiture of vessels employed in violating "oyster law" without regard to guilt or innocence of owners thereof.

— **Destruction of animals.**

Cited in *Blair v. Forehand*, 100 Mass. 136, 97 A. D. 82, 1 A. R. 94, holding statute authorizing summary destruction of dogs not licensed and collared as prescribed by law valid; *King v. Hayes*, 80 Me. 206, 13 Atl. 882, holding statute authorizing agent of society for prevention of cruelty to animals to condemn, conclusively fix value of and destroy one's horse, without notice to owner, unconstitutional; *Loesch v. Koehler*, 144 Ind. 278, 35 L.R.A. 682, 41 N. E. 326, holding statute authorizing agent of such society to kill animal neglected, injured or diseased past recovery unconstitutional.

Validity of statutes regulating sales of intoxicating liquors.

Cited in *Dorman v. State*, 34 Ala. 216, upon point that act which prohibits sale of spirituous liquors entirely does not deprive owner of his property; *State v. Downer*, 21 Wis. 275, to same effect; *Santo v. State*, 2 Iowa, 165, 63 A. D. 487; *State v. Keeran*, 5 R. I. 497,—sustaining statute regulating liquor traffic; *Dorman v. State*, 34 Ala. 216, holding act prohibiting sale of intoxicating liquors within five miles of certain place valid.

Cited in reference notes in 63 A. D. 519, on power of state to regulate sale of spirituous liquors; 63 A. D. 519, on validity of liquor laws throwing burden of proof on owner of liquors.

Distinguished in *Polk County v. Hierb*, 37 Iowa, 361, holding statute providing that fine imposed for keeping intoxicants shall be lien on property used for such illegal purpose with owner's knowledge valid though it did not affirmatively provide for trial of fact as to such knowledge.

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—Statutes authorizing seizure and forfeiture of liquors.

Cited in *State v. Intoxicating Liquors*, 65 Me. 556, holding that intoxicating liquors though in original packages, are liable to seizure and forfeiture under statute where importer's purpose and intent is to break it and sell in this state in quantities less than package; *State v. Miller*, 48 Me. 576, holding statutes authorizing seizure of intoxicants upon warrants duly issued therefor valid; *Ferguson v. Josey*, 70 Ark. 94, 66 S. W. 345, holding statute authorizing seizure of intoxicants kept for sale in violation of law and their destruction after notice to and hearing of claimants, valid; *Ewings v. Walker*, 9 Gray, 95, holding that if statute providing for seizure of spirituous liquors gave owner no remedy against officer seizing them under warrant and wrongfully converting them, it would be void; *State v. Brennan's Liquors*, 25 Conn. 278, holding statute providing that intoxicants kept for sale in violation of statute be forfeited and delivered to agent of town to be destroyed or sold for town's benefit valid; *Com. v. Certain Intoxicating Liquors*, 107 Mass. 396, holding intoxicants kept for purpose of illegal sale by bailee in fraud of true owner who is innocent of bailee's illegal purpose, subject to forfeiture; *Hibbard v. People*, 4 Mich. 125, holding statute which authorized seizure of intoxicants kept for illegal sale void where it made no provision for notice to owner or for trial; *State v. McManus*, 65 Kan. 720, 70 Pac. 700, holding statute declaring intoxicating liquors kept for sale in violation of law and property used in connection therewith common nuisances valid if proper protection be afforded parties to defend their property before it is destroyed.

Cited in reference note in 63 A. D. 519, on validity of liquor laws conflicting with provision as to unlawful searches and seizures.

—Statutes declaring place of sale a nuisance.

Cited in *Hartley v. Henretta*, 35 W. Va. 222, 13 S. E. 375 (dissenting opinion), upon point that legislature may declare places where intoxicants are sold contrary to law to be nuisances; *State ex rel. Rhodes v. Saunders*, 66 N. H. 39, 18 L.R.A. 646, 25 Atl. 588, sustaining statute declaring use of building for illegal sale of liquor to be a nuisance abatable in equity; *Carleton v. Ruigg*, 149 Mass. 550, 14 A. S. R. 446, 5 L.R.A. 193, 22 N. E. 55, sustaining statute giving jurisdiction in equity to supreme or superior court, on petition of not less than ten voters, to enjoin as common nuisances buildings used for illegal keeping or sale of intoxicants.

Liability of officers.

Cited in notes in 64 A. D. 52, on liability of judicial officers; 64 A. D. 53, on liability of ministerial officers.

Void statute or command from superior officer as justification for one's acts.

Cited in *Miller v. Horton*, 152 Mass. 540, 23 A. S. R. 850, 10 L.R.A. 116, 26 N. E. 100, holding one killing horse in obedience to order of commissioners empowered to kill horses suffering from glanders liable to owner if horse had not in fact such disease; *Skeen v. Monkeimer*, 21 Ind. 1, to point that inferior military officer may render himself liable if he carry out orders of his superior officer to do illegal act; *Lampert v. Laclede Gaslight Co.* 14 Mo. App. 376, to point that military commanders are not liable for acts done within line of their duty or in execution of their orders; *Ela v. Smith*, 5 Gray, 121, 66 A. D. 356, to point that mayor's precept calling out militia to quell riot under power conferred by statute is justification to those acting lawfully in obedience to

its command; *Tyler v. Pomeroy*, 8 Allan, 480, holding that one who signed paper in hands of municipal authorities promising to serve as volunteer for three years from date of being mustered into federal service may maintain action against such authorities and their agents for forcibly seizing him and carrying him into camp; *Warren v. Charlestown*, 2 Gray, 84, to point that subordinate officers cannot justify under unconstitutional statutes; *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927, 2 A. & E. Ann. Cas. 74, to point that one is not protected in acting in obedience to unconstitutional law; *Boales v. Ferguson*, 55 Neb. 565, 76 N. W. 18, holding that administrator remains liable where he makes distribution under statute which, though not declared void, was so in fact; *Dexter v. Boston*, 176 Mass. 247, 79 A. S. R. 306, 57 N. E. 379, holding that payment induced by compulsory process and made under protest may be recovered where assessment is founded on unconstitutional statute.

Cited in notes in 42 A. D. 55, on civil liability of military and naval officers for acts done under color of military authority; 64 A. D. 51, on protection afforded by unconstitutional statute; 64 A. D. 54, on liability of parties procuring issuance of writ under unconstitutional statute.

—In respect to service of process.

Cited in *Gray v. Kimball*, 42 Me. 299, holding that officer is protected in executing process valid upon its face and emanating from court having jurisdiction; *Tellefsen v. Fee*, 168 Mass. 188, 60 A. S. R. 379, 45 L.R.A. 481, 46 N. E. 562, holding officer not protected by his process where he makes arrest after being informed of facts which show court has no jurisdiction in the particular case; *Cassier v. Fales*, 139 Mass. 461, 1 N. E. 922, holding one aiding constable in arresting plaintiff for debt under process valid in form not liable in trespass though plaintiff stated at the time that he was infant and therefore exempt from arrest on mesne process; *Calderone v. Kiernan*, 23 R. I. 578, 51 Atl. 215, holding constable who had taken plaintiff into custody under process valid in form not liable for false imprisonment though he refused to take plaintiff about to his friends to obtain bail; *Clark v. May*, 2 Gray, 410, 61 A. D. 470, holding constable not liable for executing warrant of justice which did not show upon its face irregularity constituting excess of jurisdiction; *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1101, holding officer making arrest for obtaining goods under false pretenses not protected where warrant showed on its face that person from whom goods were obtained knew at time that pretenses were false; *Batchelder v. Currier*, 45 N. H. 460, holding officer liable for arresting one under warrant made returnable before justice where law provided that all warrants should be made returnable before police court; *Barker v. Stetson*, 7 Gray, 53, 66 A. D. 457, to point that magistrate and officer are liable for service of process issued under void statute; *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49, holding officer executing process issued by court proceeding under void law civilly liable; *Kelley v. Bemis*, 4 Gray, 83, 64 A. D. 50, holding justice liable to one arrested upon warrant issued by him under void statute.

Cited in reference notes in 61 A. D. 473, on protection of officer under process which he is executing; 66 A. D. 458, as to when process is justification for acts done under it; 66 A. D. 458, on trespass against officer acting under void process; 77 A. D. 199, on justification of officer by his process; 80 A. D. 668, on when warrant protects officer; 86 A. D. 201, on liability of officers executing process fair on its face but actually void.

Distinguished in *Chase v. Carrier*, 97 Mass. 524, holding officer not liable for

arresting plaintiff where his precept did not show that magistrate who took affidavit and made certificate authorizing arrest was attorney of record of judgment creditor.

Rights of owner of intoxicants used in violation of law.

Cited in *Breck v. Adams*, 3 Gray, 569, holding purchaser of intoxicants sold in violation of law may maintain action where they are tortiously taken from his possession; *Hamilton v. Goding*, 55 Me. 419, holding same as to owner of intoxicating liquors intended for illegal sale; *Booraem v. Crane*, 103 Mass. 522, holding one liable where he converted spirituous liquors which had been intrusted to him with view to sale, notwithstanding statutes against sales of such liquors; *Cobb v. Farr*, 16 Gray, 597, holding that mortgagee of spirituous liquors has property rights therein though mortgage amounted to sale prohibited by statute; *Arcutt v. Nelson*, 1 Gray, 536, holding that action may be maintained for price of liquors sold in Connecticut without any fraudulent view to their resale in Massachusetts though law of latter state provided that no action should be maintained for price of liquors not sold in accordance with provision of certain statute.

Cited in reference note in 73 A. D. 319, on spirituous liquors as property.

What constitutes a "criminal" proceeding.

Cited in *Re Randall*, 11 Allen, 473, holding proceedings for disbarment of attorney not criminal proceeding; *Com. v. Reed*, 162 Mass. 215, 38 N. E. 364, to point that proceedings for forfeiture of intoxicants kept for sale in violation of statute are in their nature criminal; *United States v. Athens Armory*, 35 Ga. 344, Fed. Cas. No. 14,473, upon point that act relating to confiscation of property was in nature of criminal statute.

Distinguished in *United States v. Three Tons of Coal*, 6 Biss. 379, Fed. Cas. No. 16,515, holding proceeding for forfeiture of distillery property under United States revenue laws not "criminal" proceeding.

Right of jury to pass on the law.

Cited in *Com. v. Anthes*, 5 Gray, 185, upon right of jury to pass upon the law of criminal case.

Right to discharge on habeas corpus.

Cited in *Moore v. Wheeler*, 109 Ga. 62, 35 S. E. 116, holding one held under conviction had upon unconstitutional statute may be released upon habeas corpus; *Ex parte Stout*, 5 Colo. 509, holding that if one be held under proceedings had before court having no jurisdiction he is entitled to be discharged upon habeas corpus; *State v. Shattuck*, 45 N. H. 205, to same effect; *Tuttle v. Lang*, 100 Me. 123, 60 Atl. 892, holding it proper to discharge upon habeas corpus one committed under mittimus issued after he had been allowed to go at large without day.

Cited in reference note in 71 A. D. 391, on duty to release on habeas corpus prisoner convicted under void statute or ordinance.

Cited in note in 26 A. D. 48, on validity of statute under which conviction is had.

What reviewable on habeas corpus.

Cited in *Plumley's Case*, 156 Mass. 236, 15 L.R.A. 839, 30 N. E. 1127, to point that constitutionality of statute may be inquired into upon habeas corpus; *Sennott's Case*, 146 Mass. 489, 4 A. S. R. 344, 16 N. E. 448, holding that upon writ of habeas corpus no inquiry can be made into errors or irregularities so far

as they were within jurisdiction of court; *Elsner v. Shrigley*, 80 Iowa, 30, 45 N. W. 393, holding that judgment failing to fix limit of accused's imprisonment cannot be reviewed upon habeas corpus where law fixes limit to such imprisonment.

Cited in reference notes in 67 A. D. 395, on assailing judgment under unconstitutional statute by habeas corpus; 91 A. D. 553, on how imprisonment under judgment is regarded on habeas corpus; 39 A. S. R. 903; 11 A. S. R. 262,—on right, on habeas corpus, to question validity of statute under which conviction was secured.

Cited in notes in 87 A. S. R. 175, on review of constitutionality of statutes and ordinances on habeas corpus; 87 A. S. R. 199, on review on habeas corpus of proceedings of police courts and magistrates.

Reversal of judgment for matters not apparent of record.

Distinguished in *State v. Keeran*, 5 R. I. 497, holding that conviction had under statute authorizing conviction upon evidence short of constitutional standard will be sustained upon appeal if record fail to show just what evidence was produced.

Sufficiency of search warrants.

Cited in *State ex rel. Register v. McGahey*, 12 N. D. 535, 97 N. W. 865, 1 A. & E. Ann. Cas. 650, holding search warrant void where affidavit therefor failed to state facts required by statute to be shown as foundation for its issuance; *State v. Spirituous Liquors*, 68 N. H. 47, 40 Atl. 398, holding that warrant to search for spirituous liquors for purpose of forfeiting them must be founded on complaint charging that they were kept for sale in violation of law; *Com. v. Intoxicating Liquors*, 105 Mass. 178, holding one not liable for using reasonable force in ejecting from his premises officer searching for intoxicating liquors where his warrant therefor failed to state probable cause had been shown for its issue.

Cited in reference note in 63 A. D. 519, on grounds for issuance of search warrants and construction thereof.

Validity of condemnation statute.

Cited in *Orr v. Quimby*, 54 N. H. 590 (dissenting opinion), upon validity of statute authorizing condemnation of property without first providing for assessment of damages.

Estoppel by matter of record.

Cited in notes in 23 A. S. R. 110, on collateral attacks upon judgments; 39 L.R.A. 455, 456, on conviction for violating unconstitutional statute or ordinance as a nullity subject to collateral attack; 11 E. R. Co. 15, on estoppel by matter of record.

Effect of excessive sentence on appeal or writ of error.

Cited in note in 45 L.R.A. 150, on effect of excessive sentence on appeal or writ of error.

Injunction to restrain monopoly.

Cited in note in 12 L.R.A. 754, on remedy by injunction to restrain monopoly.

61 AM. DEC. 410, COM. v. McKIE, 1 GRAY, 61.

—Burden of proof in civil cases.

Cited in *Lisbon v. Lyman*, 49 N. H. 553, holding rule of burden of proof not affected by fact that subject-matter is peculiarly within knowledge of one of the

parties; *Kendall v. Brownson*, 47 N. H. 186, to point that rule of burden of proof cannot be made to depend upon order of proof or upon particular mode in which evidence is introduced; *Smith v. Porter*, 10 Gray, 66, holding that where burden of proof devolves upon one party it never in relation to same question shifts over upon his adversary.

Distinguished in *Lillienthal v. United States*, 97 U. S. 237, 24 L. ed. 901, approving instruction that burden is on claimant in condemnation proceedings under internal revenue act to show that violations of act were not with intent to defraud; *Benton v. Burbank*, 54 N. H. 583, holding burden of proof upon defendant in action on indemnity bond alleging damage caused by plaintiff's own act.

— In criminal cases generally.

Cited in *Sparf v. United States*, 156 U. S. 151, 39 L. ed. 343, 15 Sup. Ct. Rep. 273 (dissenting opinion), on burden of proof in criminal case; *People v. Gordon*, 88 Cal. 422, 26 Pac. 502, holding that statute shifting burden of proof in homicide cases cannot be extended to prosecution for assault to commit murder; *Chaffee v. United States*, 18 Wall. 516, 21 L. ed. 908, holding instruction that government need only prove that defendant was presumptively guilty whereupon it devolved upon him to establish his innocence, erroneous; *Hart v. United States*, 28 C. C. A. 612, 55 U. S. App. 479, 84 Fed. 799 (dissenting opinion), upon accused's right to acquittal where there is no evidence to show guilty knowledge; *Mason v. State*, 32 Ark. 238, holding that in prosecution for larceny criminal intent must be proved and cannot be presumed from mere fact of taking and carrying away; *McKnight v. United States*, 54 C. C. A. 358, 115 Fed. 972, holding burden not on defendant to show absence of fraudulent intent when government proves facts from which such intent may be inferred; *State v. Weckert*, 17 S. D. 202, 95 N. W. 924, 2 A. & E. Ann. Cas. 191, holding it error to charge in effect that burden is on accused in prosecution for larceny to satisfy jury that he took property under honest belief of ownership; *Payne v. Com.* 1 Met. (Ky.) 370, to point that where defendant relies on no separate and independent fact but confines himself to transaction on which charge is founded burden of proof continues throughout with prosecution, *Williams v. United States*, 158 Fed. 30, holding that in prosecution for violation of revenue law in failing to make proper records of sales burden is not on defendant to show he made entries in book prescribed by revenue department; *State v. Thornton*, 10 S. D. 349, 41 L.R.A. 530, 73 N. W. 196 (dissenting opinion), upon question whether burden of proving alibi rests upon accused or prosecution; *Ake v. State*, 6 Tex. App. 398, 32 A. R. 586, holding burden of proof on defendant in prosecution for rape to show nonage; *State v. Patterson*, 45 Vt. 308, 12 A. R. 200, holding it error to instruct jury that if prosecution proved accused was guilty of the killing, it devolved on him to justify it; *Dubose v. State*, 10 Tex. App. 230, holding where fact of killing was only point in issue instruction, which assumed that defendant killed deceased and called upon him to justify it, erroneous; *Brubaker v. State*, 89 Ind. 577, holding that in prosecution for keeping licensed liquor shop in a disorderly manner, the state must prove existence of license.

Cited in reference note in 86 A. D. 447, on presumption of innocence in criminal cases.

Cited in note in 11 L.R.A. 813, on inference of evil intent from doing of wrongful act.

Distinguished in *Ake v. State*, 6 Tex. App. 398, 32 A. R. 586, holding that where accused invokes benefit of statute declaring that person under certain age shall not be capitally punished burden is on him to bring himself within exception; *State v. Morphy*, 33 Iowa, 270, 11 A. R. 122, holding burden on defendant to show where one died from injury inflicted by him that death resulted not from injury itself but from treatment of it.

— As to insanity.

Cited in *McAllister v. Territory*, 1 Wash. Terr. 360, to point that if proof of insanity does not consist of facts attending killing proof thereof must be made out by defendant; *People v. Garbutt*, 17 Mich. 9, 97 A. D. 162, holding that though state may in first instance rely on presumption of sanity yet when any evidence is given to overcome such presumption burden of proof is with state; *King v. State*, 9 Tex. App. 515, to point that to charge that burden of proving insanity is on defendant is erroneous.

Cited in notes in 97 A. D. 176, on burden of proof when insanity set up as defense to crime; 36 L.R.A. 731, on burden of proving insanity in criminal prosecution.

Distinguished in *Snider v. State*, 56 Neb. 309, 76 N. W. 574, holding that state has burden of proving defendant sane though evidence adduced by him to prove his insanity be insufficient to raise reasonable doubt in respect thereto.

— As to self defense.

Cited in *State v. Wingo*, 66 Mo. 181, 27 A. R. 329, holding burden not on defendant to show that if he committed homicide he acted in self-defense or under circumstances reducing offense from second degree murder.

Extent of proof required.

Cited in *Payne v. Com.* 1 Met. (Ky.) 370, holding defendant in criminal case entitled to benefit of any reasonable doubt in regard to any fact necessary to show guilt; *State v. Meysenberg*, 171 Mo. 1, 71 S. W. 229, to point that establishment of inferences however strong will not warrant conviction; *Gavin v. State*, 42 Fla. 553, 29 So. 405, to point that to support conviction all essential facts must be proved beyond reasonable doubt; *State v. McCluer*, 5 Nev. 132, holding it not incumbent on one charged with murder to establish by preponderance of evidence matters in justification or mitigation of the homicide; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481, holding that in prosecution for assault with deadly weapon where defendant relies on no separate or independent fact burden of proof never shifts but remains with government to prove that act was criminal beyond reasonable doubt; *State v. McDaniel*, 68 S. C. 304, 102 A. S. R. 661, 47 S. E. 384, holding that defence that homicide was accidental need not be established by preponderance of evidence; *State v. Shelley*, 166 Mo. 616, 66 S. W. 430, holding in prosecution for impersonating elector book of registration in which name of person impersonated appeared as elector insufficient evidence to prove he was such.

Cited in reference note in 6 A. S. R. 61, on necessity for prosecution to prove case beyond reasonable doubt.

Cited in note in 68 L.R.A. 50, on necessity of proof of corpus delicti in criminal case.

— In respect to establishment of sanity or insanity.

Cited in *State v. Lawrence*, 57 Me. 574, holding that defendant must establish plea of insanity by preponderance of evidence; *Hopps v. People*, 31 Ill. 385,

83 A. D. 231, holding it not incumbent on one charged with murder to establish his defence of insanity by preponderance of proof; *State v. Bartlett*, 43 N. H. 224, 80 A. D. 154, holding that sanity of accused who relies on insanity as defence must be established beyond reasonable doubt no matter from what side evidence of insanity comes.

—As to self-defense.

Cited in *Gravely v. State*, 38 Neb. 871, 57 N. W. 751; *People v. Shanley*, 14 N. Y. Crim. Rep. 471, 49 App. Div. 56, 63 N. Y. Supp. 449,—holding that accused need not establish his plea of self-defence by preponderances of evidence; *Tweedy v. State*, 5 Iowa, 433, holding it error to instruct jury in prosecution for murder that facts of excuse or self-defense must be proved beyond reasonable doubt.

Validity of statute as to presumptions and burden of proof.

Cited in *Wooten v. State*, 24 Fla. 335, 1 L.R.A. 819, 5 So. 39, sustaining statute providing that if any gaming devices be found in any house such fact shall be prima facie evidence that said house is kept for gambling purposes; *State v. Buck*, 120 Mo. 479, 25 S. W. 573, sustaining statute declaring that in prosecutions against bank officers for receiving deposits with knowledge that bank is insolvent, fact that bank subsequently failed shall be prima facie evidence that bank was insolvent and that officers knew it to be so; *Com. v. Williams*, 6 Gray, 1, sustaining statute declaring that in prosecutions for selling spirituous liquors delivery in any place other than dwelling-house shall be deemed prima facie evidence of a sale.

What constitutes assault and battery.

Cited in *State v. Fulkerson*, 97 Mo. App. 599, 71 S. W. 704, holding it sufficient to constitute assault that accused place his hand on arm of prosecutrix under circumstances indicating lustful purpose.

Cited in reference note in 11 A. S. R. 835, on what constitutes crime of assault.

61 AM. DEC. 414, MULHALL v. QUINN, 1 GRAY, 105.

Assignability of future interests and effect of assignment.

Cited in *Rice v. Stone*, 1 Allen, 566, holding that creditor may maintain bill in equity to compel payment of his claim from proceeds of judgment for personal injuries assigned by his debtor after verdict, but before entry of judgment; *Mayer v. Taylor*, 69 Ala. 403, 44 A. R. 522, holding equitable title or interest only conveyed by mortgage of crop to be planted in future; *Low v. Pew*, 108 Mass. 347, 11 A. R. 357, holding that sale of fish to be caught subsequently does not pass title to same when caught; *Huling v. Cabell*, 9 W. Va. 522, 27 A. R. 562, holding assignment for benefit of certain creditors, made by agricultural society of proceeds of fair to be held subsequently, void as against lien of fieri facias in hands of sheriff before such proceeds paid over to such creditors; *East Lewisburg Lumber & Mfg. Co. v. Marsh*, 91 Pa. 96, 37 Phila. Leg. Int. 6, holding assignment for value of proceeds of future sales valid in equity as an assignment to take effect when such proceeds are subsequently brought into existence, though inoperative as present conveyance; *Emerson v. European & N. A. R. Co.* 67 Me. 387, 24 A. R. 39, holding that mortgage by railroad company of "all its right, title and interest in and to all and singular its property real and personal, of whatever nature and description, now possessed or to be hereafter acquired" does not attach to money earned in carrying freight under contract with express company entered into subsequent to such mortgage; *Morrill v. Noyes*, 56 Me. 458, 96 A. D. 486, holding

that lien of mortgage of all "cars, engines, and furniture, that have been or may be purchased" by railroad, given to secure bonds issued for construction of same, attaches to rolling stock subsequently acquired as soon as purchased and placed on road; *McGee v. McCann*, 69 Me. 79, holding right of action for causing or contributing to another's intoxication not assignable, being not a thing in existence but a mere future right to litigate.

Cited in note in 91 A. D. 418, on effect of assignment of debt preceding garnishment or attachment.

— Accruing under existing contracts generally.

Cited in *Ingram v. Osborn*, 70 Wis. 184, 35 N. W. 304, holding assignee of another's interest under contract protected against garnishment by creditors other than bank, when assignment is made upon consideration of employing assignor, assuming liabilities, and paying certain portion of profits to such bank; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555, holding draft drawn on amount to be due upon completion of purchase, under existing contract therefor, an equitable assignment; *Garland v. Harrington*, 51 N. H. 409, holding debt afterwards to accrue under existing contract assignable.

Cited in reference note in 34 A. S. R. 245, on assignment of money to become due.

Distinguished in *Neumann v. Calumet & H. Min. Co.* 57 Mich. 97, 23 N. W. 600, holding debt actually due under existing contract assignable.

— Under subsequent contract generally.

Approved in *Shackleford v. Kiser Co.* 131 Ala. 224, 31 So. 77, holding power of attorney to collect present and future claims inapplicable to claims arising under contract entered into subsequent to such assignment.

— Wages under existing engagement.

Cited in *Rodijkeit v. Andrews*, 74 Ohio St. 104, 5 L.R.A. (N.S.) 564, 77 N. E. 747, 6 A. & E. Ann. Cas. 761, holding assignment of wages to be earned in future under existing employment valid; *Haynes v. Thompson*, 80 Me. 125, 13 Atl. 276, holding wages to be earned under existing engagement assignable at law; *Thayer v. Kelley*, 28 Vt. 19, 65 A. D. 220, holding wages to be earned under existing engagement of uncertain duration assignable to secure present indebtedness or future advances; *Hawley v. Bristol*, 39 Conn. 26, holding assignment of final installment to be paid upon completion of house valid as against garnishing creditor though only portion thereof was earned when assignment was made; *Runnells v. Bosquet, N. I. & S. Co.* 60 N. H. 38, holding assignment of wages to be earned under existing engagement invalid when made in fraud of creditors, and without adequate consideration; *Bell v. Mulholland*, 90 Mo. App. 612, holding assignment of future wages under existing engagement of either certain or uncertain duration void when made for purpose of securing usurious loan; *Kane v. Clough*, 36 Mich. 436, 24 A. R. 599, holding wages to be earned in future under an existing engagement assignable, though assignor works by the piece.

Distinguished in *Boylan v. Leonard*, 2 Allen, 407, holding that assignment of future wages, without limitation of time, will pass wages earned for nine months thereafter, under existing engagement for indefinite time, though wages subsequently increased, especially where parties have treated it as applicable to such wages; *Taylor v. Lynch*, 5 Gray, 49, holding that order of workman, accepted by employer, to pay portion of future wages earned under existing engagement of indefinite duration at agreed monthly price, in consideration of support for himself and family, is a good assignment as against subsequent attachment under

trustee process; *Metcalf v. Kincaid*, 87 Iowa, 443, 43 A. S. R. 391, 54 N. W. 867, holding assignment of wages to be earned under existing engagement of indefinite duration valid as against attaching creditors.

— **Future earnings.**

Cited in reference notes in 65 A. D. 222; 90 A. D. 166,—as to assignment of future earnings; 77 A. D. 135; 43 A. S. R. 395,—on validity of assignment of future earnings.

Cited in notes in 14 L.R.A. 126, on effect of mortgage or assignment of future accounts or earnings; 20 E. R. C. 477, on validity of assignment of wages to be earned in future.

— **Wages under subsequent engagement.**

Cited in *Billings v. O'Brien*, 14 Abb. Pr. N. S. 238, 45 How. Pr. 401, to point that wages expected to be earned under some possible future contract are not assignable; *Twiss v. Cheever*, 2 Allen, 40, holding assignment of sums to be earned before a certain date as city fireman invalid when no agreement for appointment to such service existed at time such assignment was made; *Lehigh Valley R. Co. v. Woodring*, 116 Pa. 516, 9 Atl. 58, 19 W. N. C. 372, 2 Pa. Co. Ct. 465, 2 *Lehigh Valley Rep.* 357, holding assignment of wages to be earned invalid when assignor not engaged in or under contract for employment when making same; *Kennedy v. Tiernay*, 14 R. I. 528, holding assignment of wages void in so far as it attempts to dispose of those to be earned under some future employment for which no present contract or engagement exists; *Lightbody v. Smith*, 125 Mass. 51, holding assignment of wages by one employed by the day invalid as to those earned under engagement with another subsequent to leaving such first employment; *Trumbower v. Ivey*, 2 Pa. Co. Ct. 470, holding void, assignment of wages to be earned in future employment; *Herbert v. Bronson*, 125 Mass. 475, holding wages to be earned hereafter under new engagement assignable; *Eagan v. Luby*, 133 Mass. 543, holding assignment of wages to be earned by janitor of public school appointed annually invalid as against trustee process to pass title to those earned under subsequent reappointment, when there was no existing agreement for such reappointment; *Hartley v. Tapley*, 2 Gray, 565, stating rule that money to be earned hereafter under a new engagement cannot be assigned.

Distinguished in *Wallace v. Walter Heywood Chair Co.* 16 Gray, 209, holding that written order founded on good consideration drawn upon employer by workman employed for definite time under subsisting engagement and accepted by former "payable when earned" applies to wages subsequently earned under new agreement at lower wages entered into between same parties at expiration of first one.

— **Officer's salary.**

Cited in *State ex rel. State Bank v. Hastings*, 15 Wis. 76, holding that a circuit judge may assign his salary to become due.

Cited in note in 9 L.R.A. 706, on assignability of officer's unearned salary.

Distinguished in *Bliss v. Lawrence*, 58 N. Y. 442, holding assignment of salary to become due to clerk in U. S. sub-treasury void as against public policy; *State v. Williamson*, 118 Mo. 146, 40 A. S. R. 358, 21 L.R.A. 827, 23 S. W. 1054, holding assignment of unearned salary by mail carrier void as against public policy; *Schwenk v. Wyckoff*, 46 N. J. Eq. 560, 19 A. S. R. 438, 9 L.R.A. 221, 20 Atl. 259, holding assignment of unearned half-pay by retired officer of U. S. army void as against public policy; *National Bank v. Fink*, 86 Tex. 305, 40 A. S. R. 833, 24 S. W. 256, holding assignment of unearned salary or fees, by county assessor void as against public policy; *Bliss v. Lawrence*, 48 How. Pr. 21, holding salary of public

officer not due and payable not assignable; *Serrill v. Wilder*, 77 Ohio St. 343, 14 L.R.A. (N.S.) 982, 83 N. E. 486, in same connection.

— **Mere possibilities.**

Cited in reference note in 70 A. D. 96, on assignability of a mere possibility.

Cited in note in 94 A. D. 649, on assignability of mere possibilities or contingencies.

Trustee's answers as evidence.

Cited in *Hubbard v. Lameburn*, 194 Mass. 398, 80 N. E. 459, holding that trustee's answers may be received in evidence on trial of issues between plaintiff and interposing claimant.

61 AM. DEC. 417, BLANCHARD v. ELLIS, 1 GRAY, 195.

Effect of grantor's subsequently acquiring title.

Cited in *Resser v. Carney*, 52 Minn. 397, 54 N. W. 89, holding that grantee cannot be compelled to accept after-acquired title in satisfaction of broken covenant of seisin or in mitigation of damages recoverable for such breach; *Fletcher v. Chamberlin*, 61 N. H. 438, upon same principle.

Cited in reference notes in 66 A. D. 374, as to when after-acquired title inures to benefit of grantee; 89 A. D. 549, on grantor's right to set up subsequently acquired title against grantee.

Cited in note in 99 A. D. 78, on recovery of nominal damages for breach of covenant of seisin when grantor subsequently acquires perfect title.

Distinguished in *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. 764, holding in action on covenant of seisin that grantor may, where grantee has not been evicted, defend by showing he procured the outstanding title; *Edridge v. Rochester City & B. R. Co.* 54 Hun, 194, 7 N. Y. Supp. 439, holding co-tenant who purported to grant railroad right to lay tracks upon common property not estopped to deny it such right after acquiring other co-tenants' interest.

— **After eviction of grantee.**

Cited with special approval in *Nichol v. Alexander*, 28 Wis. 118, holding that evicted grantee cannot be compelled to accept after-acquired title either in satisfaction of covenant against encumbrances or in mitigation of damages for its breach.

Cited in *Burton v. Reeds*, 20 Ind. 87, holding that evicted grantee may recover substantial damages in action on warranty though after eviction grantor had purchased title paramount.

Estoppel as applied to grantee who has recovered back consideration paid by him.

Cited in *Gray v. Nolde*, 76 Neb. 106, 107 N. W. 224, to point that grantee who, in action for breach of covenant, recovered back consideration paid is estopped to set up his title deed against grantor; *Noonan v. Ilsley*, 21 Wis. 139, to same effect. **Estoppel upon warranty of title.**

Cited in reference note in 83 A. D. 693, on application of estoppel upon warranty of title.

61 AM. DEC. 423, NORWAY PLAINS CO. v. BOSTON & M. R. CO. 1 GRAY, 263.

Liability of gratuitous bailee.

Distinguished in *Jenkins v. Bacon*, 111 Mass. 373, 15 A. R. 33 (dissenting opin-

ion), majority holding gratuitous bailee liable for loss of bond purchased by him for bailor.

Who are common carriers.

Cited in *Fitchburg R. Co. v. Gage*, 12 Gray, 393, holding railroad company a common carrier.

Demurrage charges by carrier.

Cited in *Miller v. Mansfield*, 112 Mass. 260, sustaining lien for storage by railroad, under rule and usage making charge for storage if goods are not called for in 24 hours, though not actually unloaded.

Place where carrier must receive or deliver goods.

Cited in *Camblos v. Philadelphia R. R. Co.*, 4 Brewst. (Pa.) 612, 9 Phila. 435, 3 Phila. Leg. Int. 149, Fed. Cas. No. 2,331, to point that carrier, in absence of further professions, cannot be required to receive or deliver goods at other place than station.

Cited in reference notes in 85 A. D. 260, on persons to whom delivery of goods by carrier by boat must be made; 98 A. D. 77, on rule that delivery must be made by carrier at usual place of discharge.

Liability of common carriers generally.

Cited in reference notes in 62 A. D. 294, on extent of common carriers' liability; 62 A. D. 294, as to how common carriers' liability may be modified; 63 A. D. 138, on carrier's liability for accidents except by public enemy or act of God; 64 A. D. 393, on responsibility of common carrier after liability as such terminates; 64 A. D. 159; 64 A. D. 411,—on liability of common carriers; 64 A. D. 754, on liability of common carrier of goods; 71 A. D. 290; 75 A. D. 94; 75 A. D. 497; 75 A. D. 567,—on carriers as insurers against all loss except that arising from act of God or the public enemy.

Cited in note in 24 A. D. 147, on common carriers before carriage is begun or after termination, as warehousemen.

When liability of carrier begins.

Distinguished in *Fitchburg & W. R. Co. v. Hanna*, 6 Gray, 539, 66 A. D. 427, holding liability as carrier begins immediately on delivery for transportation, though property is temporarily stored on wharf, before loading.

When liability of carrier as such terminates.

Cited in *Rice v. Boston & W. R. Corp.* 98 Mass. 212, holding railroad company liable as carrier for negligence in unloading coal in unsuitable place.

Cited in reference notes in 47 A. D. 648, on when railroad's duty as carrier ceases; 63 A. D. 320, on what is sufficient delivery by carrier; 64 A. D. 392, on what delivery by common carrier exonerates from liability; 68 A. D. 147, on how long liability of carrier of goods continues; 74 A. D. 193; 76 A. D. 776,—on termination of carrier's liability; 86 A. D. 776, as to when carrier's liability as such terminates.

Cited in notes in 7 A. R. 591, on termination of carrier's liability as insurer; 17 L.R.A. 691, 693, on time when liability of railway carrying goods ceases to be that of carrier; 8 L.R.A. (N.S.) 237, on termination of carrier's liability as such as affected by its fault preventing removal of goods.

Distinguished in *Alabama & T. Rivers R. Co. v. Kidd*, 35 Ala. 209, holding railroad company liable as warehouseman under contract to deliver cotton to its own agent, for storage for owner.

Disapproved in *Derosia v. Winona & St. P. R. Co.* 18 Minn. 133, Gil. 119,

sustaining charge that carrier is liable as such, for reasonable time after arrival of goods for consignee to remove them.

— **Necessity of notice to consignee.**

Cited in *Bachant v. Boston & M. R. Co.* 187 Mass. 392, 105 A. S. R. 408, 73 N. E. 642, to point that under particular facts carrier could not be considered released by delivery until consignees had been notified and car so placed as that they could conveniently unload it; *Ely v. New Haven S. B. Co.* 6 Abb. Pr. N. S. 72, to point that steamboat company is not liable as carrier after depositing goods on wharf though no notice to consignee be given; *Hicks v. Wabash R. Co.* 131 Iowa, 295, 8 L.R.A. (N.S.) 235, 108 N. W. 534, holding that liability of common carrier as such terminates after arrival of goods at their destination in condition for delivery even though consignee is not notified; *Northrop v. Syracuse*, 5 Abb. Pr. N. S. 425, 3 Abb. App. Dec. 386, holding carrier's liability as such terminated upon its depositing goods in its freight house where consignee was absent and without any agent to whom delivery could be made or notice given; *Burr v. Adams Exp. Co.* 71 N. J. L. 263, 58 Atl. 609, holding that liability of common carrier as such continues until consignee has been notified and given reasonable time within which to remove goods from carrier's premises; *Rankin v. Pacific R. Co.* 55 Mo. 167, holding railroad company not required to notify consignee of arrival of goods.

Cited in reference note in 91 A. D. 363, on carrier's duty as to delivery of goods and notice to consignee.

Questioned in *Michigan S. & N. I. R. Co. v. Bivens*, 13 Ind. 263, on necessity of notice to consignee of arrival of goods.

Disapproved in *McMillan v. Michigan, S. & N. I. R. Co.* 16 Mich. 79, 93 A. D. 208, to point, that carrier's liability does not cease on arrival of goods and deposit in depot, without notice to consignee; *Hedges v. Hudson River R. Co.* 6 Robt. 119, upon point that liability of railroad as carrier ceases upon its delivering goods in conformity with its custom upon its platform without notifying consignee.

— **Effect of notice to consignee.**

Cited in *Salmon Falls Mfg. Co. v. The Tangier*, 1 Cliff. 396, Fed. Cas. 12,266 (affirming 3 Ware, 110, Fed. Cas. No. 12,267), denying carrier's liability for loss by fire, after notice to consignee of arrival of goods and unloading same on wharf.

Disapproved in *United Fruit Co. v. New York & B. Transp. Co.* 104 Md. 567, 8 L.R.A. (N.S.) 240, 65 Atl. 415, 10 A. & E. Ann. Cas. 437, holding common carrier not liable as such where consignee allowed goods to remain with him for one and one-half business days after being notified of their arrival.

— **Goods left in cars.**

Cited in *Bloyd v. Pollocks*, 27 W. Va. 75, to point that carrier is liable as warehouseman for goods after arrival at destination and being switched on side-track for consignee.

Distinguished in *Missouri P. R. Co. v. Haynes*, 72 Tex. 175, 10 S. W. 398, holding railway company liable as carrier for loss by fire of cotton after arrival at destination, but before unloading or notice to consignee; *Chicago & N. W. R. Co. v. Sawyer*, 69 Ill. 285, 18 A. R. 613, holding carrier liable as such for loss by fire in cars at destination of dutiable goods which under congressional laws, not deemed delivered until placed in bonded warehouse.

Criticised in *Dunham v. Boston & A. R. Co.* 46 Hun, 245, holding railroad

company liable for loss by fire of goods in car on switch, while in course of removal by consignee.

— Goods left on platform or wharf.

Cited in *Ely v. New Haven S. B. Co.* 53 Barb. 207, to point that carrier is liable only as warehouseman for loss by fire on July 5th of goods after arrival and deposit on wharf July 4th; *Milwaukee & M. R. Co. v. Fairchild*, 6 Wis. 403, holding railroad company liable for loss of wheat after arrival at Milwaukee and being placed on depot platform for the night.

Distinguished in *Normile v. Oregon Nav. Co.* 41 Or. 177, holding carrier liable for injuries to mule removed from vessel on arrival but so carelessly tied at wharf as to cause injury.

— Goods stored in warehouse or depot.

Cited in *Bausemer v. Toledo & W. R. Co.* 25 Ind. 434, 87 A. D. 367; *Stowe v. New York B. & P. R. Co.* 113 Mass. 521; *Bassett v. Connecticut River R. Co.* 145 Mass. 129, 1 A. S. R. 443, 13 N. E. 370; *Gashweiler v. Wabash, St. L. & P. R. Co.* 83 Mo. 112, 53 A. R. 558; *Spears v. Spartanburg, U. & C. R. Co.* 11 S. C. 158,—holding railroad company liable merely as warehouseman for loss by fire of goods, after arrival and unloading at depot; *Merchants' Dispatch Transp. Co. v. Hallock*, 64 Ill. 284, holding carrier's liability for loss by fire on 9th, caused by unloading goods in depot on 7th, and only liable as warehouseman thereafter; *Rice v. Hart*, 118 Mass. 201, 19 A. R. 433, holding railroad company liable merely as warehouseman for loss of goods, arriving on Saturday and unloaded in station after statement to consignee's teamster that he could not get them till Monday; *Hardman v. Montana Union R. Co.* 39 L.R.A. 300, 27 C. C. A. 407, 48 U. S. App. 570, 83 Fed. 88, holding railroad company liable as bailee for hire for loss of goods after arrival and while in its warehouse; *White v. Colorado C. R. Co.* 5 Dill. 428, Fed. Cas. No. 17,543, holding railroad company liable as warehouseman for goods received at destination and placed in depot, which was destroyed by fire, not extinguished through firemen's fear of powder stored therein; *New Albany & S. R. Co. v. Campbell*, 12 Ind. 55, holding railroad company liable only as warehousemen for loss by fire of goods, after arrival and deposit in depot and notice to consignee; *Francis v. Dubuque & S. C. R. Co.* 25 Iowa, 60, 95 A. D. 769, holding railroad company liable only as warehouseman for loss by fire of goods after arrival at 8 P. M. and deposit in depot; *Sessions v. Western R. Co.* 16 Gray, 132, affirming that if goods had been removed from car and deposited in freight-house railroad company would have been liable only as warehouseman; *Hall v. Boston & W. R. Corp.* 14 Allen, 439, 92 A. D. 283, holding railroad company depositing flour from cars, in depot liable therefor as warehouseman; *Morris & E. R. Co. v. Ayres*, 29 N. J. L. 393, 80 A. D. 215, on railroad company's liability as warehouseman after arrival of goods and deposit in depot; *Hirsch v. The Quaker City*, 2 Disney (Ohio) 144, sustaining power of carrier to deposit goods in warehouse on consignee's failure to call for some after reasonable time; *Faulkner v. Hart*, 12 Jones & S. 471, holding that where freight which was received at hour too late for delivery according to road's custom was stored in freight-house and was burned, railroad was not liable as common carrier under Massachusetts law.

Cited in reference notes in 63 A. D. 320, on respective liabilities of carriers and warehousemen; 71 A. D. 290, on railroad company's liability as carrier ceasing when goods have reached destination and been stored in warehouse; 86 A. D. 776, as to when carrier's liability as warehouseman commences.

Cited in note in 97 A. S. R. 90, on reduction of carrier's liability to that of warehouseman on storage of goods in depot or warehouse.

Distinguished in *Chicago & A. R. Co. v. Scott*, 42 Ill. 132, holding railroad company liable as warehouseman for loss by fire on 16th of wool after arrival on 14th and deposited in its warehouse; *Angle v. Mississippi & Mo. River R. Co.* 18 Iowa, 555, holding carrier liable for loss by fire of goods removed to third party's warehouse within twenty-four hours of their arrival; *Brown v. Grand Trunk R. Co.* 54 N. H. 535, holding railroad company removing flour from car to depot and gratuitously holding there at consignee's request. liable only as simple depositary therefor.

Disapproved in *Missouri P. R. Co. v. Nevill*, 60 Ark. 375, 46 A. S. R. 208, 28 L.R.A. 80, 30 S. W. 425, holding railroad company liable as carrier for goods lost by fire on night succeeding arrival and deposit in depot, where consignee had not reasonable time for removing same; *Leavenworth, L. & G. R. Co. v. Maris*, 16 Kan. 333, affirming railroad company liable as carrier for loss of goods after arrival and deposit in depot and until reasonable time for consignee to call and remove same; *Jeffersonville R. Co. v. Cleveland*, 2 Bush, 463, holding railroad company liable as carrier for loss by fire on 26th of goods after arrival on 25th, and deposit in depot; *Moses v. Boston & M. R. Co.* 32 N. H. 523, 64 A. D. 381, holding railroad company liable as carrier for loss by fire of goods arriving too late in day to be removed by consignee, and therefore placed in warehouse; *Faulkner v. Hart*, 82 N. Y. 413, 37 A. R. 574, holding railroad company liable for loss of goods received too late for delivery to consignee and unloaded in warehouse where they are burned in night; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 A. D. 349, holding that railroad company's liability as carrier for loss of box arriving and unloaded at depot in afternoon ceased when consignee called and left box over night; *Wood v. Crocker*, 18 Wis. 346, 86 A. D. 773, holding railroad company liable as carrier for goods destroyed after arrival and deposit in depot late Saturday afternoon after consignee's teamster had called for them.

— Goods sent on by connecting carrier.

Cited in *Cramer v. American Merchants Union Exp. Co.* 56 Mo. 524, denying liability of carrier, unable to find consignee at St. Louis, and consequently forwarding goods to owner in Vicksburg, by boat on which goods were lost.

— Goods stored pending delivery to connecting carrier.

Cited in *Denny v. New York C. R. Co.* 13 Gray, 481, 74 A. D. 645, holding railroad company's liability as carrier, ended by deposit of goods in depot at terminus to await further transportation by next carrier.

Distinguished in *Judson v. Western R. Corp.* 4 Allen, 520, 81 A. D. 718, holding railroad company not liable as carrier for goods lost in its freight-house, before receipt of "expense-bills" from connecting carrier; *McDonald v. Western R. Corp.* 34 N. Y. 497, holding railroad company liable as carrier for loss by fire of goods placed in depot as terminus some days before, and awaiting further transportation by connecting carrier.

— Liability for baggage.

Cited in *Nealand v. Boston & M. R. Co.* 161 Mass. 67, 36 N. E. 592, holding railroad company merely liable as warehouseman, for loss of trunk after arrival late at night, and while in baggage-room; *Burnell v. New York C. R. Co.* 45 N. Y. 184, 6 A. R. 61, holding carrier liable for loss of trunk brought to New York, though not called for in two days owing to neglect of owner's truck man.

Distinguished in *Pennsylvania Co. v. Liveright*, 14 Ind. App. 518, 41 N. E. 350; *Cary v. Cleveland & T. R. Co.* 29 Barb. 351, holding carrier liable as such for loss of baggage, for time after its arrival, reasonable for passenger to remove same.

Consideration for services as warehouseman.

Cited in *Barron v. Eldredge*, 100 Mass. 455, 1 A. R. 126, holding freight to be ultimately paid for whole service of transportation sufficient consideration for preliminary service as warehouseman.

When liability on marine policy terminated.

Cited in *Mansur v. New England Mut. Marine Ins. Co.* 12 Gray, 520, holding insurance company not liable for destruction of property unloaded on wharf, under insurance "to continue on property until landed."

Application of common law to new questions.

Cited in *Gagg v. Vetter*, 41 Ind. 228, 13 A. R. 322, affirming elasticity of common law principles in their application to novel state of facts; *Edgerly v. Barker*, 66 N. H. 434, 28 L.R.A. 328, 31 Atl. 900, affirming broadness of common-law principles as applied to doctrine of suspension of power of alienation; *Bath Gas-light Co. v. Rowland*, 84 App. Div. 563, 82 N. Y. Supp. 841, applying as common law, principle enunciated by courts of Maine, though after facts in case at hand arose; *People v. Haas*, 105 App. Div. 119, 93 N. Y. Supp. 790, to point that courts may declare the common law as it is founded upon principles of natural justice which are expansive and adaptable to changing times and conditions.

61 AM. DEC. 433, BULLARD v. RANDALL, 1 GRAY, 605.**What constitutes an assignment.**

Cited in *Getchell v. Naney*, 69 Me. 442, to point that without debtor's assent creditor cannot assign portion of debt so as to give assignee any equitable interest therein.

Cited in reference note in 90 A. D. 219, on what constitutes equitable assignment.

Distinguished in *National Exch. Bank v. McLoon*, 73 Me. 498, 40 A. R. 388, holding that assignment of part of entire demand is valid in equity and sustainable against consent of debtor in all cases where equitable results follow.

— When made by check or draft.

Cited in *Grammel v. Carmer*, 55 Mich. 201, 54 A. R. 363, holding that unaccepted draft does not operate as assignment of funds in drawee's hands; *Rosenthal v. Mastin Bank*, 17 Blatchf. 318, Fed. Cas. No. 12,063, holding same of draft not accepted by drawee nor charged against drawer; *Chase v. Alexander*, 6 Mo. App. 505, holding that bill of exchange does not before acceptance operate as assignment pro tanto of funds in hands of drawee; *Whitney v. Eliot Nat. Bank*, 137 Mass. 351, 50 A. R. 316, to point that one's draft on another for part of sum due by such other does not operate as assignment; *Dickinson v. Coates*, 79 Mo. 250, 49 A. R. 228, holding that bank check drawn for part only of sum due drawer does not, before its presentment and acceptance, operate in equity or law as assignment of amount for which drawn; *Hall v. Flanders*, 83 Me. 242, 22 Atl. 158, to point that check drawn against fund on deposit in bank is not deemed assignment thereof in action at law; *Moses v. Franklin Bank*, 34 Md. 574, holding that check does not until accepted operate as assignment of drawer's funds in bank, and holder may therefore sue endorser upon bank's refusing payment; *Weiland v. State Nat. Bank*, 112 Ky. 310, 56 L.R.A. 178, holding that bank cannot pay unaccepted check after having been notified not to do so by administrator of drawer; *Pullen v. Placer County Bank*, 138 Cal. 169, 94 A. S. R. 19, 71 Pac. 83, holding that where father gave son check asking him to present it after his death and son did so, and bank knowing of father's death paid it,

bank is liable to father's estate; *Dana v. Third Nat. Bank*, 13 Allen, 445, 90 A. D. 216, holding bank which paid amount of drawer's deposit to holder of check, drawn for larger amount, after institution of insolvency proceedings against drawer liable therefor to assignee in insolvency; *Holbrook v. Payne*, 151 Mass. 383, 21 A. S. R. 456, 24 N. E. 210, holding that orders drawn on town in amount greater than its indebtedness to drawer containing request that they be charged to drawer's account and which were left by drawee with selectmen who merely retained them cannot prevail against trustee process; *Covert v. Rhodes*, 48 Ohio St. 66, 27 N. E. 94, holding that holder of draft has no priority over drawer's creditors for whose benefit he made general assignment before draft was accepted; *Hulings v. Hulings*, 38 W. Va. 351, 18 S. E. 620, holding that general assignment for benefit of creditors does not defeat check-holder although check be not presented for payment until after such assignment; *Donohoe-Kelly Bkg. Co. v. Southern P. Co.* 138 Cal. 183, 94 A. S. R. 28, 71 Pac. 93, holding that garnishment proceeding against funds of depositor in bank will prevail over all unpresented and unaccepted checks drawn by him; *Love v. Ardmore Stock Exch.* 5 Ind. Terr. 202, 67 L.R.A. 617, 82 S. W. 721, 5 A. & E. Ann. Cas. 183, to same effect; *Duncan v. Berlin*, 60 N. Y. 151, holding statement of bank's clerk that check was in order and would be paid, not such acceptance as will bind bank; *Rockville National Bank v. Second Nat. Bank*, 69 Ind. 479, 35 A. R. 236, holding cashier's taking check drawn on his bank and placing it on "cancelling fork" not such acceptance as will preclude him from returning check upon learning it is not in proper form or that drawer is without funds.

Cited in reference notes in 88 A. D. 178, as to when draft operates as assignment; 96 A. D. 157, on bank check as assignment of deposit.

Criticized in *Willetts v. Finlay*, 11 How. Pr. 468, upon point, that reason for check's not operating as assignment is that it is drawn for part only of drawer's funds in hands of drawee.

What are checks.

Cited in *Budd v. Himmelberger*, 4 Pa. Dist. R. 545, to point that check is order to pay holder sum of money at bank on presentment of check and demand of money; *Harrison v. Nicollet Nat. Bank*, 41 Minn. 488, 16 A. S. R. 718, 5 L.R.A. 746, 43 N. W. 336, holding draft drawn on bank payable at day subsequent to its date, a "bill of exchange" and not a "check;" *Hawley v. Jette*, 10 Or. 31, 45 A. R. 129, holding same of order directing individual to pay sum of money on future day "without grace" and charge same to drawer's account and requiring presentment to drawee for acceptance.

Cited in reference note in 44 A. S. R. 708, on nature of bank checks.

Rights of holder of check against drawer.

Cited in *Carr v. National Security Bank*, 107 Mass. 45, 9 A. R. 6, holding that promise of bank to honor its depositor's checks does not entitle holder of check drawn by depositor for part of amount deposited to sue bank on check; *Bank of the Republic v. Millard*, 10 Wall. 152, 19 L. ed. 897, holding that holder of check cannot sue bank for refusing payment in absence of proof that it was accepted by bank or charged against drawer; *Re Smith*, 15 Nat. Bankr. Reg. 459, Fed. Cas. No. 12,990, to same effect; *Martin v. Home Bank*, 160 N. Y. 190, 54 N. E. 717, to point that check does not operate as assignment of drawer's funds in bank and unless accepted or certified creates no obligation against drawee; *Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank*, 54 Ohio St. 60, 56 A. S. R. 700, 31 L.R.A. 653, 42 N. E. 700, holding that holder of unaccepted

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check cannot sue bank for its refusal to pay it though drawer have funds in bank sufficient to meet it.

Cited in note in 19 A. D. 423, on right of holder of check to sue bank for refusal to pay.

Disapproved in *McGregor v. Loomis*, 1 Disney (Ohio) 247, holding that holder of check has action against drawee who having sufficient funds of drawer's on hand refused payment; *Roberts v. Corbin*, 26 Iowa, 315, 96 A. D. 146, to same effect.

Effect of certification of check.

Cited in *Minot v. Russ*, 156 Mass. 458, 32 A. S. R. 472, 16 L.R.A. 510, 31 N. E. 489, holding that certification of check discharges drawer or not accordingly as whether it is procured for holder's or drawer's benefit.

Cited in note in 89 A. D. 442, on bank's liability on certified checks.

Relation of bank to its depositors.

Cited in *Libby v. Hopkins*, 104 U. S. 303, 26 L. ed. 769, to point that bank is depositor's debtor and may set off against his claim, its claim against him.

Cited in note in 9 L.R.A. 109, on relation between depositor and bank.

Order of payment of checks.

Cited in note in 41 L. ed. U. S. 858, on order of payment of checks.

Overdrawn accounts.

Cited in reference note in 100 A. D. 122, as to overdrawn accounts.

Time and place of doing business.

Cited in reference note in 77 A. D. 763, on effect as binding bank of time and place of cashier's doing business.

61 AM. DEC. 436, *ANGIER v. TAUNTON PAPER MFG. CO.* 1 GRAY, 621.

Damages recoverable in action for conversion of property.

Cited in *Hurd v. Hubbell*, 28 Conn. 389, holding that rule of damages in trover is value of property at time of conversion with interest; *Colcord v. McDonald*, 128 Mass. 470; *Brown v. Haynes*, 52 Me. 578,—holding that one who sold property on condition that title was to remain with him until purchase money paid can, if such condition is not fully performed, recover its full value against one converting it; *Davis v. Bliss*, 187 N. Y. 77, 10 L.R.A.(N.S.) 458, 79 N. E. 851, applying contrary rule; *Jellett v. St. Paul, M. & M. R. Co.* 30 Minn. 265, 15 N. W. 237, holding carrier who made wrongful delivery to conditional vendee not entitled in action of trover by vendor to reduce damages by amount paid by vendee to vendor before conversion; *Lorain Steel Co. v. Norfolk & B. Street R. Co.* 187 Mass. 500, 73 N. E. 646, holding that defendant in trover cannot show in reduction of damages as against vendor in conditional sale that debt has been so reduced by partial payments that amount of purchase money unpaid is less than property's market value.

Cited in reference note in 73 A. D. 308, on measure of damages in trover.

Cited in note in 10 L.R.A.(N.S.) 459, on damages recoverable by conditional vendor of personalty from third person who converts same after partial payment of purchase price.

Distinguished in *McGinnis v. Savage*, 29 W. Va. 362, 1 S. E. 746, upon point that in action of trover for conversion of property conditionally sold no abatement can be had because of partial payments; *Homans v. Newton*, 4 Fed. 880,

upon point that one converting property is liable for its full value to one who had made but conditional sale of it.

61 AM. DEC. 437, COM. v. HAYNES, 2 GRAY, 72.

Necessity for formal words in concluding indictments.

Cited in *Com. v. Reynolds*, 14 Gray, 87, 74 A. D. 665, holding it unnecessary to conclude indictment alleging facts showing obstruction and hindrance of public justice with words "to obstruction and hindrance of public justice;" *Gilmore v. State*, 118 Ga. 299, 45 S. E. 226, holding accusation failing to allege that the act of public indecency "tended to debauch the morals" not fatally defective.

What interference with public rights is indictable.

Cited in *People v. Jackson*, 7 Mich. 432, 74 A. D. 729, holding that to render obstruction of alley indictable offense it must affect injuriously some right which public has in their aggregate capacity.

61 AM. DEC. 438, PIPER v. PEARSON, 2 GRAY, 120.

Civil liability of officers.

Cited in *Thurston v. Adams*, 41 Me. 419, sustaining action against constable for destroying liquors under warrant, not reciting they were advertised as required by law, when owner unknown; *Batchelder v. Currier*, 45 N. H. 460, holding sheriff liable for imprisoning one under commitment issued by justice of peace for offense exclusively within jurisdiction of police court; *Ela v. Smith*, 5 Gray, 121, 66 A. D. 356, holding mayor of city, authorized in exercise of judgment to call out militia to suppress threatened riot, not liable for latter's unlawful acts.

Cited in note in 86 A. S. R. 408, on who liable for abuse of process.

Distinguished in *Chase v. Ingalls*, 97 Mass. 524, holding sheriff not liable for arresting judgment debtor under execution apparently valid but void because issued by judgment creditor's attorney.

— Judicial officers generally.

Cited in *Craig v. Burnett*, 32 Ala. 728, holding common council liable for committing one violating city ordinance, although members thereof, as magistrates, had jurisdiction of offense; *Vanderpool v. State*, 34 Ark. 174, holding U. S. commissioner, only authorized to conduct examinations, liable for fining and imprisoning one charged with violating federal statutes; *Call v. Pike*, 66 Me. 350, holding magistrate prohibited from acting when related to party within sixth degree liable for committing witness for contempt in refusing to testify; *Kelly v. Bemis*, 4 Gray, 83, 64 A. D. 50, holding justice of peace liable for false imprisonment in committing one, after trial, for violation of void statute; *Morton v. Crane*, 39 Mich. 526, denying recovery against justice for rendering judgment against party upon unauthorized appearance of attorney, without proof of authority; *De Courcey v. Cox*, 94 Cal. 665, 30 Pac. 95, holding justice liable for imprisoning one for larceny upon charge of retaining money over-paid, by mistake, not constituting a crime; *Smith v. Casner*, 2 Kan. App. 591, 44 Pac. 752, holding justice of the peace liable for committing complainant for default in payment of costs after he has executed statutory bond relieving him from imprisonment for costs; *Brown v. Carroll*, 16 R. I. 604, 18 Atl. 283, holding justice liable for damages sustained by sale of property under execution when writ or summons was not filed before return day.

Cited in reference notes in 63 A. D. 688, on liability of judicial officer for acts in judicial capacity; 61 A. D. 473; 64 A. D. 52; 68 A. D. 750; 77 A. D. 624,—on liability of judicial officers; 25 A. R. 700, 701, on civil liability of judge for judicial acts.

Cited in notes in 14 L.R.A. 139, on civil liability of judicial officer for acts of judicial nature; 14 L.R.A. 144, on civil liability of judge committing person for contempt; 15 E. R. C. 51, on civil liability of judge for his judicial acts.

Distinguished in *Hendrick v. Whittemore*, 105 Mass. 23, holding judgment of justice against cosureties not assailable in action for contribution because summons was defective in former action.

— As to matters within their jurisdiction.

Cited in *Calhoun v. Little*, 106 Ga. 336, 71 A. S. R. 254, 43 L.R.A. 630, 32 S. E. 86, holding magistrate, having jurisdiction, not liable for committing one violating void ordinance prescribing imprisonment, without option of fine, as required by statute; *White v. Morse*, 139 Mass. 162, 29 N. E. 539, denying recovery against justice for rendering judgment for excessive costs in action within his jurisdiction; *Lange v. Benedict*, 73 N. Y. 12, 29 A. R. 80, holding judge of U. S. district court not liable for false imprisonment in pronouncing excessive, void sentence in case within his jurisdiction.

Cited in reference note in 66 A. D. 458, on nonliability of judicial officers for acts done within sphere of jurisdiction.

— As to matters without or in excess of their jurisdiction.

Cited in *Brewer v. Casey*, 196 Mass. 384, 82 N. E. 45, to point that one has action against justice of court of limited jurisdiction who exceeded his authority in committing him to house of correction instead of jail; *Withers v. Coyles*, 36 Ala. 320, holding magistrate of limited jurisdiction liable for imprisoning slave in default of bond for good behavior, demandable from free person; *McClure v. Hill*, 36 Ark. 268, holding justice liable for conversion of property taken in replevin when its value is not shown to be within amount of his jurisdiction; *Waterville v. Barton*, 64 Me. 321, on point that courts of limited jurisdiction are liable in trespass for acts without or in excess of their jurisdiction; *Hush v. Sherman*, 2 Allen, 596, holding justice, having no jurisdiction of action in which his town was interested, liable for committing one under judgment for penalty payable to town; *McVea v. Walker*, 11 Tex. Civ. App. 46, 31 S. W. 839, holding justice being disqualified when related to party within third degree liable for conversion of property taken under execution in such case; *Clarke v. May*, 2 Gray, 410, 61 A. D. 470, holding justice of peace liable for false imprisonment for committing witness, after termination of case, for contempt in failing to appear.

Cited in reference note in 67 A. D. 404, on liability of justice of the peace as trespasser exceeding jurisdiction.

Disapproved in *Rush v. Buckley*, 100 Me. 322, 70 L.R.A. 464, 61 Atl. 774, 4 A. & E. Ann. Cas. 318, holding magistrate invested with general jurisdiction over subject-matter of alleged offense not civilly liable for erroneously deciding that he had jurisdiction over particular offense and issuing warrant for accused's arrest, though ordinance under which he proceeded was invalid.

Invalidity of proceedings in excess of jurisdiction of magistrate.

Cited in *Learnard v. Bailey*, 111 Mass. 160, to point that proceedings before magistrate in taking recognizance for release of one arrested are void if he acted

beyond his jurisdiction; *Rossiter v. Peck*, 3 Gray, 538, holding action not maintainable upon judgment of justice of peace unless record shows that summons was served upon defendant.

Power to punish for contempt.

Cited in *Ex parte Gardner*, 22 Nev. 280, 39 Pac. 570, holding court of one county, to which action was illegally transferred, unauthorized to punish party for contempt in violating its order; *Robinson v. Owen*, 46 N. H. 38, holding courts authorized to deny party right to appear upon trial who refused to pay costs imposed upon procuring adjournment.

Cited in reference notes in 79 A. D. 536, on want of jurisdiction as affecting commitment for contempt; 98 A. D. 413, on power of courts to punish for contempt.

— Power of justice of the peace.

Cited in *Whitcomb's Case*, 120 Mass. 118, 21 A. R. 502, on point that justice of peace exercises judicial power and is authorized to punish for contempt witness, regularly subpoenaed, refusing to testify; *Miskimmins v. Shaver*, 8 Wyo. 392, 49 L.R.A. 831, 58 Pac. 411 (dissenting opinion), on point, that justices of peace are judicial officers with power to punish, for contempt, witness, duly subpoenaed, refusing to testify; *Emery v. Hapgood*, 7 Gray, 55, 66 A. D. 459, on jurisdiction of a justice of the peace of proceeding for contempt by defendant in prosecution brought before him.

Cited in note in 1 L.R.A.(N.S.) 1142, on want of jurisdiction of magistrate to punish witness for contempt.

Violation of void injunction as a contempt.

Cited in *Old Dominion Teleg. Co. v. Powers*, 140 Ala. 220, 37 So. 195, 1 A. & E. Ann. Cas. 119, holding state and municipal officers not punishable for contempt in violating injunction, which court had no jurisdiction to grant, restraining criminal prosecutions; *Guebelle v. Epley*, 1 Colo. App. 199, 28 Pac. 89, holding election officers not punishable for contempt in conducting election, in manner prescribed by statute, in violation of void injunction; *Walton v. Develing*, 61 Ill. 201, holding election officers not punishable for contempt in ignoring void injunction restraining election held in manner prescribed by law.

Presumption of jurisdiction of justice of peace.

Cited in reference notes in 67 A. D. 404, on necessity for affirmative showing of jurisdiction of justices of the peace; 69 A. D. 589, on necessity of proving jurisdiction of inferior courts; 90 A. D. 497, as to affirmative appearance of fact of jurisdiction of inferior tribunal; 41 A. S. R. 104; 59 A. S. R. 48,—on presumption as to jurisdiction of justice of the peace.

Relief from contempt.

Cited in note in 22 A. S. R. 425, on means of relief from contempt.

61 AM. DEC. 443, BIXBY v. BRUNDIGE, 2 GRAY, 129.

Actions for malicious prosecution.

Cited in *Dennehey v. Woodsum*, 100 Mass. 195, holding declaration for malicious prosecution alleging that plaintiff's conviction before trial justice was obtained upon false testimony and that upon appeal complaint was dismissed and plaintiff discharged insufficient in not alleging want of probable cause.

— Right to maintain, as affected by validity of prosecution proceedings.

Cited in *Vinson v. Flynn*, 64 Ark. 453, 39 L.R.A. 415, 43 S. W. 146; *Berger v. Saul*, 113 Ga. 869, 39 S. E. 326,—holding that action for malicious prosecu-

tion cannot be based on proceedings had in court having on jurisdiction thereof; *Shipman v. Fletcher*, 9 Mackey, 245, to same point; *Dennis v. Ryan*, 65 N. Y. 385, 22 A. R. 635 (dissenting opinion), upon same point; *Whiting v. Johnson*, 6 Gray, 246, to point that declaration for malicious prosecution averring institution of suit in court having no jurisdiction is bad; *Minneapolis Threshing Mach. Co. v. Regier*, 51 Neb. 402, 70 N. W. 934, holding it no defense to action for malicious prosecution that complaint on which prosecution was founded was insufficient; *Painter v. Ives*, 4 Neb. 122, holding that while such action cannot be based on proceedings had before commissioner acting without jurisdiction, action for false imprisonment can, if plaintiff were arrested in consequence thereof.

Cited in notes in 26 A. S. R. 130, on want of jurisdiction in court in which prosecution was commenced as defense to action for malicious prosecution; 2 L.R.A. (N.S.) 1103, on effect of lack of jurisdiction of court in which malicious prosecution is begun upon right to maintain action therefor.

Distinguished in *Sweet v. Negus*, 30 Mich. 406, holding that where want of jurisdiction does not appear on face of warrant action for malicious prosecution may be maintained; *Potter v. Gjertsen*, 37 Minn. 386, 34 N. W. 746, holding such action sustainable though complaint upon which prosecution was founded failed to show that an offense was committed; *Gibbs v. Ames*, 119 Mass. 60, holding such action sustainable where magistrate had jurisdiction of subject-matter of complaint though proceedings were irregular; *Castro v. Uriarte*, 2 N. Y. Civ. Proc. Rep. (McCarty) 199, 2 N. Y. Civ. Proc. Rep. (Brown) 210, 12 Fed. 250, holding that such action will lie though proceedings upon which founded were invalid, court, however, having jurisdiction; *Ward v. Sutor*, 70 Tex. 343 8 A. S. R. 606, 8 S. W. 51, to same effect.

— **Necessity of showing malice and want of probable cause.**

Cited in reference note in 75 A. D. 677, on necessity of showing malice and want of probable cause in action for malicious prosecution.

Cited in note in 64 L.R.A. 486, on acquittal or discharge as evidence of want of probable cause where there was a want of jurisdiction.

61 AM. DEC. 444, BLOOD v. NASHUA & L. R. CORP. 2 GRAY, 137.

Rights of riparian owners.

Cited in reference notes in 63 A. D. 389; 65 A. D. 253; 72 A. D. 403,—on riparian proprietor's right to natural and unobstructed flow of stream.

Cited in note in 4 L.R.A. 572, on rights of riparian owners.

Right of private action in respect to public nuisances.

Distinguished in *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 A. R. 147, upon point that private action does not lie for public nuisance causing plaintiff damages no different in kind from public generally; *Wesson v. Washburn Iron Co.* 13 Allen, 95, 90 A. D. 181, holding that action may be maintained for maintenance of business in such manner as to injure plaintiff's property and his health though others in neighborhood suffer in like manner.

— **Nuisances affecting highways.**

Cited in *Shaubut v. St. Paul & S. C. R. Co.* 21 Minn. 502, holding that one who suffers no peculiar or special injury by reason of obstruction in highway can maintain no action therefor; *Powell v. Bunger*, 91 Ind. 64, holding same as to abutting land owner; *Robinson v. Brown*, 182 Mass. 266, 65 N. E. 377, holding

same where highway was obstructed at point near, but not opposite plaintiff's land; *Shaw v. Boston & A. R. Co.* 159 Mass. 597, 35 N. E. 92, holding that one damaged in his business in consequence of being deprived of highway has no action against those responsible for its obstruction; *Willard v. Cambridge*, 3 Allen, 574, holding that one whose place of business was adjacent to obstructed bridge can maintain no action for damages suffered in consequence of his not being able to use it; *Gold v. Philadelphia*, 115 Pa. 184, 8 Atl. 386, holding that innkeeper whose business was injured in consequence of defendant's failure to keep highway in fit condition has no right of action.

— **Nuisances affecting rivers.**

Cited in *Brightman v. Fairhaven*, 7 Gray, 271, holding that individual not specially injured has no right of action against one obstructing navigable river; *Harvard College v. Stearns*, 15 Gray, 1, holding same as to one whose access by water to his land is cut off by defendant's filling up navigable creek; *Jones v. St. Paul, M. & M. R. Co.* 16 Wash. 25, 47 Pac. 226, holding same as to one prevented from taking his steamboat down river because of obstructions placed therein by defendant; *Blackwell v. Old Colony R. Co.* 122 Mass. 1, holding that owner of only wharf upon navigable river affected by construction of bridge can maintain no action on ground that his wharf has been rendered useless; *Fall River Iron Works Co. v. Old Colony & F. River R. Co.* 5 Allen, 221, holding individuals cannot have erection of bridge across tidewaters enjoined though they suffer loss greater in degree, but not different in kind, from public generally; *Brayton v. Fall River*, 113 Mass. 218, 18 A. R. 470, holding that one may maintain action where navigable creek is so obstructed near his wharf as to prevent vessels from lying there in their accustomed manner; *Jones v. Seaboard Air Line R. Co.* 67 S. C. 181, 45 S. E. 188, holding that one whose land was injured in consequence of defendant's constructing bridge across navigable stream in such manner as to alter its flow, has right of action; *Enos v. Hamilton*, 27 Wis. 256, holding that one engaged in business on bank of river which formed only route to his source of supplies may maintain action against one obstructing it, where stock on hand was spoiled and manufactured product declined in price.

Cited in reference note in 69 A. D. 580, on right of mill owner to recover damages for obstruction of stream.

Cited in notes in 59 L.R.A. 81, on right to object to obstruction of navigation where navigation is merely impaired; 59 L.R.A. 86, on right to object to special injury to riparian or wharf right; 59 L.R.A. 867, on liability for injury by damming back water of stream by railroad bridge; 3 L.R.A.(N.S.) 1126, on private right of action for obstruction of navigable stream.

Disapproved in *Piscataqua Nav. Co. v. New York, N. H. & H. R. Co.* 89 Fed. 362, holding that where draw in railroad company's bridge across navigable river fell it was liable to owners of vessels thereby detained.

Recovery on abandonment of highway.

Cited in note in 26 L.R.A. 665, on damages and compensation on abandonment of highway.

Constitutionality of private roads and mill dam statutes.

Cited in *Sadler v. Langham*, 34 Ala. 311, holding statutes authorizing establishment of private roads across third persons' lands and condemnation of their lands for erection of mill-dams unconstitutional; *Varner v. Martin*, 21 W. Va.

534, holding statute authorizing condemnation of lands to establish private roads unconstitutional.

What damages are too remote to be recovered.

Cited in *Warner v. Bacon*, 8 Gray, 397, 69 A. D. 253, holding that in action for nonperformance of agreement to convey realty plaintiff cannot recover expenses incurred in erecting building on his other land by reason of not obtaining legal right to put thereon similar building standing upon land to be conveyed.

Rights of mill owners.

Cited in reference note in 66 A. D. 490, on mill owners and their rights.

What waters are navigable.

Cited in note in 42 L.R.A. 317, on what waters are navigable.

What are private streams.

Cited in note in 3 L.R.A. 611, on what are private streams.

61 AM. DEC. 448, LOWELL v. DANIELS, 2 GRAY, 161.

Estoppel of persons under disability.

Cited in *Denholm v. McKay*, 148 Mass. 434, 12 A. S. R. 574, 19 N. E. 551, to point that doctrine of estoppel is not applicable to infants or others incapable of contracting for themselves; *Re Comstock*, 3 Sawy. 218, Fed. Cas. No. 3,078, holding that one may prevent recovery on contract he had with foreign corporation by showing it had never complied with statute requiring foreign corporations to appoint agents upon whom process might be served; *State v. O'Laughlin*, 19 Kan. 504, holding that highway cannot be predicated upon doctrine of estoppel or dedication over lands of Indian having no power to convey without consent of Secretary of Interior; *Parsons v. Teller*, 111 App. Div. 637, 97 N. Y. Supp. 808 (dissenting opinion), as to whether admission of consideration contained in infant's contract is prima facie proof of the fact.

Cited in note in 2 L.R.A. 347, as to whether party who has no legal capacity to contract is estopped by falsely representing that he has capacity.

— Married women.

Cited in *Osborne v. Cooper*, 113 Ala. 405, 59 A. S. R. 117, 21 So. 320, to point that equity will not give effect to married woman's deed which, by statute, is inoperative; *Smith v. Ingram*, 132 N. C. 959, 95 A. S. R. 680, 61 L.R.A. 878, 44 S. E. 643, holding that doctrine of estoppel in pais is inapplicable to married women; *McIntosh v. Parker*, 82 Ala. 238, 3 So. 19, to same point; *Bodine v. Killen*, 53 N. Y. 93; *Third Nat. Bank v. Guenther*, 13 Abb. N. C. 428,—to point that such is the rule in absence of statute; *Behler v. Weyburn*, 59 Ind. 143, holding that married woman may not divest herself of title to her lands by estoppel in pais; *Reis v. Lawrence*, 63 Cal. 129, 49 A. R. 83 (dissenting opinion), upon same point; *Bemis v. Call*, 10 Allen, 512, to point that married woman cannot be barred of her sole and separate estate by estoppel in pais resulting from acts of her own; *Vliet v. Eastburn*, 64 N. J. L. 627, 46 Atl. 735, holding married woman may avoid her contract by showing that it was in fact, though not in form, one of suretyship; *Farmington Nat. Bank v. Buzzell*, 60 N. H. 189, holding wife not estopped to show that she signed note as surety though plaintiff took it believing she signed as principal; *Bank of America v. Banks*, 101 U. S. 240, 25 L. ed. 850, holding recitals in deed of trust of wife's separate property that it was given to secure her indebtedness not conclusive against her; *Mason v.*

Jordan, 13 R. I. 193, holding married woman not estopped by recital in deed, which she was incapable of making, that she was single woman; Levering v. Shockey, 100 Ind. 558, holding that where statute prohibited married woman from mortgaging her land acquired by gift, she was not estopped to show she had so acquired land in question though deed of it to her recited valuable consideration; Anthony v. Pierce, 108 Mass. 254, holding that married woman's void conveyance cannot be rendered effectual by her acts and admissions; Merriam v. Boston, C. & F. R. Co. 117 Mass. 241, holding married woman who conveyed stock without obtaining assent of husband as statute required not estopped to assert title thereto as against bona fide purchaser from transferee; Childs v. McCheaney, 20 Iowa, 431, 89 A. D. 545, holding wife who joins with husband in warranty deed not estopped from subsequently acquiring title to same property and asserting it against grantee; Rannells v. Gerner, 80 Mo. 474, holding married woman who joined in deed of husband's land executed by his guardian, he being insane, not estopped to assert deed inoperative to bar dower; Knight v. Thayer, 125 Mass. 25, to point that in absence of statute, married woman's warranty deed cannot operate against her by way of covenant or estoppel; Peaslee v. Peaslee, 147 Mass. 171, 17 N. E. 506, holding acts and declarations of woman during coverture inadmissible to prove her ratification of contract barring dower; Wales v. Coffin, 13 Allen, 213, holding wife though she had joined in many deeds and mortgages, in which husband asserted his sole ownership, not estopped from claiming estate as her own; Plumer v. Lord, 9 Allen, 455, 85 A. D. 773, upon point that married woman cannot estop herself by any act or declaration from setting up her legal incapacity to contract; McGregor v. Wait, 10 Gray, 72, 69 A. D. 305, holding wife's admissions made without husband's knowledge not competent evidence to prove way over land owned by them in her right; Graves v. Broughton, 185 Mass. 174, 69 N. E. 1083, holding that husband cannot during coverture acquire prescriptive right to way over wife's lands; Danner v. Berthold, 11 Mo. App. 351, holding that husband and wife cannot eject one who bought from wife as a feme sole where she held herself out as such and where husband, renouncing his marital obligations, had gone abroad; Wilder v. Wilder, 89 Ala. 414, 18 A. S. R. 130, 9 L.R.A. 97, 7 So. 767, holding married woman estopped to enforce vendor's lien on land sold and conveyed by joint deed of herself and husband where both were active in making sale and where strangers made advances relying thereupon.

Cited in reference notes in 64 A. D. 217, on whether married woman estopped to deny validity of deed; 77 A. D. 651, on estoppel by feme covert by covenants of warranty in deed; 80 A. D. 525, on when married woman estopped; 87 A. D. 758, on estoppel of married woman by fraudulent representations or concealment as to separate property; 44 A. S. R. 641, on estoppel of married women.

Cited in notes in 43 A. D. 427, on wife's estoppel to deny title by warranty in deed; 58 A. D. 116, on effect of voluntary acts and representations of married women, made with intent to deceive and which do deceive others to their prejudice; 57 A. S. R. 170, on estoppel of married women by deed; 1 L.R.A. 524, on limit to operation of principle of estoppel as to married women; 2 L.R.A. 348, on application of doctrine of estoppel to contracts of married women; 38 L. ed. U. S. 476, on estoppel of married women and widows.

Distinguished in *Berry v. Seawall*, 13 C. C. A. 101, 31 U. S. App. 30, 65 Fed. 742, holding that married woman may by acquiescing in husband's partition of lands which she held in co-tenancy estop herself from objecting thereto.

Operation of statutes affecting married women.

Cited in *Nolin v. Pearson*, 191 Mass. 283, 114 A. S. R. 605, 4 L.R.A. (N.S.) 643, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, holding that under statute allowing married woman to maintain actions for injuries in same manner as if sole, she may sue for alienation of her husband's affections.

— In respect to deeds of.

Cited in *Leggate v. Clark*, 111 Mass. 308, holding deed of husband and wife of her land made when he was insane null and void under statute requiring that husband assent to wife's conveyances; *Lewis v. Apperson*, 103 Va. 624, 106 A. S. R. 903, 68 L.R.A. 867, 49 S. E. 978, holding married woman's dower rights not barred by deed signed by herself and court commissioner where statute provided for barring such rights by deed signed by husband and wife; *Weed Sewing Mach. Co. v. Emerson*, 115 Mass. 554, holding wife's purchase money mortgage in which husband failed to join null and void; *Gebb v. Rose*, 40 Md. 387, holding wife's deed of trust to her husband, executed by her alone, void where statute provided that feme covert should convey by joint deed of herself and husband; *Cook v. Walling*, 117 Ind. 9, 10 A. S. R. 17, 2 L.R.A. 769, 19 N. E. 532, holding married woman's mortgage in which man whom she had married after husband's disappearance joined, inoperative if first husband be not dead in fact.

Cited in note in 12 A. D. 90, on incapability of using married woman's acts and admissions to validate void conveyance of her realty.

Revival of lien of mortgage which has been paid.

Cited in *Bailey v. Rockafellow*, 57-Ark. 216, 21 S. W. 227, holding that mortgage lien which had been extinguished by payment cannot be orally revived so as to make it security for fresh loan by stranger.

61 AM. DEC. 454, GREENE v. GREENE, 2 GRAY, 361.**Conclusiveness of judgments generally.**

Cited in *Harrington v. Harrington*, 154 Mass. 517, 28 N. E. 903, holding judgment obtained in sister state conclusive upon parties as to matter there involved; *DeProux v. Sargent*, 70 Me. 266, holding that judgments conclude parties thereto as to all matters properly available by way of defense in action in which rendered; *Fuller v. Eastman*, 81 Me. 284, 17 Atl. 67, holding that judgment in foreclosure suit as to amount due on mortgage concludes defendant when sued on mortgage note; *Sparhawk v. Wills*, 5 Gray, 423, holding that such judgment concludes defendant when seeking to redeem mortgaged premises; *State ex rel. Wolferman v. Superior Court*, 8 Wash. 591, 36 Pac. 443, holding that judgment of appellate court cannot be interfered with by lower court by any proceeding in cause other than such as appellate court directs.

Cited in reference notes in 83 A. D. 667, on collateral impeachment of domestic judgments; 43 A. S. R. 285, as to when judgment may be collaterally attacked.

— When affected by fraud.

Cited with special approval in *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93, holding that judgments cannot be vacated because founded on fraudulent instrument which was presented to and considered by court in making judgment assailed.

Cited in *Brooks v. O'Hara Bros.* 2 McCrary, 644, 8 Fed. 529, holding that judgments will not be vacated on original bill upon ground of fraud except where unsuccessful party has been deprived of his right to present his case

fully; *Bearnes v. Bearnes*, 66 How. Pr. 456; *McDougall v. Walling*, 21 Wash. 478, 75 A. S. R. 849, 58 Pac. 669,—to point that judgment cannot be attacked on ground of fraud in respect to matter which might have been tried in original action; *Dringer v. Erie R. Co.* 42 N. J. Eq. 573, 8 Atl. 811, holding that decree cannot be vacated because procured by fraud in respect to matter in issue; *Donovan v. Miller*, 12 Idaho, 600, 9 L.R.A. (N.S.) 524, 88 Pac. 82, 10 A. & E. Ann. Cas. 444, holding that equity will not enjoin enforcement of judgment procured by perjury or fraud unless such fraud be collateral to matter before court in rendering judgment; *Camp v. Ward*, 69 Vt. 286, 60 A. S. R. 929, 37 Atl. 747, to same effect; *Guthrie v. Doud*, 33 Ill. App. 68, refusing to enjoin judgment alleged to have been procured through perjury and mistakes of witnesses; *Pepin v. Lautman*, 28 Ind. App. 74, 62 N. E. 60, holding complaint for new trial alleging that judgment was procured through false testimony given to establish plaintiff's claim insufficient; *Bleakley v. Barclay*, 75 Kan. 402, 10 L.R.A. (N.S.) 230, 89 Pac. 906, holding that party to judgment cannot attack it collaterally on ground that it was obtained by perjured testimony; *New York C. R. Co. v. Harrold*, 65 How. Pr. 89, holding that judgment in personal injury action cannot be vacated on ground that plaintiff's witnesses conspired to testify falsely as to his injuries; *Adamski v. Wiczorek*, 93 Ill. App. 357, holding that rehearing cannot be had upon bill of review upon ground that witness upon original hearing testified falsely as to matters in issue; *Hillsborough v. Nichols*, 46 N. H. 379, holding that town against which judgment had been rendered by agreement in action for damages resulting from defective highway cannot maintain action against plaintiff for obtaining such judgment by fraudulently and falsely pretending that he had cause of action; *De Armond v. Adams*, 25 Ind. 455, holding that strangers to action may attack, upon ground of fraud, judgment rendered therein; *Lee v. Back*, 30 Ind. 148, holding that parent not party to action in which custody of his child was determined may attack judgment therein founded on false allegation that he had abandoned it.

Cited in reference notes in 79 A. D. 752, on fraud as defense to judgment; 83 A. D. 533, on right of strangers to impeach fraudulent or collusive judgments collaterally; 92 A. D. 373, on attack of judgment collaterally on ground of fraud.

Cited in notes in 11 A. D. 222, on impeaching judgment for fraud; 25 A. S. R. 168-169, on relief from judgments obtained by perjury; 54 A. S. R. 233, on effect of perjury on right to equitable relief against judgment, decree, or other judicial determination; 10 L.R.A. (N.S.) 230, on perjury as ground for relief against judgment.

Distinguished in *Morrow v. Allison*, 39 Ala. 70, holding it proper to open administrator's fraudulent settlement at instance of non-resident distributees who had no actual notice of the probate court proceedings; *Keyes v. Brackett*, 187 Mass. 306, 72 N. E. 986, 3 A. & E. Ann. Cas. 81, holding that equity will cancel bond which master in chancery was fraudulently induced to approve, it appearing that no appeal could be had from his decision; *Brennan v. New York*, 8 Daly, 426, holding that audit and allowance by board of supervisors may be impeached for fraud.

Conclusiveness of divorce decrees.

Cited in *Lucas v. Lucas*, 3 Gray, 136, holding that writ of review will not lie to revise decree dismissing libel for divorce; *Barnett v. Barnett*, 9 N. M. 205, 50 Pac. 337, holding that decree of divorce bars further proceedings be-

tween the parties to enforce rights growing out of marital relation; *Hood v. Hood*, 11 Allen, 196, 87 A. D. 709, holding it not competent for party to judgment of divorce procured in another state to contradict facts upon which such judgment proceeded; *Whiting v. Whiting*, 114 Mass. 494, refusing to open decree of divorce nisi three years after it was granted to let in evidence to contradict facts upon which it was founded where no fraud was shown; *Re Brigham*, 176 Mass. 223, 57 N. E. 328, dismissing because of laches widow's petition to vacate divorce decree which was procured, she alleged, by reason of her not contesting in consequence of duress practiced upon her; *Ewing v. Ewing*, 24 Ind. 468, in holding certain statutory provisions respecting new trials inapplicable to divorce cases, to point that where rule permits of two constructions results of one as compared with other are to be considered.

Cited in reference notes in 22 A. S. R. 387, on vacation of divorce which has been ratified; 74 A. S. R. 840, on annulment of decree of divorce; 36 A. S. R. 617; 78 A. S. R. 878,—on vacation of divorce decree.

Cited in notes in 61 A. D. 462-463, on possibility of and grounds for vacating and annulling divorces; 65 A. D. 361, on conclusiveness of decrees of divorce.

— When affected by fraud.

Cited in *Salisbury v. Salisbury*, 92 Mo. 683, 4 S. W. 717, holding that decree of divorce by court having jurisdiction cannot after expiration of term be opened by petition for review; *Lewis v. Lewis*, 15 Kan. 181, to point that decree of divorce obtained by fraud cannot be avoided on original bill filed at subsequent term; *DeGraw v. DeGraw*, 7 Mo. App. 121, holding that if decree of divorce is to be attacked for fraud it must be by proceeding before tribunal granting decree; *Folsom v. Folsom*, 55 N. H. 78, denying retrial of libel for divorce alleged to have been procured through perjury of witnesses in respect to matters in issue; *Kingman v. Kingman*, 61 Ill. App. 134, refusing to vacate decree of divorce at instance of husband who though summoned in divorce case failed to appear, it being alleged decree was procured by false testimony; *Karren v. Karren*, 25 Utah, 87, 95 A. S. R. 815, 60 L.R.A. 294, 69 Pac. 465, holding collusive divorces binding on parties, especially after re-marriage of one of them; *Nichols v. Nichols*, 25 N. J. Eq. 60, holding that parties to collusive divorce are bound by it; *Adams v. Adams*, 154 Mass. 290, 13 L.R.A. 275, 28 N. E. 260, to same point; *Davis v. Davis*, 61 Me. 395, holding that party to divorce cannot show that it was procured by collusion; *Dow v. Blake*, 148 Ill. 76, 39 A. S. R. 156, 35 N. E. 761, to point that one cannot attack decree of divorce upon ground that it was obtained through fraud practiced by himself; *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431, holding that wife who was granted divorce upon cross-complaint cannot have same vacated on ground that court was without jurisdiction because of husband's non-residence, she having suppressed such fact in original action; *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095, holding it proper to vacate divorce decree where plaintiff, who after non-resident defendant had filed her answer making full denial promised to notify her of further proceedings, dismissed his bill and brought another action in different county, in which decree in question was rendered and of which defendant received no notice other than by publication; *Graves v. Graves*, 132 Iowa, 199, 10 L.R.A. (N.S.) 216, 109 N. W. 707, 10 A. & E. Ann. Cas. 1104, granting new trial to modify decree of divorce with reference to alimony where it appeared defendant had testified falsely as to amount of property owned by him; *Parish v. Parish*, 9 Ohio St. 534, 75 A. D. 482, holding petition to vacate decree of divorce alleging its procurement by

fraud and perjury and that court obtained jurisdiction by defendant's false testimony as to his residence, demurrable.

Cited in reference notes in 8 A. S. R. 220, on power of courts to vacate divorce decrees for fraud; 9 A. S. R. 826, on setting aside divorce obtained by husband by fraud; 40 A. S. R. 509, on vacation of judgments for divorce obtained by fraud; 42 A. S. R. 398, on vacation of divorce obtained by fraud; 50 A. S. R. 424, on relief from divorce decree procured by fraud or perjury.

Cited in notes in 51 A. D. 611, on vacation of decree of divorce obtained by fraud; 60 L.R.A. 298, on direct attack on divorce decree by party who has coluded in its procurement.

Distinguished in *McMurray v. McMurray*, 67 Tex. 665, 4 S. W. 357, holding that decree of divorce may be re-examined where complainant was prevented by defendant's fraud from fully presenting her case at time and at term decree was entered; *Wisdom v. Wisdom*, 24 Neb. 551, 8 A. S. R. 215, 39 N. W. 594, sustaining petition to vacate decree of divorce alleging that it was procured by fraud and that complainant had received no proper notice of the proceedings; *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342, holding that decree of divorce may be impeached where complainant to give court jurisdiction falsely swore his wife was a non-resident; *Edson v. Edson*, 108 Mass. 590, 11 A. R. 393, to same effect; *Adams v. Adams*, 51 N. H. 388, 12 A. R. 134, holding that decree of divorce may be set aside for fraud and imposition clearly established; *Ex parte Smith*, 34 Ala. 455, holding that decree of divorce may be impeached on ground of fraud where divorce decrees do not operate to fix status of parties.

Disapproved in *Irvine v. Leyh*, 102 Mo. 200, 16 S. W. 10, upon point that decree of divorce fraudulently procured cannot be avoided.

Proceeding to annul divorce decree.

Cited in reference note in 99 A. D. 195, on proceedings to annul judgment of divorce.

Effect of setting aside or annulling divorce decree.

Cited in reference notes in 19 A. S. R. 409, on effect of setting aside or annulling decree of divorce; 57 A. S. R. 549, on revival of marital rights, obligations, and status on annulment of divorce decree.

Appeal from divorce decree after remarriage.

Cited in note in 57 A. S. R. 281, on effect of remarriage on right to appeal from decree of divorce.

Right of divorced wife to dower.

Cited in *McCraney v. McCraney*, 5 Iowa, 232, 68 A. D. 702, holding decree revising sentence of divorce against wife to extent of declaring marriage relation dissolved and awarding wife dower, void.

Right of action for damages resulting from perjury.

Cited in *Young v. Leach*, 27 App. Div. 293, 50 N. Y. Supp. 670, holding that no action lies to recover damages alleged to have resulted from perjury or subornation of perjury.

61 AM. DEC. 468, THURBER v. MARTIN, 2 GRAY, 394.

Rights of riparian proprietors.

Cited in reference notes in 66 A. D. 490, on mill owners and their rights; 69 A. D. 98, on right of mill owners and erection of dams.

Cited in note in 57 A. D. 690, on flowing lands under mill acts.

—To erect dams.

Cited in *Smith v. Agawam Canal Co.* 2 Allen, 355, holding that riparian owner may erect dam across non-navigable stream if he do not thereby unreasonably interfere with operation of ancient mill on such stream; *Springfield v. Harris*, 4 Allen, 494, 81 A. D. 715, holding that if dams erected by riparian owner be adapted to stream's size and capacity he is not liable in action for obstructing it.

—To use of water.

Cited in *Lakeside Mfg. Co. v. Worcester*, 186 Mass. 552, 72 N. E. 81, holding that mill-owner can acquire no prescriptive right to have maintained reservoirs which operated to increase power at his mill but which were erected and used by other riparian owners in connection with their mills; *Cox v. Howell*, 108 Tenn. 130, 58 L.R.A. 487, 65 S. W. 868, holding that one who sells his interest in mill to his co-tenant cannot subsequently withdraw water from stream for manufacturing purposes to injury of mill; *New England Cotton Yarn Co. v. Laurel Lake Mills*, 190 Mass. 48, 76 N. E. 231, to point that riparian owner has right to withdraw water from stream if he return it without unreasonable detention and in substantially undiminished quantity; *Mason v. Hoyle*, 56 Conn. 255, 14 Atl. 786, 45 Phila. Leg. Int. 363, holding that use made of stream by upper mill owners must be adapted to its capacity.

Cited in reference notes in 64 A. D. 358, on right of riparian owner to use of stream; 66 A. D. 490, on nature and extent of riparian proprietor's right to use of water.

Cited in note in 79 A. D. 640, on riparian owner's right to reasonable use of water.

—To flow of water.

Cited in *Phillips v. Sherman*, 64 Me. 171, holding mill owner liable for unreasonably and unnecessarily detaining water of stream to injury of lower owner.

Cited in reference notes in 65 A. D. 253, on riparian proprietor's right to natural and uninterrupted flow of stream; 69 A. D. 93, on right of riparian owner to flow of water.

Cited in note in 41 L.R.A. 748, on right as between upper and lower proprietors to hold back flow of stream.

—Rights acquired by prior appropriation.

Cited in *Mimpower v. Bristol*, 90 Va. 151, 44 A. S. R. 902, 17 S. E. 853, holding that prior dam owner cannot be enjoined from raising dam to obtain sufficient supply of water for his mill though lower owner be at times thereby deprived of water; *Pratt v. Lamson*, 2 Allen, 275, to point that proprietor who first lawfully erects dam across stream has right afterwards to maintain it against other proprietors above and below him.

Cited in reference notes in 63 A. D. 141, on prior appropriation of water in running stream; 65 A. D. 254, on rights acquired by prior appropriation of water of stream for mill purposes; 65 A. D. 534, on rights acquired by prior appropriation of water of stream.

Cited in note in 43 A. D. 277, on rights acquired by prior appropriation of water of stream for mill purposes.

N. W. 167, holding that in determining what is reasonable use of stream all What is reasonable use of stream.

Cited in *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 A. R. 194, 15.

circumstances surrounding its use are to be considered; *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371, holding same where stream was used for irrigation purposes; *Dumont v. Kellogg*, 29 Mich. 420, 18 A. R. 102, holding it proper in determining what is reasonable use of stream to consider general usage of country in similar cases; *White v. Whitney Mfg. Co.* 60 S. C. 254, 38 S. E. 456, to same effect.

Cited in reference notes in 63 A. D. 389, on matters upon which riparian owner's right to reasonable use depends; 67 A. D. 727, on reasonableness of use of stream by riparian proprietor.

Cited in notes in 79 A. D. 641, on what is reasonable use of water by riparian owner; 79 A. D. 644, on reasonable use or detention of water by riparian owner as question for jury.

Pollution of streams.

Cited in *Merrifield v. Worcester*, 110 Mass. 216, 14 A. R. 592, holding city whose sewers emptied into stream and polluted it not liable to riparian owner unless injuries suffered by him resulted from negligent construction or maintenance of sewers or from unreasonable use thereof; *Parker v. American Woolen Co.* 195 Mass. 591, 10 L.R.A.(N.S.) 584; 81 N. E. 468, holding that upper riparian proprietor has no right to discharge into stream noxious matters in such quantities as to foul it and destroy its fitness for use by others.

Cited in note in 13 L.R.A. 117, on pollution of waters.

Rights in public rivers.

Cited in *Davis v. Winslow*, 51 Me. 264, 81 A. D. 573, holding, in action for damages for detention of logs by means of boom erected by defendants in river, that every person has equal right to reasonable use of public rivers.

61 AM. DEC. 470, CLARKE v. MAY, 2 GRAY, 410.

Civil liability of judicial and ministerial officers.

Cited in *Smith v. Casner*, 2 Kan. App. 591, 44 Pac. 752, holding justice, acting judicially but clearly in excess of his jurisdiction, liable in action for false imprisonment for committing one to jail; *Sullivan v. Jones*, 2 Gray, 570, holding justice civilly liable for illegally issuing execution on judgment recovered before him whereby plaintiff was arrested; *Piper v. Pearson*, 2 Gray, 120, 61 A. D. 438, holding justice civilly liable for committing witness to prison for contempt in case of which police court had exclusive jurisdiction; *Call v. Pike*, 66 Me. 350, holding justice being disqualified because of relationship to take deposition liable if he commit party for contempt in refusing to testify; *McVea v. Walker*, 11 Tex. Civ. App. 46; 31 S. W. 839, holding justice aware of his disqualification to try case because of his relationship to plaintiff liable to one whose property was seized under judgment rendered therein; *Brewer v. Casey*, 196 Mass. 384, 82 N. E. 45, to point that justice is civilly liable if he, in excess of his authority, commit one to house of correction instead of jail; *Lange v. Benedict*, 73 N. Y. 12, 29 A. R. 80, holding judge of superior court or court of general jurisdiction not liable for judicial act in matter within his jurisdiction though he act in excess thereof; *Craig v. Burnett*, 32 Ala. 728, holding judicial officer of inferior court, not of record, civilly liable for acts done in exercise of authority not within scope of his jurisdiction; *Truman v. Walton*, 59 Ohio St. 517, 53 N. E. 57, holding mayor civilly liable where he in excess of his authority tried and convicted plaintiff during his voluntary absence; *Kelly v. Bemis*, 4 Gray, 83, 64 A. D. 50, holding justice liable to one arrested upon warrant issued by him under void statute;

Truesdell v. Combs, 33 Ohio St. 186, holding justice civilly liable where he issued warrant upon state of facts which he mistakenly believed constituted offense over which he had jurisdiction.

Cited in reference notes in 63 A. D. 688, on liability of judicial officer for acts in judicial capacity; 64 A. D. 53, on liability of ministerial officers; 66 A. D. 458, on liability of magistrate of inferior jurisdiction for acts in excess of or without jurisdiction; 67 A. D. 404, on liability of justice of the peace as trespasser exceeding jurisdiction; 61 A. D. 441; 64 A. D. 52; 77 A. D. 624,—on liability of judicial officers; 86 A. D. 291, on liability of person or officer issuing process without jurisdiction; 25 A. R. 700, 701, on civil liability of judge for judicial acts.

Cited in notes in 61 A. D. 442, on liability of judicial officers; 14 L.R.A. 146, on civil liability of judge for proceedings after judgment; 15 E. R. C. 51, on civil liability of judge for his judicial acts.

Distinguished in *White v. Morse*, 139 Mass. 162, 29 N. E. 539, holding justice not acting in excess of his jurisdiction not liable to one injured by reason of his error in deciding question of law.

—Of officer executing process.

Cited in *Jennings v. Thompson*, 54 N. J. L. 55, 22 Atl. 1008, holding that officer is protected in acting under warrant issued by court of limited jurisdiction if subject-matter of suit appear to be within court's jurisdiction; *Penniman v. Freeman*, 3 Gray, 245, to point that officer is protected if process is regular on its face and does not disclose want of jurisdiction; *Sanders v. Simmons*, 30 Ark. 274, to point that officer in executing warrant or legal process from competent legal authority need not look beyond such warrant or process; *Waterville v. Barton*, 64 Me. 321, to same effect; *Hussey v. Danforth*, 77 Me. 17, holding that officer in making arrest need only see that process is regular in form and issued by court having jurisdiction of subject; *Tellefsen v. Fee*, 168 Mass. 188, 60 A. S. R. 379, 45 L.R.A. 481, 46 N. E. 562 (dissenting opinion), upon duty of officer executing process valid on its face to heed statements made to him when executing it tending to show court has no jurisdiction; *Conner v. Long*, 104 U. S. 228, 26 L. ed. 723, holding sheriff selling in obedience to order of court property which he had attached not liable as for its conversion though prior to sale court's jurisdiction had been ousted by commencement of bankrupt proceedings in another state; *Mangold v. Thorpe*, 33 N. J. L. 134, holding constable, acting under warrant regular on its face and issued by magistrate having jurisdiction over subject matter protected; *Allen v. Corlew*, 10 Kan. 70, holding officer and those assisting him protected if writ of restitution under which they act be valid on its face though founded on irregular judgment; *Patzack v. Von Gerichten*, 10 Mo. App. 424, holding officer liable for executing warrant issued by justice upon judgment void for want of jurisdiction; *Batchelder v. Currier*, 45 N. H. 460, holding officer arresting one on warrant issued by and made returnable before justice liable, where statute provided that all warrants should be made returnable to police court; *Henke v. McCord*, 55 Iowa, 378, 7 N. W. 623, holding officer executing warrant issued by justice in attempting to enforce void ordinance not civilly liable; *Ela v. Smith*, 5 Gray, 121, 66 A. D. 356, to point that mayor's precept calling out militia to quell riot under power conferred by statute is justification to those acting lawfully in obedience to its command.

Cited in reference notes in 77 A. D. 199, on justification of officer by his process; 80 A. D. 668, on when warrant protects officer; 86 A. D. 291, on liability of officers executing process fair on its face but actually void.

Cited in notes in 61 A. D. 410, on justification under warrant; 61 A. D. 443, on liability of officer executing process of court having no jurisdiction; 8 L.R.A. 529, on arrest under warrant; 51 L.R.A. 193-195, on liability of officer for making an arrest under warrant or writ valid on its face; 51 L.R.A. 200, on liability of officer for making an arrest under warrant in case where court has no jurisdiction.

Right of officer proceeding under irregular judgment to receive commissions therefor.

Distinguished in *Wilson v. Sawyer*, 37 Ala. 631, holding sheriff not entitled to commissions where he sells property under fi. fa. regular on its face but issued on judgment rendered in case which judge was incompetent to try.

Power of justices of peace to punish contempts.

Cited in notes in 117 A. S. R. 955, on power of justices of the peace and similar magistrates to punish contempts; 1 L.R.A.(N.S.) 1141, on necessity of pendency of action to authorize magistrate to punish witness for contempt.

Means of relief from contempt.

Cited in note in 22 A. S. R. 425, on means of relief from contempt.

61 AM. DEC. 473, SHEPARD v. RICHARDS, 2 GRAY, 424.

Actions between co-tenants.

Cited in *Badger v. Holmes*, 6 Gray, 118; *Brown v. Wellington*, 106 Mass. 318, 8 A. R. 330; *Blood v. Blood*, 110 Mass. 545,—to point that one may maintain assumpsit against his co-tenant to recover surplus of rents and profits received by latter out of common property; *Moses v. Ross*, 41 Me. 360, 66 A. D. 250, to point that for one to maintain action against his co-tenant for receiving more than his share of rents and profits balance must be due plaintiff and not other co-tenants; *Starks v. Sikes*, 8 Gray, 609, 69 A. D. 270, holding that one may recover his proportionate share of insurance money received by his co-tenant under policy upon common property issued to latter's lessee; *Dewing v. Dewing*, 165 Mass. 230, 42 N. E. 1128, to point that one may maintain assumpsit against his co-tenant to recover his share of net profits realized by latter in carrying on common farm; *Tyler v. Cartwright*, 40 Mo. App. 378, holding guardian who occupies whole of property held by himself and his ward in co-tenancy liable to account to ward for value of his share of the property during such occupancy; *Williamson v. Jones*, 43 W. Va. 562, 64 A. S. R. 891, 38 L.R.A. 694, 27 S. E. 410, holding that tenant for life or tenant in common in sole possession claiming exclusive ownership, taking petroleum and converting it to his exclusive use, is liable to account on basis of rents and profits, not for annual rental.

Cited in reference notes in 59 A. D. 144, on right of tenant in common to sue co-tenant in assumpsit when account authorized; 66 A. D. 479, on right of one tenant in common to maintain assumpsit against cotenant for share of rents and profits; 68 A. D. 492, on tenant's liability to cotenant for profits received over and above his share; 73 A. D. 555, as to when tenant in common is liable to action at law to recover share of rents and profits; 80 A. D. 534, on liability of tenant in common to cotenant for share of profits; 98 A. D. 595, on assumpsit by tenant against his cotenant.

Cited in notes in 78 A. D. 666-667, on liability of cotenants to account for rents and profits and for use and occupation of common property; 52 A. S. R. 933, on cotenants' right to off-set claim against cotenants suing for rents and Am. Dec. Vol. VIII.—79.

profits; 14 A. D. 587, on assumpsit by one cotenant against another for his share of rents and profits; 28 L.R.A. 848, on liability of cotenants to account for rents received; 28 L.R.A. 846, on remedy by action in assumpsit to compel cotenants to account for use and occupation and rents and profits.

Distinguished in *Webster v. Calef*, 47 N. H. 289, holding that one who occupies and receives profits of whole of common property by permission of his cotenant cannot be made liable to account to him in action on common counts.

Mode of taking account between co-tenants.

Cited in note in 78 A. D. 668, on mode of taking account between cotenants.

Who is co-tenant in land.

Cited in reference note in 92 A. D. 615, on mortgagee of undivided part of land as cotenant.

Actions between partners.

Cited in *Currier v. Hallowell*, 158 Mass. 254, 33 N. E. 497, holding that where nothing remains but to divide profits of venture and there are but two partners action at law is proper remedy; *Wheeler v. Wheeler*, 111 Mass. 247, to point that in case of copartners neither settlement of accounts nor express promise to pay need be proved where suit is in assumpsit for final balance.

Right of mortgagee to receive rent accruing after his entry.

Cited in *Lucier v. Marsales*, 133 Mass. 454, holding tenant at will of mortgagor who continues to occupy after entry by mortgagee and notice to pay rent to him liable to him for use and occupation of premises subsequent to such entry; *Cook v. Johnson*, 121 Mass. 326, holding entry of mortgagee though invalid for purpose of foreclosure sufficient, when made with notice to tenant, to entitle mortgagee to rents under lease made since mortgage.

61 AM. DEC. 476, COM. v. GREY, 2 GRAY, 501.

Use of word "or."

Cited in *People ex rel. Raymond v. Latham*, 203 Ill. 9, 67 N. E. 403, holding that "or" in statute authorizing town to "provide by ordinance for construction of sidewalks therein or along or upon any street" has meaning of "that is to say."

— In indictments.

Cited in *Thomas v. State*, 18 Tex. App. 213, holding indictment for forgery of "school voucher or check" valid; *Clifford v. State*, 29 Wis. 327, holding indictment which charged selling of "spirited, ardent or intoxicating liquors or intoxicating drinks," bad; *State v. Charlton*, 11 W. Va. 332, 27 A. R. 603, holding indictment charging that defendant sold liquors to be drunk in, upon or about "building or premises where sold" invalid for uncertainty in not charging that liquor was to be drunk either in building or upon premises; *People v. Tomlinson*, 35 Cal. 503, holding indictment charging that accused passed "or" attempted to pass forged writing demurrable; *Blemer v. People*, 76 Ill. 265, holding indictment which adopts words of statute is well-framed where "or" in statute is used in sense of "to wit," in explanation of what precedes.

Distinguished in *State v. Dyer*, 67 Vt. 690, 32 Atl. 814, holding indictment for conspiracy to prevent one who was already employed "from obtaining work or continuing in said work," valid.

Use of word "and" in indictments.

Cited in *State v. Hill*, 73 N. J. L. 77, 62 Atl. 936, holding indictment charging

that accused did "utter and expose" obscene pictures valid under statute making it offense to "utter or expose" such pictures; *Koetting v. State*, 88 Wis. 502, 60 N. W. 822, holding under indictment charging defendant with receiving with knowledge of bank's insolvency money "on deposit and for safe keeping" it insufficient merely to prove receipt of deposit; *Com. v. Burns*, 9 Gray, 287, holding indictment for being common seller of "intoxicating liquors and mixed liquors, part of which is intoxicating," supported by proof of three sales of intoxicating and none of mixed liquors.

What are spirituous liquors.

Cited in *Sarlls v. United States*, 152 U. S. 570, 38 L. ed. 556, 14 Sup. Ct. Rep. 720; *Re McDonough*, 49 Fed. 360,—holding lager beer neither "spirituous liquors" nor "wine" within meaning of statute prohibiting sale thereof to Indians; *Clifford v. State*, 29 Wis. 327, to point that "spirituous liquors" and "intoxicating liquors" are not synonymous terms; *McDuffie v. State*, 87 Ga. 687, 13 S. E. 596, holding "Act to prohibit sale of spirituous liquors" not sufficiently broad title to cover prohibition in body of act against sale of "intoxicating liquors of any kind;" *State v. Adams*, 51 N. H. 508, holding evidence of sales of ale, porter and cider inadmissible under indictment charging sale of "spirituous" liquors; *Allred v. State*, 80 Ala. 112, 8 So. 56, holding it for jury to determine in prosecution under statute for selling "vinous, spirituous or malt liquors" whether certain intoxicating liquor was of class of liquors denounced by statute; *Blankenship v. State*, 93 Ga. 814, 21 S. E. 130, holding to same effect.

Cited in note in 20 L.R.A. 645, on what liquors are within statutory restrictions as to sale of spirituous liquors.

61 AM. DEC. 478, COM. v. SMITH, 2 GRAY, 516.

Religious belief as qualification of witness.

Cited in reference note in 14 A. S. R. 697, on incompetency of witnesses on account of religious belief.

Cited in notes in 92 A. D. 474, on incompetency of witness because of religious belief; 42 L.R.A. 554-555-560, on religious belief as qualification of witness.

How witness's want of religious belief may be established.

Cited in *Com. v. Burke*, 16 Gray, 33, holding that inquiry into religious belief of witness either on voir dire or upon cross-examination is unauthorized; *Searcy v. Miller*, 57 Iowa, 613, 10 N. W. 912, holding that want of religious belief upon part of witness cannot be established by examining him upon stand.

Cited in reference note in 80 A. D. 400, on how want of religious belief of witness shown.

61 AM. DEC. 480, TANNAHILL v. TUTTLE, 3 MICH. 104.

Operation of chattel mortgage upon title.

Cited in *Vose v. Whitney*, 7 Mont. 385, 16 Pac. 846, upon point that upon breach of condition in chattel mortgage title vests in mortgagee; *Thurber v. Jewett*, 3 Mich. 295, to point that if condition in chattel mortgage be not performed whole title vests absolutely at law in mortgagee; *Everett v. Buchanan*, 2 Dak. 249, 8 N. W. 31, to point that chattel mortgage vests title in mortgagee subject to being divested on compliance with mortgage's conditions; *Bryant*

v. Carson River Lumbering Co. 3 Nev. 313, 93 A. D. 403, holding that mortgagee may, after breach of condition and upon due notice, sell mortgaged chattel; Heyland v. Badger, 35 Cal. 404, to point that in absence of stipulation to contrary mortgagee is entitled to immediate possession against mortgagor; Flanders v. Chamberlain, 24 Mich. 305, holding that mortgagor of chattel may within reasonable time maintain equitable action to redeem after condition broken and after mortgagee has taken possession.

Cited in reference notes in 45 A. D. 446, on right of mortgagee of property to immediate possession; 88 A. D. 148, on nature of chattel mortgage; 5 A. S. R. 826, on transfer of legal title by chattel mortgage; 6 A. S. R. 290, on rights of chattel mortgagee when condition in mortgage is broken; 42 A. S. R. 705, on effect of chattel mortgages upon title.

Cited in notes in 55 A. D. 301, on legal title to chattel mortgage passing conditionally to mortgagee; 88 A. D. 675, on mortgagee's and mortgagor's respective rights in chattels mortgaged.

Modified in Wineman v. Fisher Electrical Mfg. Co. 118 Mich. 636, 77 N. W. 245, holding that chattel mortgage does not transfer legal title.

Disapproved in Pinch v. Willard, 108 Mich. 204, 66 N. W. 42, holding that bill of sale, absolute in form, but in fact a chattel mortgage, does not pass title; Gardner v. Matteson, 38 Mich. 200, upon point that chattel mortgage operates as absolute transfer of title and that debt is thereby paid.

Right to levy on chattel mortgagor's interest.

Cited in Eggleston v. Mundy, 4 Mich. 295, holding that levy cannot be made on mortgaged personalty in possession of mortgagor unless mortgage contain express stipulation giving him possession for definite period; Bacon v. Kimmel, 14 Mich. 201, holding that chattel in possession of mortgagee cannot be attached as property of mortgagor after time for payment has expired and mortgage has become absolute; Gay v. Bidwell, 7 Mich. 519 (dissenting opinion), upon points that mortgagee is entitled to possession of mortgaged chattel and that mortgagor has no right therein which can be sold on execution; Shapard v. Hynes, 52 L.R.A. 675, 45 C. C. A. 271, 104 Fed. 449, holding that seizing mortgaged property in possession of mortgagee's agent to recover mortgagor's debt and proceeding to sell enough to make debt after notice of mortgagee's rights amount to conversion whether enough remain to satisfy mortgage or not.

Cited in reference notes in 77 A. D. 466, on liability of property covered by chattel mortgage to execution or attachment against mortgagor; 17 A. S. R. 865, on chattel mortgagor's interest as subject to execution sale; 50 A. S. R. 307, on levy of execution on mortgaged personal property.

Distinguished in Cary v. Hewitt, 26 Mich. 228, holding that statute changed rule that execution levied on mortgaged chattel where mortgage remained unpaid at maturity was void.

Mortgagee's right of action for unlawful interference with chattels.

Cited in reference notes in 74 A. D. 476; 5 A. S. R. 754,—on mortgagee's right of action for unlawful interference with mortgaged chattels.

Cited in note in 36 A. D. 590, on mortgagee's right against officer seizing mortgaged property under *fi. fa.* against mortgagor.

What are fraudulent conveyances.

Cited in Bindley v. Martin Bros. 28 W. Va. 773, holding it for jury to determine whether sale was fraudulent where vendor retained possession; Heisch v. Bell, 11 N. M. 523, 70 Pac. 572, holding that debtor may dispose of his

exempt property at will; *Hickman v. Perrin*, 6 Coldw. 135, holding mortgage of stock-in-trade, not necessarily fraudulent because it provided for mortgagor's retaining possession and continuing business.

Cited in reference notes in 68 A. D. 662, on validity and effect of chattel mortgages; 75 A. D. 144, on validity of chattel mortgage without delivery of property.

Validity of attachment proceeding begun under defective affidavit.

Cited in *Borland v. Kingsbury*, 65 Mich. 59, 31 N. W. 620, holding attachment proceedings begun under defective affidavit null and void.

61 AM. DEC. 491, PEOPLE EX REL. LAKE v. HIGGINS, 3 MICH. 233.

When initial letter of Christian name may be used in writing signature.

Cited in reference notes in 97 A. D. 158, on use of initials in ballot; 14 A. S. R. 235, on irregularities in spelling, initials, etc., on ballot.

Distinguished in *Rice v. People*, 15 Mich. 9, holding it sufficient for county clerk before whom information is sworn to, to give initial only of his Christian name in signing jurat.

Throwing out ballot for mistake or error in name of candidate.

Cited in *Ott v. Brissette*, 137 Mich. 717, 100 N. W. 906, holding that where name of Christian Ott is erroneously printed on ballot as O. H. Christian votes cast as for latter cannot be counted for former; *People ex rel. Tobey v. McNeal*, 63 Mich. 294, 29 N. W. 728, holding parol evidence to show that ballot was intended for Samuel Tobey instead of Samuel Toley inadmissible; *People ex rel. Williams v. Cicott*, 16 Mich. 283, 97 A. D. 141, holding that ballots containing only initials of candidate's Christian name cannot be counted; *Clark v. Board of Examiners*, 126 Mass. 282, holding that mandamus will not lie to compel board of examiners to count ballots containing initial letter only of Christian name of candidate with other ballots containing his full name.

Disapproved in *People ex rel. Tobey v. McNeal*, 63 Mich. 294, 29 N. W. 728, upon point that ballots containing only initials of candidate's Christian name cannot be counted.

Validity of elections.

Cited in *People ex rel. Hartwick v. Avery*, 102 Mich. 572, 61 N. W. 4, holding election not void though proper notices in nature of instructions to voters were not posted; *State ex rel. Bates v. Thayer*, 31 Neb. 82, 47 N. W. 704, holding provision of law requiring governor to issue thirty days before election his proclamation therefor merely directory; *Avery v. Williams*, 8 Ariz. 355, 76 Pac. 463, holding same of requirement as to preservation of ballots; *Fowler v. State*, 68 Tex. 30, 3 S. W. 255, holding same of requirements respecting method of making up and transmitting of returns; *Pradat v. Ramsey*, 47 Miss. 24, holding election valid though ballot-box was not locked and sealed as statute required.

Admissibility of ballots in evidence.

Cited in *O'Gorman v. Richter*, 31 Minn. 25, 16 N. W. 416, holding ballots not enveloped and sealed as required by statute regulating preservation of ballots admissible as evidence in election contest if shown to have been kept in same condition as when counted; *Andrews v. Probate Judge*, 74 Mich. 278, 41 N. W. 923, holding that while ballots cast by voters constitute best and primary evi-

dence of their choice one is not prevented from showing that ballots were tampered with after result was declared; *People ex rel. Dailey v. Livingston*, 79 N. Y. 279, holding ballots which have been kept undisturbed admissible as evidence though canvassers failed to seal them up as law required.

Cited in reference note in 78 A. D. 192, on determining intention of voter from ballot.

Conclusiveness of certificate of election.

Cited in reference note in 53 A. D. 73, on conclusiveness of certificate of election.

61 AM. DEC. 494, ST. MARTIN v. DESNOYER, 1 MINN. 156, GIL. 131.

Words actionable per se.

Cited in *McCarty v. Barrett*, 12 Minn. 494, Gil. 398, to point that words to be actionable in themselves, must charge indictable offense; *West v. Hanrahan*, 28 Minn. 385, 10 N. W. 415, holding words which import a charge of commission of indictable felony actionable per se; *Pett-Morgan v. Kennedy*, 62 Minn. 348, 54 A. S. R. 647, 30 L.R.A. 521, 64 N. W. 912, holding words charging one with habitual drunkenness, a crime punishable by indictment, actionable per se.

Cited in reference notes in 66 A. D. 91, on words actionable per se as imputing crime; 82 A. D. 63, as to when words deflecting on another are actionable per se; 83 A. D. 626, on words slanderous per se; 91 A. D. 402, on actionability per se of words spoken or written concerning another; 71 A. D. 220; 96 A. D. 284,—on words imputing crime as actionable per se; 28 A. S. R. 245, on words actionable per se.

Cited in notes in 12 A. D. 41, on actionability of words imputing crime; 21 A. S. R. 305, on words actionable per se.

Function of jury in actions for slander.

Cited in *Jarnigan v. Fleming*, 43 Miss. 710, 5 A. R. 514, holding that in actions for slander questions concerning malice, justification and the like are for jury under proper instructions from court.

Cited in reference note in 96 A. D. 285, on intent with which words, alleged to be slanderous, were spoken as question for jury.

Validity of "average" verdicts.

Cited in *Orange Belt R. Co. v. Craver*, 32 Fla. 28, 13 So. 444, refusing to vacate verdict where jury averaged the amount each was in favor of giving but after further discussion altered such average; *Marquette, H. & O. R. Co. v. Probate Judge*, 53 Mich. 217, 18 N. W. 788, sustaining award of damages in condemnation proceedings where commissioners, after each had stated amount he would give, struck an average.

Validity of gambling verdict.

Cited in reference notes in 90 A. D. 390, as to validity of gambling verdict; 35 A. S. R. 185; 40 A. S. R. 459,—on validity of chance verdicts.

Cited in notes in 35 A. D. 260, on misconduct of jurors in mode of arriving at verdict as ground for new trial; 11 L.R.A. 706, on validity of chance verdicts.

Right of jurors to support or impeach their verdict.

Cited in *Territory v. Taylor*, 1 Dak. 479 Appx. holding affidavits of jurors inadmissible to impeach their verdict; *Knowlton v. McMahon*, 13 Minn. 386, Gil. 358, 52 A. D. 649, holding affidavits of jurors or of persons as to state-

ments made by jurors inadmissible to impeach their verdict on ground that officer having them in charge improperly influenced it; *State v. Lentz*, 45 Minn. 177, 47 N. W. 720, holding affidavits of jurors to show that newspaper accounts of case were read in jury-room and that verdict was reached in reliance upon statement of juror as to what judge had told him, inadmissible to impeach their verdict.

Cited in reference notes in 64 A. D. 329, on affidavits of jurors to support their verdict; 39 A. S. R. 501; 40 A. S. R. 459,—on juror's affidavit to impeach verdict.

Cited in notes in 24 A. D. 478, on affidavits of jurors to impeach their verdict; 5 L.R.A. 525, on right of jurors to impeach their verdict.

Affidavits of third persons to impeach verdict.

Cited in, reference note in 97 A. D. 239, on affidavits of third persons of juror's declarations to show misconduct of jury.

Right and duty of court to stop improper comments of counsel.

Cited in reference note in 1 A. S. R. 368, on right and duty of court to stop improper comments of counsel.

Time for objections.

Cited in *Kumler v. Ferguson*, 22 Minn. 117, holding that no point can be raised in appellate court where no exception was taken to exclusion of evidence which had been received, under objection, subject to be stricken out; *Nininger v. Knox*, 8 Minn. 140, Gil. 110, holding that where counsel misleads jury as to ground upon which evidence is received, opponent must, if he desires to object, object then and there.

What verdicts are excessive.

Cited in *Beaulieu v. Parsons*, 2 Minn. 37, Gil. 26, holding that verdict will not be vacated on ground of excessiveness of damages unless it be manifest that jury were swayed by prejudice, partiality, passion or corruption; *St. Paul v. Kuby*, 8 Minn. 154, Gil. 125, applying same principle to verdict returned by referee in action by parent for injuries to his child; *Shumacher v. St. Louis & S. F. R. Co.* 39 Fed. 174, sustaining verdict for \$8,000 where one was injured in being run over by defendant's car, necessitating amputation of his leg.

Cited in reference notes in 62 A. D. 689, on right to new trial for excessive damages; 74 A. D. 790; 97 A. D. 288,—on when verdict will be disturbed on ground of excessive damages; 74 A. D. 469; 85 A. D. 381; 2 A. S. R. 40,—on setting aside verdict for excessive damages.

Cited in note in 8 E. R. C. 460, on excessive damages as ground for new trial.

61 AM. DEC. 500, CURRIE v. STEWART, 27 MISS. 52.

Proceedings on sale of decedent's land.

Cited in *Root v. McFerrin*, 37 Miss. 17, 75 A. D. 49, holding it essential condition to power of probate court to order sale of land that jurisdictional facts be judiciously ascertained of record; *Kempe v. Pintard*, 32 Miss. 324, holding administrator's sale void where proceedings failed to show that citations were set up in three most public places in county as required by law; *Haynes v. Meeks*, 20 Cal. 288, holding that authority of probate court to order sale of intestate's realty can be exercised only in cases specially designated by statute; *Clay v. Field*, 115 U. S. 260, 29 L. ed. 375, 6 Sup. Ct. Rep. 36, to point that sale by administrator who never gave bond to account for proceeds thereof is void as against heirs.

Cited in reference notes in 79 A. D. 555, on necessity for strict compliance with statute authorizing sale of decedent's land; 74 A. S. R. 356, on sales by executors and administrators.

Cited in note in 79 A. S. R. 82, on causes for which legislature may authorize sale of real property of decedents.

61 AM. DEC. 503, SCOTT v. NICHOLS, 27 MISS. 94.

Matters triable by jury.

Cited in *Isom v. Mississippi C. R. Co.* 36 Miss. 300, holding that upon appeal to circuit court by owner from inquest of jury assessing his damages for railroad company's use of his land, either party may demand that questions of fact be tried by jury.

Cited in reference note in 73 A. D. 680, on necessity of leaving all issues of fact to jury.

When limitations begin to run.

Cited in *Pollock v. Wright*, 15 S. D. 134, 87 N. W. 584, holding that limitations accrue against person claiming right of subrogation from time payment, upon which he relies, is made; *Magee v. Leggett*, 48 Miss. 139; *Fullerton v. Bailey*, 17 Utah, 85, 53 Pac. 1020,—to point that at law limitations accrue against surety from time he makes payment; *Bushnell v. Bushnell*, 77 Wis. 435, 9 L.R.A. 411, 46 N. W. 422, holding limitations to right of action of surety, who makes partial payments against his co-surety for contribution, accrue as to such payments from time he pays creditor more than his proportion of the debt, citing annotation also on this point; *Burrus v. Cook*, 117 Mo. App. 385, 93 S. W. 888 (dissenting opinion), on right to apply different period of limitation in equity than at law, to action by paying surety.

Cited in reference notes in 91 A. D. 115, on statute of limitations in actions between sureties; 94 A. D. 323, as to when statute of limitations runs against surety; 59 A. S. R. 851, on limitation of action against surety; 71 A. S. 713, on running of limitations against right of sureties to be subrogated; 77 A. S. R. 843, on limitation by lapse of time of right to be subrogated; 87 A. S. R. 118, as to when limitations begin to run against surety paying principal's debt.

Rights and liabilities of sureties.

Cited in reference note in 84 A. D. 607, on liability of sureties on sheriff's bond for seizure of exempt property.

Cited in note in 21 E. R. C. 635, as to when cosurety's right to contribution attaches.

Right to jury trial.

Cited in reference notes in 79 A. D. 631, on when trial by jury may be dispensed with; 22 A. R. 291, on right to jury trial; 9 A. S. R. 570, on right to jury trial in criminal case; 50 A. S. R. 214, on right to jury trial in civil cases.

Instructions expressing opinion as to evidence.

Cited in note in 77 A. D. 502, on right of court in charging jury to express opinions as to what has been proved.

61 AM. DEC. 508, WILLIAMS v. CAMMACK, 27 MISS. 209.

Taxing power.

Cited in *Crawford v. Linn County*, 11 Or. 482, 5 Pac. 738, in sustaining

mortgage tax law, to point that courts will not interfere though legislature in using its power to tax violate principles of natural justice; *Martin v. Dix*, 52 Miss. 53, 24 A. R. 661, holding it competent for legislature to extend taxable limits of city so as to embrace property having no advantages of city property; *Griffin v. Dogan*, 48 Miss. 11, holding that selling property for non-payment of taxes is not appropriating private property for public use within meaning of constitutional provision in respect thereto; *Coulson v. Harris*, 43 Miss. 728 (dissenting opinion), upon right of equity to interfere to enjoin wrongful collection of taxes.

Cited in reference notes in 59 A. D. 789, on power of legislature to control taxation; 67 A. D. 296, on effect of provision prohibiting taking private property for public use on taxing power; 67 A. D. 296, on right of legislature to tax particular city for local improvement; 73 A. D. 380, on power of legislature as to taxation; 73 A. D. 522, on assessments for local improvements as exercise of taxing power; 73 A. D. 706, on limitation of power of legislature in reference to taxation; 19 A. S. R. 402, on power of taxation.

Cited in notes in 1 L.R.A. 758, on equality and uniformity of taxation; 3 L.R.A. 472, on constitutionality of tax on local district for local improvements.

Local assessments for local improvements.

Cited in *Palmyra v. Morton*, 25 Mo. 593, holding it competent for town to require property owners to bear cost of paving street in front of their property; *Martin v. Tyler*, 4 N. D. 278, 25 L. R.A. 838, 60 N. W. 392, to point that drainage legislation may designate localities which are to be benefited thereby and to bear burdens thereof; *Daily v. Swope*, 47 Miss. 367, holding that expense of protecting lowlands from overflow may be met by taxes collected within specified district; *Daily v. Swope*, 47 Miss. 367, sustaining statute imposing taxes on land within defined district to raise cost of public improvement the rate varying according to land's situation and state of cultivation; *Winona & St. P. R. Co. v. Watertown*, 1 S. D. 46, 44 N. W. 1072, holding that railroad company's exemption from "all taxation" does not include special assessments for street improvements; *State ex rel. Abbott v. Dodge County*, 8 Neb. 124, 30 A. R. 819, holding that constitutional provision empowering legislature to "vest . . . cities, towns and villages with power to make local improvements by special assessments or by taxation of property benefited" does not prohibit it from conferring such power upon other municipal corporations than those designated; *Alcorn v. Hamer*, 38 Miss. 653, holding it competent for legislature to impose local taxation upon district specially created by it for that purpose.

Cited in notes in 6 L.R.A. 802, on reassessment of special assessment for local improvement; 13 L.R.A. 533, 534, on essentials in local taxation.

Distinguished in *Clayton v. Lafargue*, 23 Ark. 137, holding that bill to enjoin collection of taxes assessed under levee act upon lands subject to overflow cannot be maintained on ground that assessment was erroneously made because complainant's land would not be benefited.

—According to frontage.

Cited in *Emery v. San Francisco Gas Co.* 28 Cal. 345, holding assessing property to defray expense of grading street in proportion to such property's frontage thereon a valid exercise of taxing power; *Rolph v. Fargo*, 7 N. D. 640, 42 L.R.A. 646, 76 N. W. 242, holding it competent for legislature to pro-

vide that whole expense of paving street shall be assessed against abutting property in proportion to frontage.

— According to benefits.

Cited in *Birmingham v. Klein*, 89 Ala. 461, 8 L.R.A. 369, 7 So. 386, holding local assessment against property to pay for pavements constructed along its front to be apportioned with reference to accruing benefits not a tax; *Law v. Madison, S. & G. Turnp. Co.* 30 Ind. 77, sustaining statute authorizing assessment of all lands within limited distance of road to extent of benefits received from improvement thereof; *Alcorn v. Hamer*, 38 Miss. 652, holding statute, taxing inhabitants of district in proportion to benefits supposed to accrue to them from public improvement made therein, valid though it operate unequally upon different sections of district.

Cited in reference notes in 64 A. D. 573, on assessments for public improvements according to benefits conferred; 67 A. D. 296, on assessment for street improvement according to benefits; 73 A. D. 522, on assessments for local improvements according to benefits.

— According to quantity or value of land benefited.

Cited in *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 27 A. S. R. 106, 14 L.R.A. 755, 28 Pac. 272, holding assessments according to value of land and not according to amount of benefits received by each parcel which is to pay for public improvement, valid; *Thomas v. Gain*, 35 Mich. 155, 24 A. R. 535, holding sewer assessments levied upon lands in proportion to their superficial area without regard to actual or probable benefits void.

Extent of power of legislature generally.

Cited in *Nugent v. Jackson*, 72 Miss. 1040, 18 So. 493, to point that statute is not to be declared void because it may work individual hardship; *Re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 27 A. S. R. 106, 14 L.R.A. 755, 28 Pac. 272, holding it competent for legislature to provide for irrigation of any lands in particular section of state; *Stansell v. Levee Board*, 13 Fed. 846, to point that levee legislation of Mississippi was held valid by courts thereof; *Ah Lim v. Territory*, 1 Wash. 156, 9 L.R.A. 395, 24 Pac. 588, sustaining statute making it a misdemeanor to smoke or inhale opium; *Leavenworth County v. Miller*, 7 Kan. 479, 12 A. R. 425, sustaining statutes authorizing cities and counties to subscribe for stock in railroad companies and to issue bonds in payment thereof; *Newby v. Platte County*, 25 Mo. 258, sustaining statute providing that in assessing damages for property taken for road purposes commissioners shall consider advantages as well as disadvantages to owners thereof; *Horton v. Newport*, 27 R. I. 283, 1 L.R.A.(N.S.) 512, 61 Atl. 759, 8 A. & E. Ann. Cas. 1097, holding that legislature may require municipalities to pay salaries of local police officers, though they be state officers and appointed under its authority.

— In delegating its law making functions.

Cited in *Owen v. Baer*, 154 Mo. 434, 55 S. W. 644, to point that question whether or not laws of local application shall be enforced may be left to vote of particular locality; *Alcorn v. Hamer*, 38 Miss. 653, holding act complete in itself, valid though execution of some of its provisions depends upon result of vote of district to be affected by it; *Nugent v. Jackson*, 72 Miss. 100, 18 So. 493, holding it competent for legislature to invest local authorities with discretion of judging as to necessity for public improvements and to authorize levying and apportioning of charge therefor; *San Antonio v. Jones*, 28 Tex.

19, holding it competent for legislature to provide that authority given to public authorities to subscribe to railroad bonds shall not be exercised unless voters approve subscription; *Barnes v. Pike County*, 51 Miss. 305, sustaining act submitting to voters question of removal of county seat to either of two places; *Yazoo City v. Lightcap*, 82 Miss. 148, 33 So. 949, upon question of legislature's right to delegate its legislative power.

Cited in reference notes in 53 A. S. R. 331, on constitutionality of act which depends upon subsequent vote of people; 63 A. D. 518, on constitutionality of acts submitting to people whether or not they shall take effect.

Cited in note in 1 L.R.A. 87, on local option laws.

—In granting special privileges.

Cited in *Smoot v. People's Perpetual Loan & Bldg. Asso.* 95 Va. 686, 41 L.R.A. 589, 29 S. E. 746, sustaining statute relieving from imputation of usury all contracts made by a building and loan association under charter of doubtful validity; *Thigpen v. Mississippi C. R. Co.* 32 Miss. 347, holding statute providing that in actions by railroad companies for instalments of stock it shall not be necessary to prove subscription to have been made unless defendant deny it in a sworn plea not void as conferring special privileges; *Barbour v. Louisville Bd. of Trade*, 82 Ky. 645 (dissenting opinion), upon validity of statute exempting property of board of trade from taxation.

Admissibility of extrinsic evidence to supply record or omission therein.

Cited in *Re Williams*, 102 Cal. 70, 41 A. S. R. 163, 36 Pac. 407, holding parol evidence admissible to prove residence of petitioners in adoption proceedings where order of adoption was silent in respect thereto; *Turner v. Thomas*, 77 Miss. 864, 28 So. 803, holding that existence and contents of record of proceedings of board of supervisors may, where such record has been lost, be proved aliunde; *Morris v. Dooley*, 59 Ark. 483 (dissenting opinion), upon admissibility of parol evidence to supply defect in record of probate court; *Beaudrias v. Hogan*, 16 App. Div. 38, 44 N. Y. Supp. 785, upon point whether jurisdictional facts not appearing in record may be shown aliunde.

Cited in reference notes in 66 A. D. 70; 86 A. D. 282,—on right to show aliunde jurisdictional facts not appearing on record.

Cited in notes in 20 A. S. R. 521, on evidence aliunde to show jurisdiction; 39 A. S. R. 216, on validity of adoption when questioned in collateral proceedings.

Implied powers of agents.

Cited in *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind. 391, 49 A. R. 770, holding "road-master" upon railroad not impliedly authorized to make contract with third party for nursing person injured upon line of railway.

Procedure in respect to calling of special term of court.

Cited in *Ex parte Neil*, 90 Miss. 518, 43 So. 615, holding proceedings of special term of circuit court valid though clerk failed to enter upon minutes order calling such term.

Validity of bonds issued in disregard of injunction.

Distinguished in *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539, holding bona fide holder of municipal bonds not estopped from asserting title to them though they were issued after injunction had been granted against their issuance.

Injunction against tax sale.

Cited in reference note in 63 A. D. 86, on injunction against tax sale.

What constitutes taking of private property for public use.

Cited in reference note in 73 A. D. 522, as to what constitutes taking of private property for public use.

Collateral attack upon judgments.

Cited in note in 23 A. S. R. 114, on collateral attacks upon judgments.

61 AM. DEC. 520, ROBERTSON v. CRANE, 27 MISS. 362.**Objections to authority of agent making demand.**

Cited in *Isenhour v. Barton County*, 190 Mo. 163, 88 S. W. 759 (dissenting opinion), upon point that one cannot subsequently object to authority of agent making demand if he placed his refusal to comply therewith on other grounds.

61 AM. DEC. 522, JOHNSON v. JACKSON, 27 MISS. 498.**Rescission of contracts.**

Cited in *Curtis v. Brannon*, 98 Tenn. 153, 69 L.R.A. 760, 38 S. W. 1073, to point that in matters of rescission and in all relief akin thereto equity will endeavor to place parties in statu quo.

Cited in reference note in 67 A. D. 130, on necessity for restoration of statu quo on rescission of contract.

Cited in note in 30 L.R.A. 44, on duty to place other party in statu quo on rescission.

— By vendor.

Cited in *Walton v. Wilson*, 30 Miss. 576, holding that vendor in bond for conveyance cannot upon vendee's failure to make payment, as agreed, put end to contract without making valid offer to perform his part of contract; *Moak v. Bryant*, 51 Miss. 560, to same point; *Klyce v. Broyles*, 37 Miss. 524, holding that before vendee in bond for conveyance can be placed in default, vendor must affirmatively tender deed and demand payment; *Frink v. Thomas*, 20 Or. 265, 12 L.R.A. 239, 25 Pac. 717, holding to same effect; *Jones v. Loggins*, 37 Miss. 546, holding that vendor cannot, without offer to perform on his part, rescind contract whereby he agreed to convey land if vendee complied "promptly" with his contract; *Murphy v. Lockwood*, 21 Ill. 611, holding that before vendor can rescind contract for sale of land because of vendee's default he must offer to return notes and purchase money received from vendee; *Harrington v. Pinson*, 30 Miss. 30, to same effect.

What essential in action for purchase price of land.

Cited in reference note in 64 A. D. 537, on showing offer to convey premises in action for purchase price of land agreed to be conveyed.

Nature of lien arising in favor of purchase money notes.

Cited in *Francis v. Wills*, 2 Colo. 660 (dissenting opinion), upon point that if upon sale of land only bond of conveyance be given and notes for purchase price be given by vendee, lien arising in favor of notes passes with them to one to whom they are assigned.

61 AM. DEC. 524, HODGE v. MITCHELL, 27 MISS. 560.**Execution as affected by death of party thereto.**

Cited in *Hughes v. Wilkinson*, 37 Miss. 482, holding sale under execution issued and tested after death of plaintiff, and without revivor, merely voidable; *Hardin v. McCanse*, 53 Mo. 255, holding, in construing statutes, execution issued

against two judgment debtors, one of whom had died, not void where it was levied upon property of survivor; *Cook v. Toumbs*, 36 Miss. 685, holding that equity may entertain heir's bill to vacate sale of ancestor's land made under execution issued and tested after ancestor's death without revivor of the judgment, of which facts purchaser had knowledge.

Cited in reference notes in 68 A. D. 186, on necessity for revival of judgment after death of party and before issuance of execution; 70 A. D. 589, on effect on execution of defendant's death; 74 A. D. 521, on validity of sale under execution issued after death of defendant without revival of judgment; 96 A. D. 371, on effect of issuing execution after death of defendant.

Cited in notes in 61 L.R.A. 365, on necessity of revivor on death of sole judgment debtor before issuance of execution; 61 L.R.A. 393, on effect of death of one of the parties after judgment upon remedy by execution.

61 AM. DEC. 527, BUTLER v. CRAIG, 27 MISS. 628.

Exceptions to statute of limitations.

Cited in *Crane v. French*, 38 Miss. 503, holding that courts can engraft no equitable exceptions upon statute of limitations.

61 AM. DEC. 528, EPPS v. HINDS, 27 MISS. 657.

Liability of innkeeper.

Cited in reference notes in 62 A. D. 592, on liability of innkeeper; 63 A. D. 372; 66 A. D. 752,—on liability of innkeeper for goods of guest; 71 A. D. 326, on prima facie liability for negligence of innkeeper where guest's property is lost while in his charge.

Cited in notes in 69 A. D. 223, on kind of goods for which innkeeper is liable; 99 A. S. R. 589, as to what goods innkeeper is liable for; 13 E. R. C. 129, on liability of innkeeper for goods brought to inn.

Liability of carriers.

Cited in note in 3 L.R.A. 346, on carrier's liability for loss of baggage.

Distinguished in *The R. E. Lee*, 2 Abb. (U. S.) 49, Fed. Cas. No. 11,090, 2 Legal Gaz. 298, holding carrier not liable for jewelry stolen from handbag containing articles of personal use and which passenger left in his stateroom.

61 AM. DEC. 530, HAIRSTON v. HAIRSTON, 27 MISS. 704.

What constitutes domicile.

Cited in *Chambers v. Prince*, 75 Fed. 176, holding that to constitute domicile residence and intention to remain must concur; *Coleman v. Territory*, 5 Okla. 201, 47 Pac. 1079, to point that one's domicile is place where he has his permanent home and to which, whenever absent, he has intention of returning; *Frame v. Thormann*, 102 Wis. 653, 79 N. W. 39, holding that to effect change of domicile from one state to another there need only be removal accompanied by intention to make permanent home in new state; *Schlawig v. DePeyster*, 83 Iowa, 323, 32 A. S. R. 308, 13 L.R.A. 785, 49 N. W. 843, holding presumption that man's residence is that of his family's, rebutted by proof that he has removed to another state, established himself in business and determined to remove his family there; *Donaldson v. State*, 167 Ind. 553, 78 N. E. 182, holding that it cannot be presumed as matter of law that where alien returned to his native country and died there, such country was his domicile; *Still v. Woodville*, 38 Miss. 646, holding that where one sold his property and left place of his birth to

travel for his health and died upon his travels without having acquired any permanent home, place of birth remained his domicile.

Cited in reference notes in 65 A. D. 116, on domicile and change thereof; 69 A. D. 74, as to what constitutes, and distinction between, residence, domicile and dwelling place; 83 A. D. 509, on what is domicile; 83 A. D. 509, on necessary elements of domicile; 13 A. S. R. 903; 17 A. S. R. 659,—on what constitutes domicile; 34 A. S. R. 313, on defining domicile; 34 A. S. R. 314, on how domicile is acquired.

Cited in notes in 59 A. D. 111, on what constitutes a domicile; 48 A. S. R. 712, on definition of residence, etc.; 9 E. R. C. 714, on meaning of word "domicil."

— Of married woman.

Cited in *Johnston v. Turner*, 29 Ark. 280, holding that husband's domicile is wife's domicile; *Smith v. Smith*, 19 Neb. 706, 28 N. W. 296, holding that proof of husband's domicile is prima facie sufficient to establish that of wife; *Howland v. Granger*, 22 R. I. 1, 45 Atl. 740, holding that husband's domicile remains wife's domicile for purposes of taxation though she has gone to another state for health with intention of making it her permanent home.

Cited in reference notes in 63 A. D. 128, on domicile of husband as that of wife; 71 A. D. 506, on wife's domicile remaining the same as that of her husband; 10 A. S. R. 629, as to where wife has domicile; 34 A. S. R. 254, on domicile of wife.

Cited in note in 9 E. R. C. 728, on husband's domicile as that of wife.

Law governing right to personal property.

Cited in reference notes in 70 A. D. 370, on succession to personalty being governed by law of decedent's domicile at death; 73 A. D. 287, on law of matrimonial domicile governing right of husband and wife to movable property; 75 A. D. 508, on law of domicile governing voluntary transfers and succession to personal property; 77 A. D. 182, as to what law governs rights of married persons to movable property.

Conflict of laws as to matrimonial property.

Cited in notes in 57 L.R.A. 365, on conflict of laws as to matrimonial property acquired prior to change of matrimonial domicile; 57 L.R.A. 366, on conflict of laws as to marriage property acquired after change of domicile.

61 AM. DEC. 538, ALEXANDER v. BERESFORD, 27 MISS. 747.

Relief to vendee for vendor's misrepresentations.

Cited in reference note in 71 A. D. 218, on relief to vendee where vendor misrepresents material facts.

61 AM. DEC. 540, WINSTON v. FRANKLIN ACADEMY, 28 MISS. 118.

Estoppel of tenant to deny landlord's title.

Cited in reference notes in 75 A. D. 111, on right of tenant to dispute landlord's title; 39 A. S. R. 776, on estoppel of tenant to deny landlord's title.

Cited in notes in 69 A. D. 510, as to when tenant can dispute landlord's title; 89 A. S. R. 74, on estoppel of tenant to deny landlord's title where title is in another; 120 A. S. R. 61, on outstanding title as defense in action for unlawful detainer; 15 E. R. C. 305, on estoppel of tenant to deny landlord's title where he holds possession under lease.

Nature of sublessee's title.

Cited in *Geer v. Boston Little Circle Zinc Co.*, 126 Mo. App. 173, 103 S. W. 151, holding that forfeiture of original term operates to forfeit term of sublessee.

Cited in reference note in 87 A. D. 615, as to whether party taking possession under tenant is bound by covenants in latter's lease.

Power of executors as to decedent's executory contracts.

Cited in note in 78 A. S. R. 200, on power of executors as to executory contracts of decedent.

61 AM. DEC. 542, ROBERTS v. ROGERS, 28 MISS. 152.**Right to waive benefit of statute of limitations.**

Cited in reference note in 71 A. D. 194, on right of executors and administrators to waive benefit of statute of limitations.

Cited in note in 104 A. S. R. 745, on right to waive privilege of statute of limitations.

Claims which executor or administrator may allow.

Cited in *Re Wonn*, 80 Iowa, 750, 45 N. W. 1063, holding administrator entitled to allowance for payments made upon valid claims which though not filed in time were presented in time; *Woods v. Elliott*, 49 Miss. 168, holding administrator not entitled to reimbursement where he pays debt against which he might have pleaded limitations; *Byrd v. Wells*, 40 Miss. 711, holding executor entitled to credit for debts paid by him which though barred when paid were not barred when executor qualified.

Cited in reference note in 72 A. D. 121, on liability of administrator for voluntary payments made by him.

What constitutes court of general jurisdiction.

Cited in *Ames v. Williams*, 72 Miss. 760, 17 So. 762, holding that chancery court is court of general jurisdiction in respect to appointment of guardians even when proceeding under special statute.

61 AM. DEC. 544, SARAH v. STATE, 28 MISS. 267.**Sufficiency of indictments.**

Cited in *Riley v. State*, 43 Miss. 397, 2 Morris St. Cas. 1632, holding that indictment for illicit sale of liquors need not set forth names of persons to whom sales were made; *Taylor v. State*, 74 Miss. 544, 21 So. 129, holding that indictment charging mixing of poison with intent to kill human being must allege act was done with malice aforethought; *Simmons v. State*, 32 Fla. 387, 13 So. 896, holding that indictment for murder must charge that homicidal act was done with premeditated design to effect death of deceased; *Cook v. State*, 72 Miss. 517, 17 So. 228, holding indictment charging that accused "with malice aforethought, kill and murder one A" fatally defective in omitting word "did" before "kill."

Cited in reference notes in 65 A. D. 505, on necessity that indictment state facts constituting offense; 71 A. D. 776, on offense of administering poison.

— Relating to statutory offenses.

Cited in *Humphreys v. State*, 17 Fla. 381, holding that indictment must charge statutory offense in very language of statute or in language of equivalent import; *Finch v. State*, 64 Miss. 461, 1 So. 630, holding that insufficient to charge

statutory offense in words of statute where language of statute contains no sufficient words to define any offense; *Harrington v. State*, 54 Miss. 490, to same point in holding that indictment under statute for falsifying records must allege alteration was made with fraudulent intent.

Cited in reference notes in 74 A. D. 534, on sufficiency of information or indictment for statutory offense, which follows words of statute; 69 A. D. 290; 87 A. D. 476,—on sufficiency of indictment stating offense in language of statute; 94 A. D. 252, on necessity and sufficiency of charging offense in the language of the statute; 61 A. S. R. 409, on sufficiency of indictment following words of statute.

Distinguished in *Baeumel v. State*, 26 Fla. 71, 7 So. 371, holding that indictment charging violation of statute need not allege accused was not of a class exempted from statute's operation by proviso contained in its body.

Joinder of offenses in indictment.

Cited in *Henry v. State*, 33 Ala. 389, holding it proper to charge several distinct characters of homicide in one indictment; *People v. Aikin*, 66 Mich. 460, 11 A. S. R. 512, 33 N. W. 821, holding that where accused is charged with causing another's death by means of abortion one indictment cannot be used to prosecute for separate felonies; *Teat v. State*, 53 Miss. 439, 24 A. R. 708, holding that two different offenses of murder may be joined in one indictment, though state may be put to its election.

Cited in reference notes in 65 A. D. 386, on joinder in one indictment of two felonies which do not differ in character or punishment; 94 A. D. 132, on charging two or more offenses in same indictment; 11 A. S. R. 531, on law as to two or more counts in one indictment; 13 A. S. R. 886, on joinder of offenses in one indictment; 25 A. S. R. 428, on duplicity of indictment.

Cited in note in 58 A. D. 249, on joinder of counts for several offenses in same indictment.

Compelling election between counts of indictment.

Cited in *Strawhern v. State*, 37 Miss. 422, 2 Morris St. Cas. 1338, holding that where indictment contains two counts each charging distinct offenses against gaming statute accused cannot as of right demand that prosecutor elect upon which count he will proceed; *George v. State* 39 Miss. 570, 2 Morris St. Cas. 1419, holding it within discretion of court to allow prosecutor to go to trial upon indictment charging accused with murder, in one count as principal and in another as accessory.

Cited in reference note in 71 A. D. 403, on compelling election between counts of indictment.

Cited in note in 92 A. D. 664, on compelling election between counts in indictment as discretionary.

Right to convict for offense differing in degree from one charged in indictment.

Cited in *Henry v. State*, 33 Ala. 389, holding that under indictment charging slave with murder of white person conviction may be had for manslaughter.

Construction of words "with intent to kill."

Cited in reference notes in 76 A. D. 623, in construction of words "with intent to kill;" 81 A. D. 791, on distinction between intent to kill and intent to murder.

When statute creates distinct and separate offense.

Cited in reference note in 71 A. D. 403, on statute creating distinct and separate offenses.

61 AM. DEC. 553, BRISCOE v. ANKETELL, 28 MISS. 361.**Running of statute of limitations.**

Cited in *Fisher v. Fisher*, 43 Miss. 212, to point that statute suspending operation of limitation during absence from state is to be strictly construed.

Cited in note in 111 A. S. R. 461, on conflict of laws as to retrospective operation of statutes.

— Effect of new promise or part payment.

Cited in *Taylor v. Slater*, 16 R. I. 86, 12 Atl. 727, holding that new promise made before debt is barred operates not to create new cause of action but to suspend bar of statute; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 A. R. 47, holding maker of note not prevented from pleading limitations by reason of partial payments made by his co-maker before debt barred.

Cited in reference notes in 76 A. D. 431, on effect of acknowledgment that debt exists and is unpaid, made after original cause is barred by statute of limitations; 90 A. D. 378, on promise or acknowledgment of one of several makers of promissory note as charging comakers.

Cited in note in 65 A. S. R. 689, on payment or acknowledgment by one joint debtor before statute of limitations has run.

Power of legislature.

Cited in *Dismukes v. Stokes*, 41 Miss. 430, holding it competent for legislature to provide that no appeal shall be taken from judgment of circuit court rendered in case appealed to it from judgment of police board.

— To alter law to affect existing causes of action.

Cited in *Price v. Hopkin*, 13 Mich. 318, holding that legislature cannot provide that statute is to go into effect within nine months from date of its passage and cut off all remedy upon existing causes of action; *Coffman v. Bank of Kentucky*, 40 Miss. 29, 90 A. D. 311, holding statute suspending practically all remedy upon existing contracts, for period of two years, void; *Sharlock v. Rivers*, 13 Rich. L. 498, 91 A. D. 245, holding stay laws which interdict service of mesne process or enforcement of final process void; *Stephenson v. Osborne*, 41 Miss. 119, 90 A. D. 358, holding it competent for legislature to exempt portion of debtor's property from liability to execution and make such exemption apply to pre-existing contracts; *Cowan v. McCutchen*, 43 Miss. 207, sustaining statute providing that if contracts were made during certain period such shall be prima facie evidence that payment in Confederate money was intended; *Price v. Crone*, 44 Miss. 571, to point that legislature may make reasonable alterations in statutes of limitations and have same apply to existing contracts; *Carothers v. Hurley*, 41 Miss. 71, to point that legislature may provide that for new promise to bar limitations it must be in writing, and make such rule applicable to promises made before its passage; *Keyser v. Lowell*, 54 C. C. A. 574, 117 Fed. 400, holding statute of state which bars actions against its residents upon judgments of other states founded upon causes of action which were barred by statutes of limitations of former state but not by statutes of latter states, void.

Cited in reference notes in 90 A. D. 320, on regulation of remedy; 61 A. S. R. 662, on power of legislature over limitation laws; 72 A. S. R. 884, on constitution. Am. Dec. Vol. VIII.—80.

tionality of change in statute of limitations; 93 A. D. 782, on legislative control over remedies.

Cited in note in 1 L.R.A. (N.S.) 528, on constitutionality of statutes shortening period of limitation.

Jurisdiction of supreme court.

Cited in *Planters' Ins. Co. v. Cramer*, 47 Miss. 200, holding that the Supreme Court has no jurisdiction to award writ of prohibition to circuit court.

61 AM. DEC. 559, LONG v. CONSTANT, 19 MO. 320.

Parties to action on lost instrument.

Cited in reference note in 86 A. D. 675, on right of assignee of debt evidenced by lost note to sue thereon.

Cited in note in 94 A. S. R. 477, on parties in action on lost instruments.

61 AM. DEC. 560, KEETON v. AUDSLEY, 19 MO. 362.

Actions for conversion of timber.

Cited in *Richmond Land Co. v. Watson*, 129 Mo. App. 554, 107 S. W. 1045, holding that trespass will not lie where timber was cut under reservation in deed, but removed after time allowed therefor; *Wilson v. Petty*, 21 Mo. 417, holding in action for conversion of rails where plaintiff claimed through one who made them on public lands, defendant's certificates of entry thereupon admissible in evidence.

Cited in note in 70 L.R.A. 891, on action by settler for timber cut on public land.

Rights of party cutting timber, etc., on public domain.

Cited in note in 35 A. D. 456, on rights of party cutting timber on public domain.

Title by accession.

Cited in note in 32 L.R.A. 434, on title by accession to crops, fruit, and timber, wrongfully severed when title was in or derived from the states or the United States.

61 AM. DEC. 563, STATE v. MOORE, 19 MO. 369.

Actions upon official bonds.

Cited in *State ex rel. Jean v. Horn*, 94 Mo. 162, 7 S. W. 116, holding that obligee in constable's official bond may sue thereon though it be executed to state and not to township as statute required.

— In whose name brought.

Cited in *Sickles v. McManus*, 26 Mo. 28, holding that action on administrator's bond, in which state is obligee, must be brought in name of state; *Woodworth v. Woodworth*, 70 Mo. 601, holding same as to executor's bond; *Meier v. Lester*, 21 Mo. 112, holding same, as to constable's bond.

Nature of officer's liability for acts done under color of office.

Cited in *State ex rel. Heitkamp v. Ryland*, 163 Mo. 280, 63 S. W. 819, holding bond of notary liable where he falsely certified that signer of mortgage was personally known to him even though he acted illegally in taking the acknowledgment; *Ramsey v. Burns*, 27 Mont. 154, 69 Pac. 711, holding bond of justice liable for acts done under color of office by special officer whom he had appointed to serve writ of attachment.

Cited in note in 21 A. D. 208, on forfeit of protection of process by conduct of officer in executing it.

— **In execution of process generally.**

Cited in *State ex rel. Sidener v. White*, 88 Ind. 587, holding sheriff's bond liable to one upon whose goods execution against third party was levied; *Sangster v. Com.* 17 Gratt. 124, holding same where sheriff seized property of plaintiff under attachment against property of another; *State use of Garrett v. Farmer*, 21 Mo. 160, holding securities in constable's bond liable for his seizing property exempt from execution; *State ex rel. Burris v. Edmundson*, 71 Mo. App. 172, holding bond of constable liable for acts done by him while proceeding under a memorandum of costs which he treated as valid process; *State ex rel. Brennan v. Dierker*, 101 Mo. App. 636, 74 S. W. 153, holding sheriff's official bond not liable for tort committed by him in taking one into custody without a warrant; *Kansas City ex rel. Ochs v. Minor*, 89 Mo. App. 617, holding official bond of impounder of cattle liable where he impounds cattle he has no right to impound.

Cited in reference note in 32 A. S. R. 262, on liability of sureties for unlawful levy by sheriff.

Cited in notes in 46 A. D. 514, on surety's liability for sheriff's misconduct in execution of process; 75 A. D. 648, on liabilities of sureties of officer disregarding exemption rights of debtor; 78 A. S. R. 425, on effect of principal being a trespasser on liability of sureties on official bond; 91 A. S. R. 537, on liability of sureties on bonds of sheriffs, constables, etc., for acts under process.

Distinguished in *State v. McDonough*, 9 Mo. App. 63, holding officer's bond not liable for wrongful arrest made without warrant or authority of law though made under color of office; *State use of Pacific R. Co. v. Dulle*, 48 Mo. 282, upon point that sheriff's bond is liable where he seizes property exempt from execution or sells property of one other than execution debtor; *State ex rel. Sporleder v. Staed*, 65 Mo. App. 487, holding person who fails to disclose his title when officer executes upon property in his possession, believing him to be mere bailee thereof, estopped to assert taking was tortious.

— **In collection of taxes.**

Cited in *State ex rel. Rice v. Powell*, 44 Mo. 436, holding bond of sheriff, who is also collector of taxes, liable for wrongful acts done under color of office in collecting taxes; *State use of Hannibal & St. J. R. Co. v. Shacklett*, 37 Mo. 280, holding official bond of officer liable where he makes levy for taxes upon property illegally assessed therefor.

— **Liability for acts of deputy.**

Cited in *State ex rel. Gehring v. Claudius*, 1 Mo. App. 551, holding principal constable liable for trespass of deputy committed in entering plaintiff's premises under color of legal process addressed to principal; *Barton v. Continental Oil Co.* 5 Colo. App. 341, 38 Pac. 432, holding sheriff not responsible for unofficial act of his deputy in releasing an attachment.

Cited in reference notes in 99 A. D. 561, on officer's liability for acts of deputy; 73 A. D. 589; 86 A. D. 679; 36 A. S. R. 190,—on liability of sheriffs for acts of deputies.

Cited in note in 91 A. S. R. 550, on liability of sureties on bonds of sheriffs, constables, etc., for acts of deputies.

Prior demand as condition to maintenance of suit for wrongful execution.

Cited in *Merchants' Nat. Bank v. Abernathy*, 32 Mo. App. 211, holding that where officer levies upon property not belonging to defendant in writ no demand need be made for its return before bringing suit for its wrongful seizure.

Effect of levy on stranger's property.

Cited in note in 12 A. D. 394, on effect of levy on stranger's property.

61 AM. DEC. 566, VALLE v. FLEMING, 19 MO. 454, Later appeal in 29 Mo. 152, 77 A. D. 557.

Validity of sales by administrator.

Cited in *Mount v. Valle*, 19 Mo. 621, holding administration sale not invalidated by failure to file accounts and lists with petition as law required where petition itself sets forth estate's condition; *Garrett v. Bicknell*, 64 Mo. 404, holding neither petition nor appraisal necessary where administrator sells upon order of court under statute authorizing sale of such of intestate's lands as had not been paid for; *Reynolds v. McMullen*, 55 Mich. 568, 54 A. R. 386, 22 N. W. 41, holding that administrator appointed at place where intestate died cannot sell claim secured by mortgage on land situated in another state wherein local administrator had been appointed; *Farrar v. Dean*, 24 Mo. 16, holding that where record shows that administration was begun for purpose of selling intestate's realty, there being no debts other than administration costs, such sale is void; *Schaefer v. Causey*, 8 Mo. App. 142, holding heirs not entitled to recover in ejectment until they refund purchase money and taxes paid by purchaser at void administration sale, though they were minors when sale was made.

Distinguished in *Johnson v. Beazley*, 65 Mo. 250, 27 A. R. 276, holding administrator's deed valid though record of probate court failed to affirmatively show existence of facts necessary to authorize his appointment.

— Defects in notice of sale.

Cited in *Hutchinson v. Shelley*, 133 Mo. 400, 34 S. W. 838, holding administrator's deed void where record shows that notice required by statute could not have been given; *Young v. Downey*, 145 Mo. 250, 68 A. S. R. 568, 46 S. W. 1086; *Young v. Downey*, 150 Mo. 317, 51 S. W. 751,—in same connection; *Mickel v. Hicks*, 19 Kan. 578, 27 A. R. 161, holding administrator's sale void where record, though reciting service of "due notice," shows that no proper notice was given; *Agan v. Shannon*, 103 Mo. 661, 15 S. W. 757, holding that in absence of anything in record to indicate contrary it will be presumed that order to administrator to sell was made upon proper publication of notice; *Garner v. Tucker*, 61 Mo. 427, holding administrator's sale not void, where, though no notice was given, record shows that widow and heirs appeared by attorney.

Cited in reference notes in 65 A. D. 760, on invalidity of administrator's sale unless notice is given; 87 A. D. 246, on validity of executor's or administrator's sale where proper notice has not been given; 28 A. S. R. 420, on validity of sale without notice by administrator.

— Necessity of approval.

Cited in *Knowlton v. Smith*, 36 Mo. 507, 88 A. D. 152, holding that where administrator's deed recited probate court's order to sell burden is on party attacking sale to show it was not approved; *Murray v. Purdy*, 66 Mo. 606, to point that administrator's sale must be approved by court, but its approval

may be inferred from order directing him to make deed to purchaser; *Henry v. McKerlie*, 78 Mo. 416, to same effect.

Cited in reference note in 88 A. D. 155, on validity of administrator's sale not approved by court.

Validity of sales by guardians.

Cited in *Strouse v. Drennan*, 41 Mo. 289, holding it incumbent on purchaser at guardian's sale to see that requirements of statute, authorizing such sales, are complied with; *Castleman v. Relfe*, 50 Mo. 583, holding guardian's sale authorized by circuit court not wholly void though approved at same term at which made.

Presumption in favor of jurisdiction of courts.

Cited in *Langsdale v. Woollen*, 120 Ind. 78, 21 N. E. 541, holding that all reasonable presumptions must be made in favor of proceedings of courts having general jurisdiction as to probate matters.

Distinguished in *Eaton v. St. Charles Co.* 8 Mo. App. 177, holding that no presumption will be indulged in favor of county court's jurisdiction when proceeding under statute conferring upon it limited jurisdiction.

Rights acquired by bidder at judicial sales.

Cited in *Terry v. Coles*, 80 Va. 695, holding that bidders at judicial sales acquire no rights until bid is accepted and confirmed by court.

Effect of void judicial sale.

Cited in note in 13 A. D. 366, on effect of void judicial sale.

Estoppel to contest validity of judicial sale.

Cited in reference notes in 70 A. D. 540, on receipt by distributees of estate of proceeds of administrator's sale not necessarily being ratification of sale; 13 A. S. R. 79, on receipt of proceeds by minor heirs as estoppel to avoid voidable judicial sale; 98 A. S. R. 502, on estoppel of minor heirs to contest validity of sale made prior to settlement.

61 AM. DEC. 574, RANKIN v. CHARLESS, 19 MO. 490.

Effect of blending of jurisdiction of courts of law and equity.

Cited in *Tyler v. Magwire*, 17 Wall. 253, 21 L. ed. 576, to point that where jurisdiction of courts of law and equity are blended, one is entitled to all relief that either equity or law formerly gave.

Cited in reference notes in 27 A. S. R. 739, on relief where law and equity administered by same court; 34 A. S. R. 302, on granting equitable relief in legal action.

When injunction granted.

Cited in *Bailey v. Culver*, 84 Mo. 531, holding that in granting injunction comparative conveniences resulting from its issuance or refusal and all other circumstances will be considered; *Raband v. Frank*, 7 Mo. App. 64, enjoining lessor from building upon premises to serious injury of one to whom he had leased portion thereof for ten years; *Leavenworth Lodge No. 2 I. O. O. F. v. Byers*, 54 Kan. 323, 38 Pac. 261, sustaining refusal to enjoin use of wall for party wall purposes.

Cited in reference notes in 91 A. D. 757, on injunction against performance of inequitable act; 97 A. D. 526, on making full disclosure of all facts in application for injunction.

Cited in note in 99 A. S. R. 744, on injunction against erecting buildings and other structures.

Distinguished in *St. Louis Safe Deposit & Sav. Bank v. Keanett*, 101 Mo. App. 370, 74 S. W. 474, holding that where complainant objected at time defendant was erecting smokestack in private alley in violation of covenant mere delay will not bar relief by injunction.

Right to maintain action for value of use of wall.

Cited in note in 92 A. D. 290, on definition and nature of party walls and law governing.

Distinguished in *Abrahams v. Krautler*, 24 Mo. 69, 66 A. D. 698, holding that owner of wall cannot maintain action for value of its use against adjoining owner who uses it.

Administering relief secundum allegata et probata.

Cited in *Fink v. Alderson*, 20 Mo. App. 364, holding that where it appears upon hearing of motion to quash execution that execution is in proper form, the irregularity being in sheriff's prematurely enforcing it, court should administer relief secundum allegata et probata.

61 AM. DEC. 576, MOONEY v. KENNETT, 19 MO. 551.

Joinder of different causes of action.

Cited in *Foster-Cherry Commission Co. v. Davis*, 115 Mo. App. 65, 90 S. W. 734, holding that separate causes of action though of kindred class cannot be united in same count; *Otis v. Mechanics' Bank*, 35 Mo. 128, holding petition declaring upon many promissory notes in one count bad; *McHugh v. St. Louis Transit Co.* 190 Mo. 85, 88 S. W. 853, holding that action for damages for common law negligence cannot be joined in same count with one for statutory negligence; *Offield v. Wabash, St. L. & P. R. Co.* 22 Mo. App. 607, holding that motion to compel plaintiff to elect should be sustained where several annual overflows are complained of in one count; *Bird v. Hannibal & St. J. R. Co.* 30 Mo. App. 365, applying contrary rule.

Cited in reference notes in 78 A. D. 751, on joinder of several causes of action in one suit; 63 A. D. 471; 80 A. D. 581,—on joinder of causes of action under code practice; 59 A. S. R. 707, on joinder of causes of action.

Cited in note in 67 A. S. R. 357, on joinder of causes of action.

Distinguished in *Crowe v. Peters*, 63 Mo. 429, holding that where count at law and count in equity are included in same petition, two verdicts and two judgments are required.

— Remedy in case of.

Cited in *John S. Brittain Dry Goods Co. v. Buchanan*, 79 Mo. App. 528, holding objection because of misjoinder waived unless availed of by demurrer or motion to strike out; *Zeideman v. Molasky*, 118 Mo. App. 106, 94 S. W. 754, holding that where several causes of action which might be stated in different counts are improperly joined in one count, remedy is by motion to compel pleader to elect; *Christal v. Craig*, 80 Mo. 367, holding that error of joining distinct causes of action in one count is waived by failure to move to compel plaintiff to elect; *Meyers v. Field*, 37 Mo. 434; *Peyton v. Rose*, 41 Mo. 257,—holding that where petition blends in one count matters of law and equity, such error may be taken advantage of by demurrer, motion in arrest or writ of error or appeal; *Kern v. Pfaff*, 44 Mo. App. 29, holding that where equitable and legal matters are blended in one count, proper practice is to file motion requiring plaintiff to

elect; *Bobb v. Woodward*, 42 Mo. 482, to point that plaintiff, seeking in one petition both legal and equitable relief, may be compelled to elect on which cause of action he will proceed; *House v. Lowell*, 45 Mo. 381, holding that objection that petition unites several causes of action in one count cannot be availed of by motion in arrest of judgment; *Stevenson v. Judy*, 49 Mo. 227, holding that where petition blends two causes of action in one count and no motion to compel election is made petition is to be treated as regular with damages separately charged for each cause of action.

Cited in reference notes in 81 A. D. 509, on improper blending of several causes of action being curable by motion; 83 A. D. 81, on joinder of causes and remedy for improper joinder.

— Time for objection to joinder.

Cited in *Childs v. Kansas City, St. J. & C. B. R. Co.* 117 Mo. 414, 23 S. W. 373, holding that objection to petition for not separately stating distinct causes of action cannot be availed of for first time on appeal; *Fadley v. Smith*, 23 Mo. App. 87, holding that demurrer for improper joinder of distinct causes of action in one count comes too late when not made until after answer filed.

Sufficiency of general verdict or finding.

Cited in *St. Louis ex rel. Seibert v. Allen*, 53 Mo. 44; *Owens v. Hannibal & St. J. R. Co.* 58 Mo. 386,—holding that where petition contains several counts each stating independent cause of action and general verdict is rendered motion in arrest should be sustained; *Clark v. Hannibal & St. J. R. Co.* 36 Mo. 202; *Bricker v. Missouri P. R. Co.* 83 Mo. 391,—applying same rule; *Welsh v. Stewart*, 31 Mo. App. 376; *Wells v. Adams*, 88 Mo. App. 215,—to same point; *State ex rel. Spaulding v. Peterson*, 142 Mo. 526, 39 S. W. 453, applying same rule to finding of referee; *St. Charles v. Stookey*, 85 C. C. A. 494, 154 Fed. 772, holding in effect that such rule is not applicable in federal courts; *Seibert v. Allen*, 61 Mo. 482, holding single verdict improper where petition contains two counts each containing separate and distinct causes of action; *Erdbruegger v. Meier*, 14 Mo. App. 258 (dissenting opinion), upon same point; *Johnson v. Dicken*, 25 Mo. 580, holding that judgment should be arrested if entire damages are assessed where two causes of action, one of which is defectively stated, are pleaded and tried together; *Pitts v. Fugate*, 41 Mo. 405, reversing judgment entered upon general verdict where petition contained two counts, one upon note, other for money paid for defendant's use; *State ex rel. Collins v. Dulle*, 45 Mo. 269, holding that where petition on bond set out distinct breaches and verdict was for gross sum, judgment should be arrested; *Boyce v. Christy*, 47 Mo. 70, holding general verdict upon petition counting upon indenture and charging various breaches in form of independent counts, erroneous; *Brownell v. Pacific R. Co.* 47 Mo. 239, holding general verdict sustainable although petition contained two counts each based on separate sections of a statute where both related to same subject-matter; *Silcox v. McKinney*, 64 Mo. App. 330, holding general verdict sustainable where petition contained two counts each of which had reference to same transaction; *Sain v. Rooney*, 125 Mo. App. 176, 101 S. W. 1127, holding to same effect.

— Place where objection to general verdict must be made.

Cited in *Bigelow v. North Missouri R. Co.* 48 Mo. 510, holding that objection to general verdict rendered under petition including several distinct causes of action cannot be raised for first time upon appeal; *Speer v. Burlingame*, 61

Mo. App. 75, to point that attention of trial court must be specially called to fact that general verdict was rendered upon petition containing distinct counts.

Distinguished in *Sweet v. Maupin*, 65 Mo. 65, holding that error of rendering general verdict upon petition containing several counts must be specifically pointed out to trial court or it will be held to be waived.

— Mode of objecting to general verdict.

Cited in *Johnson v. Bedford*, 90 Mo. App. 43, holding that error of jury in not stating separately kind and quantum of damages can be availed of only by motion in arrest; *Welsh v. Stewart*, 31 Mo. App. 376, holding that error in returning general verdict to petition blending in one count several distinct causes of action can be availed of by demurrer or motion to compel election but motion in arrest comes too late.

— Right to enter nolle prosequi as to counts affected by error.

Cited in *Needles v. Burke*, 27 Mo. App. 211 (dissenting opinion), upon right of plaintiff, where there is error only as to one of several counts to enter nolle prosequi as to such and take judgment upon others.

Pleading and practice in respect to municipal ordinances.

Cited in *Apitz v. Missouri* P. R. Co. 17 Mo. App. 419, holding that in pleading city ordinances it is only necessary to state their substance; *State ex rel. Oddle v. Sherman*, 42 Mo. 210, to point that courts cannot judicially notice city ordinances; *Nutter v. Chicago*, R. I. & P. R. Co. 22 Mo. App. 328, holding that city ordinance regulating speed of train may, where not pleaded, be introduced in evidence upon question of recklessness but does not warrant court's treating speed in excess of that allowed, reckless or unlawful per se.

Cited in note in 4 L.R.A. 41, on judicial notice of municipal ordinances.

Distinguished in *Judd v. Wabash, St. L. & P. R. Co.* 23 Mo. App. 56, holding city ordinance regulating speed of trains admissible upon question of negligence though petition merely stated train was being run in excess of speed allowed by a city ordinance; *Bragg v. Metropolitan Street R. Co.* 192 Mo. 331, 91 S. W. 527, holding that city ordinance need not be pleaded if it be sought to be introduced only as an evidential fact; *Givens v. Van Studdiford*, 86 Mo. 149, 56 A. R. 421, upon point that city ordinances when made foundation for plaintiff's claim or defendant's defence must be specially pleaded.

Judicial notice of acts incorporating municipalities.

Cited in note in 89 A. D. 668, 669, on judicial notice of acts incorporating public or municipal corporations.

What are exemplary damages.

Cited in *Stuyvesant v. Wilcox*, 92 Mich. 233, 31 A. S. R. 580, 52 N. W. 465, holding instruction in action for assault and battery using term "smart money" as synonymous with exemplary damages erroneous.

What essential to maintenance of suit for malicious prosecution.

Cited in *Freymark v. McKinney Bread Co.* 55 Mo. App. 435, holding that petition in action for malicious attachment must state that attachment suit terminated in favor of defendant therein.

Cited in reference notes in 72 A. D. 610, on discharge necessary to enable party to maintain action for malicious prosecution; 75 A. D. 677; 85 A. D. 381,—on necessity and proof of malice and want of probable cause in malicious prosecution; 13 A. S. R. 381, on necessity that complaint in malicious prosecu-

tion state that prosecution was malicious and plaintiff acquitted; 39 A. S. R. 617, on pleading malice in action for malicious prosecution.

Proving foreign laws.

Cited in *McDonald v. Bankers' Life Asso.* 154 Mo. 618, 55 S. W. 999, holding that laws of sister state must be alleged and proved like any other issue of fact; *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 63 L.R.A. 301, 73 S. W. 453, holding that courts will not judicially notice laws of sister states.

61 AM. DEC. 580, STATE USE OF ROE v. THOMAS, 19 MO. 613.

Measure of damages.

Cited in *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa, 153, 98 N. W. 918, 4 A. & E. Ann. Cas. 519, holding that in action for malicious suing out of attachment writ damages for injury to one's character or credit cannot be had; *Alexander v. Harrison*, 38 Mo. 258, 90 A. D. 431, to point that one may maintain action on case for malicious abuse of attachment process and recover damages beyond actual damages resulting from attachment; *Dill v. Crum*, 39 Mo. App. 508 (dissenting opinion), as to what constitutes damages too remote to be recovered.

Cited in notes in 68 A. S. R. 269, on damages for wrongful or malicious attachment; 68 A. S. R. 272, on loss of credit or profits as element of damages for wrongful or malicious attachment; 68 A. S. R. 279, on exemplary damages for wrongful or malicious attachment; 93 A. S. R. 465, on damages for malicious prosecution of civil action.

— In actions on attachment bonds.

Cited in *State use of Burton v. McKeon*, 25 Mo. App. 667, holding in action on attachment bond expenses incurred in hiring other animals to replace those seized recoverable; *State use of Clifford v. Beldsmeier*, 56 Mo. 226, holding that in such action damages resulting from detention of money garnished may be recovered; *Thompson v. Webber*, 4 Dak. 240, 29 N. W. 671, holding that in such action damages cannot be had for the breaking up and ruin of one's business; *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563, holding that in such action damages resulting from impairment of plaintiff's credit from his inability to sell or mortgage attached property cannot be recovered; *State, ex rel. Kerns v. East Joplin Lumber Co.* 70 Mo. App. 663, holding that in such action one successfully prosecuting his interplea in attachment may recover attorney fees laid out therein; *State ex rel. Rigsby v. Goodhue*, 74 Mo. App. 162, holding in action on attachment bond expenses incurred in defending suit, for travelling, and hotel bills recoverable; *Kelly v. Beauchamp*, 59 Mo. 178, holding in such action evidence as to amounts paid for counsel fee, hotel bills, etc., admissible under allegation in petition that plaintiff "was put to great expenses and trouble in and about defending said action;" *State use of Allen v. O'Neill*, 4 Mo. App. 221, holding expenses incurred in defending attachment suit after dissolution of attachment, recoverable in action on bond; *State ex rel. Midland Transfer Co. v. Coombs*, 67 Mo. App. 199, holding same as to counsel fees paid for defending on merits after giving of bond to dissolve attachment.

Cited in reference note in 33 A. S. R. 849, on damages recoverable on indemnity bonds.

Cited in note in 81 A. D. 474, on damages in actions on attachment bonds.

Distinguished in *State use of Russell v. Fargo*, 151 Mo. 280, 52 S. W. 199, holding that expenses of defending suit on merits incurred after giving of bond which operated to dissolve attachment cannot be recovered in action on bond; *State*

use of *Lurton v. Larabie*, 25 Mo. App. 208, holding same as to expenses incurred in defending upon merits after voluntary dismissal of attachment.

When action for malicious prosecution of civil suit maintainable.

Cited in *Brady v. Ervin*, 48 Mo. 533, holding that action for malicious prosecution of civil suit may be maintained though such suit was attended with no arrest.

— For wrongful attachment.

Cited in *State use of Clifford v. Beldsmeier*, 56 Mo. 226, holding in construing statutes that defendant may, if judgment be given in his favor upon merits, sue upon attachment bond though he entered no plea in abatement; *Fry v. Estes*, 52 Mo. App. 1, holding that action in tort for wrongful attachment lies though attachment was not malicious.

61 AM. DEC. 584, WADE v. JONES, 20 MO. 75.

Construction of exemption laws.

Cited in *Riggs v. Sterling*, 60 Mich. 643, 1 A. S. R. 554, 27 N. W. 705, to point that laws granting homestead exemptions are to be liberally construed.

Cited in notes in 45 A. D. 253, on liberal construction of exemption laws; 102 A. S. R. 99, on exemption of wages, salaries, and earnings depending upon debtor being the head of the family.

Who is "head of family."

Cited in reference notes in 42 A. S. R. 471, on meaning of "head of family;" 3 A. S. R. 583; 17 A. S. R. 853; 65 A. S. R. 611; 70 A. S. R. 107,—on who is head of family.

— Within homestead and exemption laws.

Cited in *Re Morrison*, 110 Fed. 734, holding unmarried man who lived with and contributed to support of his widowed mother and sixteen year old brother, "head of family" within meaning of exemption laws; *Rolator v. King*, 13 Okla. 37, 73 Pac. 291, holding same of one who lived with his invalid mother and sisters who were wholly dependent upon him; *State use of Smythe v. Kane*, 42 Mo. App. 253, holding same of unmarried man who supported his mother who kept house for him; *Sternberg v. Levy*, 159 Mo. 617, 53 L.R.A. 438, 60 S. W. 1114, holding same of one who resided with and supported his sister and her children; *Moyer v. Drummond*, 32 S. C. 165, 17 A. S. R. 850, 7 L.R.A. 747, 10 S. E. 952, holding same of brother living with sister in her house, she being dependent upon him for her maintenance; *Duncan v. Frank*, 8 Mo. App. 286, holding same of one who lived with his sister who kept house for younger brother and sister, although mother was living and helped to support children; *Holloway v. Holloway*, 86 Ga. 576, 22 A. S. R. 484, 11 L.R.A. 518, 12 S. E. 943, holding same of widow who attempted to keep together and support minor children of her husband by former wife; *Nash v. Norment*, 5 Mo. App. 545, holding same of deserted wife who supported her child; *Adams v. Clark*, 48 Fla. 205, 37 So. 734, holding widower, "head of family" at time of his death, where he had living with him his granddaughter whom he had informally adopted during lifetime of his wife; *Broyles v. Cox*, 153 Mo. 242, 77 A. S. R. 714, 54 S. W. 488, holding unmarried man upon whose lands his mother, brothers and sisters lived, head of family; *Ridenour-Baker Grocery Co. v. Monroe*, 142 Mo. 165, 43 S. W. 633, holding that adult daughter who does not live with parents but who aids her brother in supporting them cannot as "head of family" claim as her homestead, premises upon which parents reside and of which she is part owner; *Bunell v. Hay*, 73 Ind. 452, holding widower

who employed family to keep house for him entitled to claim householder's exemption where property was levied on while his adopted child was away upon visit to its natural mother; *Fox v. Waterloo Nat. Bank*, 128 Iowa, 481, 102 N. W. 424, holding property occupied as home by divorced husband and his adult daughter who had abandoned school teaching to become his housekeeper a homestead within meaning of exemption laws.

Cited in reference notes in 29 A. S. R. 405; 48 A. S. R. 625,—on who is entitled to homestead exemption as head of family; 61 A. S. R. 532; 64 A. S. R. 699; 87 A. S. R. 305,—on head of family within homestead law; 88 A. S. R. 763, on husband as head of family within exemption law; 68 A. D. 309; 27 A. S. R. 427; 59 A. S. R. 373; 88 A. S. R. 763,—on who is head of family within exemption law; 118 A. S. R. 365, on who is head of family within homestead and exemption statutes.

Distinguished in *Murdock v. Dalby*, 13 Mo. App. 41, holding widow residing in her house with only her servants not "head of family" within meaning of exemption laws; *Spengler v. Kaufman*, 46 Mo. App. 644, holding that one cannot claim head of family's exemption as against his wife seeking maintenance though he lives with and supports his widowed mother and unmarried sisters.

What constitutes "family."

Cited in *Cross v. Benson*, 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558, holding that minor child living with grandparents under circumstances that impose upon them moral duty of supporting her, is member of their family though court may have decreed her custody to divorced father; *State v. Slater*, 22 Mo. 464, holding that indictment for disturbing peace of family may charge that family disturbed was that of deserted wife who lived with and maintained her children; *Fitzgerald's Estate*, 11 Pa. Dist. R. 628, holding widow entitled to hold in trust for herself and children whole of fund which, upon death of her husband, had been raised for benefit of his "family."

Cited in reference notes in 98 A. D. 494; 98 A. D. 556,—on what is family within homestead law; 99 A. D. 663, on who constitute a family and who is its head; 5 A. S. R. 45, on what constitutes "family" within exemption laws; 86 A. S. R. 923, on controlling effect of testator's intention in interpreting word "family" in will.

Cited in notes in 75 A. S. R. 694, on meaning of word "family" in will; 6 L.R.A. 813, on what constitutes a family and who is its head; 4 L.R.A. (N.S.) 384, on single persons as family under homestead and exemption laws.

Right to homestead.

Cited in reference notes in 68 A. S. R. 332, on right of wife separated from husband to acquire homestead; 73 A. S. R. 30, on rights of widow and children in homestead.

Constructive service of process.

Cited in reference note in 97 A. D. 280, on what amounts to constructive service of process under statute.

61 AM. DEC. 593, CARMAN v. JOHNSON, 20 MO. 108, Later appeal in 29 Mo. 84.

Title to public lands.

Cited in *Richards v. Griffith*, 57 Kan. 234, 45 Pac. 600, holding that patent for public lands regular in form conveys prima facie title to patentee; *Le*

Beau v. Armitage, 47 Mo. 138, holding that title by confirmation can confer but equitable title, legal title remaining in government until issuance of patent; *Holme v. Strautman*, 35 Mo. 293, to point that legal title to public lands may be passed by judgment to person entitled thereto; *Cunningham v. Snow*, 82 Mo. 587, holding that where under pleadings action is one of ejectment and issue of law is raised senior patent prevails over junior.

Cited in reference notes in 74 A. D. 189, on comparative value of patent and prior entry to give title; 87 A. D. 80, on fee to land disposed of by the United States remaining in government until patent issues.

Conclusiveness of decision of land officer, or patent.

Cited in reference notes in 62 A. D. 701, as to when equity will relieve against decision of land officer or patent obtained by fraud; 62 A. D. 701, as to when decision of land officer or patent obtained by fraud will be regarded at law.

Jurisdiction of state courts over title to lands derived from United States.

Cited in *Widdicombe v. Childers*, 84 Mo. 382; *Johnson v. Fleutsch*, 176 Mo. 452, 75 S. W. 1005,—holding that after title to public lands has passed from United States, state courts may determine controversies between adverse claimants; *Wilcox v. Phillips*, 199 Mo. 288, 97 S. W. 886, to same point; *Gray v. Givens*, 26 Mo. 291, to point that state courts may declare holder of patent for public lands a trustee for owner of equitable title.

Equitable title as defense to action of ejectment.

Cited in *Sebree v. Patterson*, 92 Mo. 451, 5 S. W. 31, to point that equitable title will, if well pleaded, bar action of ejectment based on legal title; *Le Beau v. Armitage*, 47 Mo. 138, holding that title by confirmation to public lands is no defense to action of ejectment unless pleaded as equitable bar thereto.

Cited in reference note in 43 A. S. R. 849, on plea or answer in ejectment suit.

When equity will compel conveyance of patentee's title.

Cited in reference note in 85 A. D. 303, on compelling patentee of land to convey where title obtained under circumstances sufficient to make him trustee of party making prior entry.

Form of judgment where defense of equitable title is established.

Cited in *Barksdale v. Brooks*, 70 Mo. 197, holding that where equitable title set up in answer is sustained, form of judgment should be that legal title vested in patentee be transferred to equitable title of defendant.

61 AM. DEC. 598, CHRISTY v. ST. LOUIS, 20 MO. 143.

Right to recover money wrongfully collected by government.

Cited in *State ex rel. Rice v. Powell*, 44 Mo. 436, to point that taxes which though they might be resisted are voluntarily paid cannot be recovered back; *Cahaba v. Burnett*, 34 Ala. 400, holding money paid for liquor license required by statute having penal features and which was subsequently declared void not recoverable; *Thomson v. Norris*, 62 Ga. 538, holding same as to money voluntarily paid for liquor license under unconstitutional statute increasing fee therefor; *Stephen v. Daniels*, 27 Ohio St. 527, holding money paid under void assessment to prevent sale of one's land upon summary process recoverable.

Distinguished in *Bradford v. Chicago*, 25 Ill. 411, holding that money paid under illegal assessment for public improvement which was not made may be recovered where collector had warrant by virtue of which he might have levied;

American Brewing Co. v. St. Louis, 187 Mo. 367, 86 S. W. 129, 2 A. & E. Ann. Cas. 821, holding excessive water rate demanded of and paid by one wholly dependent upon city for his water supply recoverable.

61 AM. DEC. 599, THOMPSON v. LYON, 20 MO. 155, Later appeal in 33 Mo. 219.

Right of infant to execute power.

Cited in note in 21 E. R. C. 355, on right of infant to execute power.

61 AM. DEC. 603, STATE v. DAVIDSON, 20 MO. 212.

Effect of pardoning accused.

Cited in Dale v. Com. 101 Ky. 612, 38 L.R.A. 808, 42 S. W. 93, holding forfeiture of bail bond not affected by subsequent pardoning of accused; Com. v. House, 10 Pa. Super. Ct. 259, holding accessory not relieved from liability to prosecution though principal after conviction had been pardoned.

61 AM. DEC. 605, WALKER v. LOVELL, 28 N. H. 138.

Effect of contract partially illegal.

Cited in Boyd v. Eaton, 44 Me. 51, 69 A. D. 83, holding that sale of various articles with separate price for each may be sustained as to those articles, sale of which is not prohibited; Fuller v. Bean, 30 N. H. 181, holding that one to whom stock of goods was sold may recover against another converting same, at least for so much thereof as was legally sold; Bixly v. Moor, 51 N. H. 402, holding that one who worked about billiard room and was employed in part in illegally selling intoxicants can recover nothing for any of his services.

Cited in reference note in 69 A. D. 85, as to whether contract void in part is void in toto.

Cited in note in 117 A. S. R. 500, on effect of partial illegality of contract when consideration separable.

Who may question another's title.

Cited in Fuller v. Bean, 30 N. H. 181, holding that one not bearing relation of creditor to vendor cannot question validity of sale made by him; State ex rel. Lemon v. Rucker, 19 Mo. App. 587, holding that for officer to question title of claimant to property which he seized as execution debtor's he must show that he was acting for creditor who had obtained valid judgment.

Note as payment.

Cited in Hartshorn v. Hartshorn, 67 N. H. 163, 29 Atl. 406, holding that void note does not operate as payment of debt for which given.

When one is trespasser ab initio.

Cited in reference note in 84 A. D. 92, on abuse of legal process as making one trespasser ab initio.

Cited in note in 14 A. D. 366, on nonfeasance insufficient to make officer trespasser ab initio.

Trespass for sale of exempt property.

Cited in reference note in 47 A. D. 711, on trespass for sale of property part of which is exempt.

61 AM. DEC. 611, STATE v. CLARK, 28 N. H. 176.

Extent of police power.

Cited in State v. Griffin, 69 N. H. 1, 76 A. S. R. 139, 41 L.R.A. 177, 39 Atl.

260, holding statute prohibiting depositing of sawdust in waters of lake or its tributaries valid though mill owner be injuriously affected by its enforcement; *State v. Campbell*, 64 N. H. 402, 10 A. S. R. 419, 13 Atl. 585, holding it competent for legislature to legislate with view to securing pure milk; *State v. Cate*, 58 N. H. 240, holding that prohibition of unusual traffic within two miles of any public assembly convened for religious worship is constitutional; *State v. Noyes*, 30 N. H. 279, holding it competent for legislature to empower cities to adopt statute regulating bowling alleys.

Cited in note in 42 A. R. 457, on validity of statute regulating sale of merchandise within certain distance of assembly for public worship.

— Regulation of liquor traffic.

Cited in *State v. Roberts*, 74 N. H. 476, 16 L.R.A.(N.S.) 1115, 69 Atl. 722, holding it competent for legislature to regulate liquor traffic; *State v. Hogan*, 30 N. H. 268, holding it competent for legislature to empower city to prohibit sale of intoxicants in any restaurant or refreshment saloon within its limits.

Construction of city's general power to pass ordinances.

Cited in *People ex rel. Larrabee v. Mulholland*, 19 Hun, 548, holding that town may under its general power to pass ordinances and to license peddlers require that persons peddling milk from vehicles take out license; *State v. Freeman*, 38 N. H. 426, holding ordinance prohibiting keeping open of restaurants after 10 p. m. valid where town's charter empowered it to make by-laws necessary to its well being.

Cited in reference notes in 83 A. D. 202, on power of municipal corporations concerning nuisances; 90 A. D. 283, as to valid exercise of police power by municipal corporations.

Cited in notes in 36 L.R.A. 609, on discrimination by municipality in defining, preventing, and abating nuisance; 41 L. ed. U. S. 519, on authority to pass municipal ordinances.

Doubted in *Knox City v. Thompson*, 19 Mo. App. 523, holding town not authorized to license vehicles for revenue purpose though it was empowered to license dram shops and places of amusement and to pass such ordinances as it might deem necessary for regulation and policing of town.

— Regulation of liquor traffic.

Cited in *State, Staates, Prosecutor, v. Washington*, 44 N. J. L. 605, 43 A. R. 402, holding that town having general power to pass ordinances for its peace and good order may prohibit selling of intoxicants after 10 p. m.

Cited in reference notes in 74 A. D. 108; 32 A. S. R. 45; 41 A. S. R. 224,—on power of municipality to regulate liquor traffic.

Cited in notes in 114 A. S. R. 303, on reasonableness of ordinances as to business of dealing in intoxicating liquors; 39 L.R.A. 526, on municipal power as to nuisance relating to intoxicating liquors; 15 L.R.A.(N.S.) 938, on constitutional right of municipalities and local authorities to prohibit sale of intoxicating liquors.

Distinguished in *State v. Ferguson*, 33 N. H. 424, holding that clause in charter of city conferring general power to make by-laws and regulations cannot extend powers conferred by special provisions relating to sale of intoxicants.

What amounts to delegation of legislative powers.

Cited in notes in 114 A. S. R. 299, on method of delegating power to municipality to regulate dealing in intoxicating liquors; 1 L.R.A. 87, on local option laws.

Distinguished in *State ex rel. Pearson v. Hayes*, 61 N. H. 264, holding statute which provided for its going into effect or not accordingly as it was or was not approved by majority of voters of state void as being delegation of legislative power.

Redelegation of delegated authority.

Cited in note in 11 L.R.A. 582, on redelegation of delegated authority.

Special grant of power as excluding implied powers.

Cited in note in 2 L.R.A. 722, as to whether special grant of power to municipal corporation excludes implied powers.

What is a "restaurant" or "refreshment saloon."

Cited in *State v. Hogan*, 30 N. H. 268, holding shop used for manufacture and sale of tobacco goods not restaurant or refreshment saloon within meaning of ordinance prohibiting sale of intoxicants.

61 AM. DEC. 614, WOODS v. KIRK, 28 N. H. 324.

Conditions precedent to maintenance of actions.

Cited in *Johnson v. Maryland Casualty Co.* 73 N. H. 259, 11 A. S. R. 609, 60 Atl. 1009, holding one failing to give notice of his claim upon accident insurance policy for four months where policy provided that such notice be given within ten days cannot recover thereon though delay was due to his agent's failure to inform him of policy's existence.

Effect of fraud.

Cited in *Jones v. Emery*, 40 N. H. 348, to point that positive fraud vitiates everything it affects.

When estoppel arises.

Cited in reference notes in 85 A. D. 171, on doctrine of estoppel in pais; 12 A. S. R. 371, on estoppel to show fraud.

61 AM. DEC. 617, SMITH v. GODFREY, 28 N. H. 379.

Conflict of laws.

Cited in *Citizens' Nat. Bank v. Culver*, 7 Legal Gaz. 317; *Citizens' Nat. Bank v. Culver*, 54 N. H. 327, 20 A. R. 134,—holding that attorney's lien upon judgment recovered by him will be enforced according to *lex loci contractus* and not according to *lex fori*; *MacDonald v. Grand Trunk R. Co.* 71 N. H. 448, 93 A. S. R. 550, 59 L.R.A. 448, 52 Atl. 982, upon point that courts of one state may out of comity give effect to laws of another.

Cited in reference notes in 65 A. D. 660, on enforceability of penal statutes in other state; 65 A. D. 660; 73 A. D. 677,—on extraterritorial effect of statutes.

— As to contracts generally.

Cited in *Stevens v. Norris*, 30 N. H. 466, to point that contract made in foreign state, though legal there will not be enforced in state whose laws or policies it violates; *Rogers v. Allen*, 47 N. H. 529, to point that validity of contracts are determined by law of place where made, but if performance is to be had in another jurisdiction law thereof will govern; *Scheible v. Bacho*, 41 Atl. 423 (dissenting opinion), as to right of lender of Confederate treasury notes to enforce contract; *Brigham v. Gilmartin*, 58 N. H. 346, holding that liability of married woman residing in New Hampshire, for goods bought by her in Massachusetts, can be enforced in New Hampshire; *Wight v. Rindskopf*, 43 Wis. 344, holding it proper

to apply *lex fori* to contracts coming from federal jurisdiction where they operate to compound crime.

Cited in reference notes in 65 A. D. 660, on governing and construing contract by *lex loci contractus* unless otherwise specified; 66 A. D. 464, on enforceability everywhere else of contract valid where made; 66 A. D. 506, on deciding validity of contract by law of place where made; 68 A. D. 662, on what law governs validity and construction of contract; 69 A. D. 743, on enforceability of law of another state or country in contravention of laws of the state of the forum; 70 A. D. 66, on nation not being bound to recognize or enforce contract injurious to its own interests; 72 A. D. 635, on *lex loci* governing contracts; 76 A. D. 616, as to what law governs validity of contract; 77 A. D. 360, as to what law governs construction and validity of personal contracts; 86 A. D. 340, on enforceability of contracts made in another state; 86 A. D. 374, as to what law governs contract; 99 A. D. 530, on control of law of place where made over contracts; 10 A. S. R. 698, as to what law governs the construction and enforcement of contracts; 55 A. S. R. 774, 776, on enforcement of contract outside of jurisdiction where made.

—As to chattel mortgages.

Cited in *Ferguson v. Clifford*, 33 N. H. 86, holding that if mortgage be in proper form in state where executed it will be enforced in state to which property is removed though not executed in accordance with its laws; *Cushman v. Luther*, 53 N. H. 562, holding that mortgage of personalty, if valid in state where executed, will be enforced in other states though not executed in accordance with their laws.

Cited in note in 17 L.R.A. 127, on extraterritorial force of chattel mortgage record.

Distinguished in *Ferguson v. Clifford*, 37 N. H. 86, holding that property mortgaged in one state and subsequently carried to another can only be attached and held there in accordance with its laws.

—As to sales generally.

Cited in *Cleveland Mach. Works v. Lang*, 67 N. H. 348, 68 A. S. R. 675, 31 Atl. 20, holding validity of conditional sale made and completed in state where it was valid not affected by subsequent removal of property, to another state; *Hill v. Spear*, 50 N. H. 253, 9 A. R. 205, holding contract for sale of intoxicants made in one state enforceable in another though vendor knew when he solicited orders that vendee intended to resell in violation of law of latter state; *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384, holding that no recovery for purchase price of liquors lawfully sold in another state can be had if it appear vendor's agent solicited orders in state where suit was brought and sale prohibited, knowing vendee purchased to resell illegally; *Bancher v. Warren*, 33 N. H. 183, holding that if in pursuance of contract made in Maine intoxicants be separated and placed on railroad in Massachusetts, contract is enforceable, if sale be legal under law of latter state but illegal under law of former; *Butler v. Northumberland*, 50 N. H. 33, holding that where liquors were placed on car in New York directed to vendee's agent in Maine who paid freight, he subsequently receiving credit for difference between freight from New York to Maine and from Massachusetts to Maine, sale was made in New York; *Wasserboehr v. Boulier*, 84 Me. 165, 30 A. S. R. 344, 24 Atl. 808, holding that where plaintiff made sale of intoxicants upon ten days' trial, delivering them to common carrier in another state, no recovery can be had for purchase money if sale be illegal in state where carrier was to deliver to vendee; *Bowman Distilling Co. v. Nutt*, 34 Kan. 724, 10 Pac.

163, holding that mere knowledge by vendor of intoxicants lawfully sold in one state that vendee intended to use them in violation of law in another state will not defeat suit in latter state for purchase money; *Feineman v. Sachs*, 33 Kan. 621, 52 A. R. 547, 7 Pac. 222, to same effect; *Fisher v. Lord*, 63 N. H. 514, 3 Atl. 927, holding contra where it appeared vendor packed liquors in manner to avoid suspicion; *Green v. Collins*, 3 Cliff, 494, Fed. Cas. No. 5,755, holding that recovery may be had on contract of sale valid in state where made though vendor knew vendee intended to sell liquor illegally in state where suit was brought; *Sawyer v. Sanderson*, 113 Mo. App. 233, 88 S. W. 151, to point that if seller participate in vendee's purpose to sell in violation of law sale will be void; *Bancher v. Mansel*, 47 Me. 58, holding note not enforceable if given for liquors lawfully sold in another state but intended to be used in violation of law of state where suit brought, it appearing plaintiff assisted defendant in evading law of such state.

Cited in reference note in 29 A. S. R. 456, as to what law governs contract of sales.

Cited in notes in 32 A. S. R. 451, 452, on sales having in view the subsequent violation of foreign or domestic law; 61 L.R.A. 427, on conflict of laws as to sale of intoxicating liquors when executory contract is consummated in one state and executed contract in another; 61 L.R.A. 432, on public policy of forum; intention to violate prohibitory statute of forum by sale of intoxicating liquors.

Note as payment.

Cited in *Hall v. Clement*, 41 N. H. 166, holding that note operates not as payment but as security.

Recovery of price of property sold for unlawful purposes.

Cited in notes in 117 A. S. R. 502, on effect of knowledge of contemplated performance of contract in illegal manner; 15 L.R.A. 834, on right to recover price of property sold for unlawful use; 12 L.R.A.(N.S.) 601, on ethics of sale in violation of law by blameless vendors.

61 AM. DEC. 622, EMERY v. BERRY, 28 N. H. 473.

Who liable as executors de son tort.

Cited in *Roggenkamp v. Roggenkamp*, 15 C. C. A. 600, 32 U. S. App. 453, 68 Fed. 605, to point that one who intermeddles with personalty of deceased person renders himself liable as executor de son tort; *Ela v. Ela*, 70 N. H. 163, 47 Atl. 414, holding that one does not become executor de son tort by intermeddling with decedent's real estate; *Batchelder v. Manchester Street R. Co.* 72 N. H. 326, 56 Atl. 752, to point that any intermeddling with personal estate of decedent that takes place without giving bond as administrator or executor is unlawful and renders person liable as executor de son tort; *Brennan v. Pardridge*, 67 Mich. 449, 35 N. W. 85, holding one receiving goods of estate of auctioneer after his death liable to his administrator both for goods that auctioneer owned and for those he was selling on commission and for which goods estate was liable; *Cullen v. O'Hara*, 4 Mich. 132, holding administrator whose intestate had possession of money belonging to an estate upon which no administration had been granted may maintain action against one who converted such money upon death of said intestate.

Cited in reference notes in 85 A. D. 423, on definition of executor de son tort; 94 A. D. 140, on executor de son tort.

Cited in notes in 55 A. D. 439, on power, title and liability of executor de son tort; 85 A. D. 424, on what acts constitute person executor de son tort; 85 A. D.

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424, on what acts will not constitute person executor de son tort; 85 A. D. 427, on liability of executor or administrator for his own acts before qualifying; 98 A. S. R. 194-195, on what constitutes one an executor de son tort; 98 A. S. R. 196, on acts of charity or kindness as constituting one an executor de son tort.

Effect of subsequent administration by executor de son tort.

Cited in reference note in 65 A. D. 140, on right of executor de son tort to discharge himself from liability as such by taking out letters of administration.

Cited in note in 98 A. S. R. 199, on effect of subsequent administration by executor de son tort.

Proving foreign laws.

Cited in *Jenne v. Harrisville*, 63 N. H. 405, holding that foreign unwritten laws including prevailing construction of foreign statutes may be proved by witnesses and are matters of fact determinable at trial term; *People v. Calder*, 30 Mich. 85, admitting in conjunction with expert testimony as evidence of what law of another state was in 1869, a presumably authorized publication of such state's laws made in 1852; *Nashua Sav. Bank v. Anglo-American Land, Mortg., & Agency Co.* 189 U. S. 221, 47 L. ed. 782, 23 Sup. Ct. Rep. 517, holding copies of acts of English parliament admissible in evidence when produced by practicing English attorney who testifies that they are printed by authority and are without further proof receivable by law in evidence.

Cited in reference notes in 63 A. D. 434, on how foreign statutory law may be proved; 65 A. D. 200, on proof of statutes of sister state by parol; 65 A. D. 200, on proof of statutes of another state or country by statute book printed by authority or by authenticated copies of the statutes; 85 A. D. 634, on how foreign laws proved; 113 A. S. R. 882, on proof of expert witnesses of laws of sister states or foreign countries.

Cited in notes in 11 A. D. 784, on method of proof of foreign laws; 113 A. S. R. 884, on how statutes of sister states or of foreign countries are generally proved; 25 L.R.A. 451, on oral proof of foreign unwritten or common law; 25 L.R.A. 455, on oral proof of written law of sister states.

Right to amend or correct court records.

Cited in *Simmons v. Goodell*, 63 N. H. 458, 2 Atl. 897, holding that probate court may correct its own records to make them conform to the facts; *Wiggin v. Veasey*, 43 N. H. 313, holding that record of judgment may be amended after lapse of many years; *State v. Dowd*, 43 N. H. 454, allowing correction of clerical errors in copy of recognizance sent by magistrate to supreme court; *Karrick v. Wetmore*, 25 App. D. C. 415, holding that judgment of dismissal cannot, without notice to party to be affected, be stricken out after lapse of term at which rendered.

Cited in reference notes in 80 A. D. 192, on power of courts to order mistakes in record corrected; 89 A. D. 337, on courts' power to amend their records; 62 A. S. R. 232, on amendment of judgments.

Power of executor or administrator to act under will.

Cited in note in 12 E. R. C. 12, on power of executor or administrator to act under will.

61 AM. DEC. 629, RUSSELL v. FABYAN, 28 N. H. 543.

Apportionment of rent.

Cited in *Anderson v. Robbins*, 82 Me. 422, 8 L.R.A. 568, 19 Atl. 910, holding that mortgagor cannot recover from tenant paying rent quarterly any portion

of rent for quarter during currency of which mortgagee entered for condition broken.

Pleading payment.

Cited in *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 312, to point that where declaration is in covenant for condition broken for rent defendant must, if he rely on payment, plead it specially or plead general issue with brief statement of facts.

Cited in reference note in 87 A. D. 523, on admissibility of evidence of payment under general denial.

Effect of tenant's holding over.

Cited in note in 15 E. R. C. 595, on effect of tenant's holding over with consent of landlord.

61 AM. DEC. 631, MURCH v. CONCORD R. CORP. 29 N. H. 9.

Duty owed by carriers to passengers and others.

Cited in *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 A. D. 332, holding that carrier need not in addition to having names of stations called out see that passenger is put off at his proper station; *O'Brien v. Boston & W. R. Co.* 15 Gray, 20, 77 A. D. 347, holding that passenger ejected for non-payment of fare at place where there is no station cannot by climbing upon train before it starts and tendering fare obtain right to be carried; *Smith v. Boston & M. R. Co.*, 44 N. H. 325, holding carrier not liable as insurer for merchandise carried by passenger though passengers had been allowed on several other occasions to carry merchandise without objection; *Johnson v. Concord R. Co.*, 46 N. H. 213, 88 A. D. 199, holding evidence of occasional instances of conductors accepting tickets not dated on day used insufficient to establish usage upon part of company to accept such tickets where regulation prohibited conductors from taking them; *Knight v. Portland, S. & P. R. Co.*, 56 Me. 234, 96 A. D. 449, holding in action by one injured by defect in wharf leading from terminus of defendant's railroad to steamboat, that carrier must provide safe passage way to and from its cars; *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124, 96 A. D. 114, holding that railroad company must keep in safe condition all portions of its platforms and station grounds reasonably near thereto, and to which passengers would ordinarily be likely to go.

Cited in reference note in 71 A. D. 243, on liability of passenger carriers only where their negligence is proximate cause of injury.

Cited in note in 20 L.R.A. 520,—on measure of care which carrier must exercise to keep its platforms and approaches safe.

Distinguished in *Chicago & W. I. R. Co. v. Reichert*, 69 Ill. App. 91, holding that one who placed himself with back to track in such position as to be struck by moving train cannot recover if he knew that platform projected over roadway.

— As affected by fact that property is operated under lease or contract.

Cited in *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68, holding that passenger contracting with lessee and operator of railroad cannot maintain action against lessor for wrongful expulsion from train; *Hale v. Dutant*, 39 Tex. 667, holding owner of ferry franchise who had leased ferry to another not liable to one injured by tripping over rope used in connection with ferry; *Cunningham v. International R. Co.*, 51 Tex. 503, 32 A. R. 632, holding railroad company not liable for acts of independent construction contractor in managing its trains which were used and controlled by him for construction purposes upon part of

road not yet delivered to it; *Pierce v. Concord R. Co.*, 51 N. H. 590, holding lessee which operates railroad of its lessor, liable as "proprietor" thereof for damages caused by flying sparks to property abutting on line of railroad; *Engel v. New York, P. & B. R. Co.*, 160 Mass. 260, 22 L.R.A. 283, 35 N. E. 547 (dissenting opinion), upon point that it is duty of carrier to have track safe whether it owns or hires it; *Birmingham v. Rochester City & B. R. Co.*, 59 Hun, 583, 14 N. Y. Supp. 13, holding railway company which lays its tracks upon bridge constructed by state liable to passenger injured by defects in bridge; *Ryerson v. Morris Canal & Bkg. Co.* 71 N. J. L. 381, 59 Atl. 29, 2 A. & E. Ann. Cas. 859, holding that canal company cannot relieve itself of its charter duty to maintain proper bridges by executing under legislative authority lease of all its property to another company; *Braslin v. Somerville Horse R. Co.*, 145 Mass. 64, 13 N. E. 65, holding lessor liable for injuries suffered by passenger notwithstanding fact that railway was being operated by lessee; *Story v. Concord & M. R. Co.*, 70 N. H. 364, 48 Atl. 288, holding railroad company liable to its employee injured by defect in track owned by another company over which former was running car upon which plaintiff was when injured.

Cited in reference note in 70 A. D. 429, on railroad's liability where it gives another permission to use its road.

Cited in notes in 71 A. D. 295, on liability of railroads for torts of their lessees; 48 A. R. 581, on railroad's liability for lessee's negligence; 58 A. S. R. 148, on liability of lessor of railway to persons other than the lessee; 37 L.R.A. 85, on responsibility of grantee of public franchises for acts of servants of lessee in possession under authorized contract; 44 L.R.A. 751, on liability of lessor of railroad for injuries caused by negligence of other company under running privileges or arrangements.

Disapproved in *Nugent v. Boston, C. & M. R. Co.*, 80 Me. 62, 6 A. S. R. 151, 12 Atl. 797, holding railroad company over portion of whose track another company operates its trains under contract, liable to brakeman who while in employ of latter was injured by reason of negligent construction of former's station-house.

— When riding on freight trains.

Cited with special approval in *Central R. Co. v. Smith*, 76 Ga. 209, 2 A. S. R. 31, to point that one taking passage on freight train can demand only such depot facilities as are found in freight yards.

Cited in *Hays v. Wabash R. Co.*, 51 Mo. App. 438, to point that one taking passage on freight train cannot expect conveniences of regular passenger train; *Mobile & O. R. Co. v. McArthur*, 43 Miss. 180, holding that where one is received as passenger for hire upon freight train carrier owes him duty of stopping train at his point of destination; *Louisville & N. R. Co. v. Bisch*, 120 Ind. 549, 22 N. E. 662, holding that one who disregarding instructions remained on platform of car attached to freight train cannot recover for injuries received in being thrown therefrom by train's jerking; *Smith v. Louisville, E. & St. L. R. Co.*, 124 Ind. 394, 24 N. E. 753, holding complaint insufficient where it alleged that plaintiff while riding upon freight train at invitation of its conductor was struck and thrown therefrom by servant of defendant upon said train and that other servants did not come to his protection; *Richmond v. Southern P. Co.*, 41 Or. 54, 93 A. S. R. 694, 57 L.R.A. 616, 67 Pac. 947, holding that agreement by passenger procuring mileage ticket at reduced rate not to hold carrier liable for injuries received while riding on freight trains, is unenforceable as to freight

trains designated by carrier to carry passengers generally; *Lucas v. Milwaukee & St. P. R. Co.*, 33 Wis. 41, 14 A. R. 735, holding that where company permits persons to be carried on some of its freight trains, one who is taken on any particular freight train without objection may recover as passenger for injuries received; *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477, 20 L.R.A. 822, 33 Pac. 185, holding that cripple carried on freight train does not become passenger after conductor's failure to eject him upon learning of his presence thereon.

Contributory negligence as bar to recovery.

Cited in *Chicago, B. & Q. R. Co. v. Dougherty*, 12 Ill. App. 181, 110 Ill. 521, holding that no recovery can be had by one whose want of ordinary care contributed to injury complained of; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185, holding that one whose negligence contributed to his being struck by train at crossing cannot recover; *Newhouse v. Miller*, 35 Ind. 463, to point that one whose negligence contributed to collision between his team and defendant's cannot recover; *Chamberlain v. Porter*, 9 Minn. 260, Gil. 244, in action for unskillful surgical treatment to point that if injury be caused proximately in part by plaintiff's negligence he cannot recover; *Underhill v. Manchester*, 45 N. H. 214, holding that under statute making towns liable for damage done by mobs proprietor of gambling house cannot recover for injuries to his property caused by riot growing out of a dispute over gambling transaction.

Cited in reference notes in 63 A. D. 333, on contributory negligence as affecting right to recover for injury; 64 A. D. 412, on recovery where negligence is mutual; 64 A. D. 675, on contributory negligence relieving defendant; 64 A. D. 771, on contributory negligence affecting injured passenger's right of recovery; 67 A. D. 327, on doctrines of negligence and contributory negligence as applied to railroad companies; 71 A. D. 239, on right of person guilty of contributory negligence proximately causing injury to recover; 72 A. D. 720, on right of recovery where both parties are mutually at fault in negligence; 75 A. D. 346, on doctrine of contributory negligence; 78 A. D. 327, on contributory negligence as bar to recovery of damages; 85 A. D. 706, on recovery for negligence where party was himself negligent; 92 A. D. 340, on when contributory negligence prevents recovery.

Criticized in *Holland v. Tennessee Coal, Iron & R. Co.*, 91 Ala. 444, 12 L.R.A. 232, 8 So. 524, upon point that negligence however slight upon part of person injured will bar recovery.

Right to maintain action of tort for breach of contract between defendant and another.

Cited in *Pittsfield Cottonware Mfg. Co. v. Pittsfield Shoe Co.*, 71 N. H. 522, 60 L.R.A. 116, 53 Atl. 807, to point that recovery cannot be had where action, though in form for tort, is in substance for breach of warranty in contract between defendant and third person.

Mode of determining existence of negligence.

Cited in *Norris v. Litchfield*, 35 N. H. 271, 69 A. D. 546, holding that what constitutes negligence is mixed question of law and fact to be settled by jury under instructions from court.

Stating law in pleadings.

Cited in *Merrill v. Plainfield*, 45 N. H. 126, to point that conclusions of law ought not to be stated in pleadings; *Pearson v. Tower*, 55 N. H. 36, to point

that courts apply law to facts stated in pleadings, without regard to any erroneous statement of law made therein.

Liability of railroad for injuries to trespassing animals.

Cited in reference note in 64 A. D. 674, on railroad's liability for injuries to trespassing animals.

Liability for remote consequences of negligence.

Cited in note in 57 A. D. 464, on liability of remote wrongdoer for damage caused by wrongful act or negligence.

61 AM. DEC. 642, BURKE v. ALLEN, 29 N. H. 106.

Validity of contracts of lunatics.

Cited in *Hall v. Butterfield*, 59 N. H. 354, 47 A. R. 209, to point that lunatics and persons non compos mentis may show their incapacity as defence to their contracts; *Hull v. Louth*, 109 Ind. 315, 58 A. R. 405, 10 N. E. 270, holding that deed of imbecile may be avoided even as against innocent persons making advancements in reliance thereupon; *Walker v. Winn*, 142 Ala. 560, 110 A. S. R. 50, 39 So. 12, 4 A. & E. Ann. Cas. 537, holding that maker may set up payee's insanity as defense to suit on note by latter's indorsee; *Anglo-Californian Bank v. Ames*, 27 Fed. 727, holding that lunatic payee's indorsement of certificate of deposit carries no title to innocent purchaser; *Gerling v. Agricultural Ins. Co.* 39 W. Va. 689, 20 S. E. 691, holding condition in insurance policy against alienation not violated by conveyance made by insured while insane; *State v. Pike*, 49 N. H. 399, 6 A. R. 533 (dissenting opinion), to point that one may avoid his contract on ground of his insanity; *Young v. Stevens*, 48 N. H. 133, 97 A. D. 592, 2 A. R. 202, holding that insanity may either be pleaded or given in evidence as bar to action founded either upon executory or executed contract; *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 A. S. R. 856, 51 L.R.A. 910, 83 N. W. 927, holding deed of lunatic not under guardianship not so far void as to render judgment recovered after its execution specific lien on property conveyed.

Cited in notes in 15 A. D. 364, as to whether contracts of lunatics are void or voidable; 16 E. R. C. 739, on avoidance of contract of alleged insane person.

— Validity of will.

Cited in *Boardman v. Woodman*, 47 N. H. 120 (dissenting opinion), upon question whether moral insanity of testator renders him incapable of executing will.

Time to take exceptions.

Cited in reference notes in 63 A. D. 312, on right on appeal to insist on exceptions not taken below; 65 A. D. 73, on refusal to consider on appeal admissibility of evidence not objected to on trial; 77 A. D. 102, on right to raise objections for first time in appellate court.

Cited in note in 76 A. D. 202, on necessity that exception to admissibility of evidence be taken in lower court.

61 AM. DEC. 648, KELLY v. GILMAN, 29 N. H. 385.

Effect of errors in writs.

Cited in *McAlpine v. State*, 68 Me. 423, holding that writ in supreme judicial court returnable at term after intervening term at which it might have been returnable is voidable; *Norton v. Dover*, 14 Fed. 106, to point that error

of making writ returnable to wrong day may be corrected by amendment; *Brown v. Ellsworth*, 72 N. H. 186, 55 Atl. 356, holding writ in which day of return and residence of parties are erroneously stated, but which is entered at proper term, may be amended; *Nash v. Mallory*, 17 Mich. 232, holding writ not invalid though it fails to state year as well as month to which it is made returnable.

Cited in reference notes in 5 A. S. R. 657, on amending sheriff's return; 71 A. S. R. 242, on validity of writ made returnable out of term.

Meaning of "month."

Cited in note in 78 A. S. R. 384, on meaning of "month" in computation of time.

61 AM. DEC. 652, *PRESCOTT v. CARR*, 29 N. H. 453.

Construction of statutes of descents.

Cited in *North's Estate*, 48 Conn. 583, holding that under statute providing that if any child die before estate is disposed of his share shall be divided among surviving children, latter take by descent from father; *Perkins v. Simonds*, 28 Wis. 90, to same effect.

Annotation cited in *Re Amy*, 12 Utah, 278, 42 Pac. 1121, holding that where statute excluded those who were not of blood of ancestor from whom property descended, children of intestate's father but not of his mother cannot inherit property which descended to intestate from his mother and from his half sister on mother's side.

— Relating to brothers and sisters of half blood.

Cited in *Seery v. Fitzpatrick*, 79 Conn. 562, 65 Atl. 964, 9 A. & E. Ann. Cas. 139, holding half-brother within statute providing that if "brother" who is devisee die before testator, his issue shall take estate devised; *Finley v. Abner*, 64 C. C. A. 262, 129 Fed. 734, interpreting "children" as meaning "kindred" in statute providing that "children of half blood shall inherit equally with children of whole blood."

Annotation cited in *Re Smith*, 131 Cal. 433, 82 A. S. R. 358, 63 Pac. 729, holding half-sisters within statute providing that surviving husband shall take one-half and sisters other half, notwithstanding further provision that kindred of whole blood were to be preferred to kindred of half blood.

Cited in notes in 12 A. S. R. 110, on rights of kindred of half blood to inheritance; 29 L.R.A. 544, on meaning of words "brothers and sisters" as applied in descent and distribution among kindred of the half blood; 29 L.R.A. 549, on distinction between whole and half blood in case of descent and distribution; 29 L.R.A. 556, on descent and distribution among kindred of the half blood in case of ancestral estates.

Considering source of property in construing will.

Cited in *Farmer v. Kimball*, 46 N. H. 435, 88 A. D. 219, holding that in determining whether or not testator intended to distribute property per capita source from which he acquired it is of little importance.

61 AM. DEC. 668, *GILES v. HALSTED*, 24 N. J. L. 366.

Office of condition in bond.

Cited in *McCullough v. Moore*, 111 Ill. App. 545, to point that office of con-

dition in bond is simply to suspend bond's efficacy upon happening of some event or performance of some act.

Cited in reference note in 82 A. S. R. 208, on condition as part of bond.

Effect of defects or blanks in bonds.

Cited in reference note in 87 A. D. 543, on effect of defects or blanks in bonds.

61 AM. DEC. 671, STATE v. OVERTON, 24 N. J. L. 435.

Validity of regulations prescribed by carriers.

Cited in *I. & G. N. R. Co. v. Goldstein*, 2 Tex. App. Civ. Cas. (Willson) 206, holding regulation of carrier prohibiting persons not having tickets from entering car reasonable; *Johnson v. Concord R. Co.* 46 N. H. 213, 88 A. D. 199, holding regulation of railroad company requiring that tickets be used on day of sale reasonable and that passenger purchases ticket subject to such regulation; *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185, 8 A. R. 641, holding that rule which would exclude negress from "ladies' car" because of her color would be unreasonable and unlawful; *Bass v. Chicago & N. W. R. Co.* 36 Wis. 450, 17 A. R. 495, holding regulation designating particular car for separate use of women, and men traveling with them, valid.

Cited in reference notes in 72 A. D. 65, on regulations which carriers of passengers may make; 92 A. D. 137, on reasonable rules which railroads may make as to passengers and others not employees; 93 A. D. 750, on right of common carrier of passengers to make reasonable regulations.

Cited in notes in 41 A. D. 471, on reasonableness as test of validity of regulations by railroad companies as to passengers and others not employees; 41 A. D. 472, on who may make regulations affecting passengers; 41 A. D. 480, on validity of rules limiting time in which ticket is to be used and as to "stop-over" tickets; 45 A. D. 193, 194, on reasonableness of rule that passengers shall not stop over without "stop-over tickets;" 43 L.R.A. 362, on reasonableness of rules for safe conduct of business as regards employees.

Duty of passenger as to tickets and fares.

Cited in *Ripley v. New Jersey R. & Transp. Co.* 31 N. J. L. 388, holding that commuter can claim no right to ride without producing like other passengers his ticket when demanded; *Cresson v. Philadelphia & R. R. Co.* 11 Phila. 597, 32 Phila. Leg. Int. 363, holding same as to purchaser of "season ticket."

— Ejection for nonpayment of fare.

Cited in *State v. Chovin*, 7 Iowa, 204, holding that conductor may lawfully eject one who, having no ticket, refused to pay higher fare charged of persons who failed to purchase tickets before entering train; *Shelton v. Erie R. Co.* 73 N. J. L. 558, 118 A. S. R. 704, 9 L.R.A.(N.S.) 727, 66 Atl. 403, 9 A. & E. Ann. Cas. 883, holding expulsion of passenger for nonpayment of fare not actionable though he informed conductor that he had paid for limited ticket, which he tendered and which was refused, a price entitling him to unlimited ticket; *Jardine v. Cornell*, 50 N. J. L. 485, 14 Atl. 590, to point that railroad company may forcibly eject from its train one who being unprovided with proper ticket refuses to pay fare or leave train.

Cited in reference note in 92 A. D. 109, on when passengers may be ejected for refusal to pay fare or extra fare.

Cited in note in 41 A. D. 476, on ejection of passengers for not showing or surrendering ticket or paying fare.

—Right of stopover.

Cited in *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 29 A. R. 458; *McClure v. Philadelphia, W. & B. R. Co.* 34 Md. 532, 6 A. R. 345,—holding that one who has through ticket cannot without carrier's consent "stop off;" *Hatten v. Newark & J. C. R. Co.* 39 Ohio St. 375, holding to same effect; *Pennsylvania R. Co. v. Parry*, 55 N. J. L. 551, 39 A. S. R. 654, 22 L.R.A. 251, 27 Atl. 914, to same point; *Dietrich v. Pennsylvania R. Co.* 71 Pa. 432, 10 A. R. 711, 29 Phila. Leg. Int. 212, holding that holder of "drover's ticket" takes it subject to company's right to eject him if he attempt to use it after having "stopped off;" *Denny v. New York, C. & H. R. R. Co.* 5 Daly, 50, holding that fact that passenger is allowed to "stop off" on one occasion without having his ticket indorsed does not entitle him to such privilege on other occasions.

Cited in reference notes in 45 A. D. 198, on passenger's right to stop over; 88 A. D. 207, on passenger's right to leave train and resume journey at another time; 39 A. S. R. 658, on railroad tickets for continuous passage.

Cited in note in 28 L.R.A. 774, on right of passenger to stop over.

Passenger's right to demand through accommodations.

Cited in *Pullman Palace Car Co. v. Taylor*, 65 Ind. 153, 32 A. R. 57, holding that passenger who purchases ticket entitling him to particular berth in particular sleeping car for continuous passage may demand that such berth or one equally convenient and safe be furnished him throughout journey.

Who are passengers.

Cited in note in 61 A. S. R. 102, on persons riding on certain tickets as passengers.

Expulsion of passengers or trespasser.

Cited in reference notes in 82 A. D. 525, on expulsion of passengers; 92 A. D. 142, on expelling passengers on dangerous or inconvenient places; 92 A. D. 142, on use of no more force than necessary in expelling passenger; 2 A. S. R. 546, on care required of railroad company in removing trespasser from car.

Reasonableness of corporate by-laws and regulations as question for court or jury.

Cited in *Brown v. Memphis & C. R. Co.* 4 Fed. 37, holding it for jury to determine whether regulation of carrier designating particular car from which persons of bad character are excluded is reasonable; *Morris & E. R. Co. v. Ayres*, 29 N. J. L. 393, 80 A. D. 215, holding same as to regulation requiring consignee to receipt for all goods before any part is removed; *Compton v. Van Volkenburgh*, 34 N. J. L. 134, holding same as to rule of ferry company prohibiting passengers from entering gateway reserved for vehicles; *Christian v. First Div. St. Paul & P. R. Co.* 20 Minn. 21, Gil. 12, declaring regulation of carrier requiring consignee to acknowledge receipt of definite quantity of wheat without giving him opportunity to measure it, void as matter of law; *Delaware, L. & W. R. Co. v. Central Stock Yard & Transit Co.* 45 N. J. Eq. 50, 6 L.R.A. 855, 17 Atl. 146, upon point that reasonableness vel non of regulations of stock yard company is question for jury; *Clason v. Milwaukee*, 30 Wis. 316, holding that whether ordinance prohibiting removal of sand from beach was reasonably necessary to its protection is question of fact to be passed on by jury after weighing evidence; *Meyers v. Chicago, R. I. & P. R. Co.* 57 Iowa, 555, 42 A. R. 50, 10 N. W. 896, holding that court may declare town ordinance limiting railways to speed of four miles an hour void.

Cited in reference notes in 80 A. D. 219, on reasonableness of regulation by carrier as mixed question of law and facts; 85 A. D. 617, on validity of by-law of corporation a question of law; 92 A. D. 142, on whether reasonableness of railroad rules question of law or fact; 100 A. D. 391, on validity of by-law of corporation as question of law; 2 A. S. R. 645, on determination of validity of corporate by-laws.

Distinguished in *Muckle v. Rochester R. Co.* 79 Hun, 32, 29 N. Y. Supp. 732, holding that whether upon given state of facts, regulation limiting time within which transfer ticket may be used is reasonable is for court; *Gregory v. Chicago & N. W. R. Co.* 100 Iowa, 345, 69 N. W. 532, holding that reasonableness vel non of rule of carrier prohibiting passengers from carrying dogs into coaches is question of law for court.

Disapproved in *Daniel v. North Jersey Street R. Co.* 64 N. J. L. 603, 46 Atl. 625, holding that reasonableness of regulation prohibiting passengers from carrying animals in cars is question for court and not jury; *Bass v. Chicago & N. W. R. Co.* 36 Wis. 450, 17 A. R. 495, holding same as to regulation designating particular car for separate use of women, and men traveling with them.

What constitutes corporate by-law.

Cited in *Mutual F. Ins. Co. v. Farquhar*, 86 Md. 668, 39 Atl. 527, holding rule whereby members of corporation attempt to regulate rights of its officers as against itself, a corporate by-law.

Cited in note in 85 A. D. 618, on what by-laws private corporation aggregate may adopt.

Who affected by corporate by-laws.

Cited in *Barnes Bros. v. Black Diamond Coal Co.* 101 Tenn. 354, 47 S. W. 498, holding stranger to corporation not affected by by-law thereof providing that no contract to endure for more than three months can be made without approval of directors.

Duty of court as to instructions.

Cited in *Wightman v. Chicago & N. W. R. Co.* 73 Wis. 169, 9 A. S. R. 778, 2 L.R.A. 185, 40 N. W. 689, holding it proper for court where jury returns inconsistent findings and fails to observe instructions, to intimate to them such fact; and while avoiding anything that might influence their verdict to insist that they determine questions with correct understanding of instructions.

Discrimination between shippers by carriers.

Cited in note in 41 A. D. 485, on carrier's right to discriminate between shippers.

61 AM. DEC. 678, WINTER v. PETERSON, 24 N. J. L. 524.

Rights and liabilities of landowners as to adjoining streets.

Cited in *Wuesthoff v. Seymour*, 22 N. J. Eq. 66, to point that owner of fee in land over which highway runs may make any use of it not inconsistent with public's right of passage; *Friedman v. Snare & T. Co.* 71 N. J. L. 605, 108 A. S. R. 764, 70 L.R.A. 147, 61 Atl. 401, 2 A. & E. Ann. Cas. 497, holding that abutting landowner may make reasonable use of street to deposit building materials therein; *State, Green, Prosecutor, v. Newark*, 54 N. J. L. 92, 23 Atl. 281, holding that abutting owner owning to middle of street may use writ of certiorari to test validity of ordinance permitting railway company to erect poles in street; *Freeman v. Sayre*, 48 N. J. L. 37, 2 Atl. 650, holding that owner

of land over which private right of way exists has action against one wrongfully interfering with soil thereof or things imbedded therein.

— As to trees therein.

Cited in *Frostburg v. Wineland*, 98 Md. 239, 103 A. S. R. 399, 64 L.R.A. 627, 56 Atl. 811, 1 A. & E. Ann. Cas. 783, holding that equity may review action of town in declaring ornamental trees adjoining curb in street in front of private property to be nuisances, and ordering their removal; *State, Avis, Prosecutor, v. Vineland*, 56 N. J. L. 474, 23 L.R.A. 685, 28 Atl. 1039, holding ordinance declaring healthy growing trees planted by owner of land on or near edge of roadway, nuisances, and directing their removal, void; *Sproul v. Stockton*, 73 N. J. L. 158, 62 Atl. 275, holding ordinance compelling cutting down and removal of all trees in street upon notice, not sustainable under town's power to regulate planting and protection of trees; *Tate v. Greensboro*, 114 N. C. 392, 24 L.R.A. 671, 19 S. E. 767 (dissenting opinion), upon right of town to have trees standing upon outer edge of sidewalk removed; *Bigelow v. Whitcomb*, 72 N. H. 473, 65 L.R.A. 676, 57 Atl. 680, holding that owner of fee in land over which highway is laid out may appropriate timber standing thereon which public desired to preserve for shade or ornamentation; *Miller v. Detroit, Y. & A. A. R. Co.* 125 Mich. 171, 84 A. S. R. 569, 57 L.R.A. 955, 84 N. W. 49 (dissenting opinion), upon duty of street railway company to give abutting owner opportunity to remove shade trees in line of proposed railway before removing them itself; *Weller v. McCormick*, 52 N. J. L. 470, 8 L.R.A. 798, 19 Atl. 1101, holding that occupant of premises abutting on street where tree stands is bound to see that it does not become dangerous to travelers.

Cited in reference notes in 69 A. D. 546, on ownership of trees growing in highway; 20 A. S. R. 537, on rights of abutting owners to trees, herbage, etc., growing in highway.

Cited in note in 101 A. S. R. 113, on abutting owner's right to shrubs and trees in highway.

Title in highway.

Cited in reference notes in 64 A. D. 651, on title to soil in street or highway where lands bounded thereon; 69 A. D. 276, on right of public in land taken for highways; 69 A. D. 546, as to who has title in highway; 86 A. D. 258, on presumption of ownership of street by adjacent landowners.

Cited in note in 101 A. S. R. 104, on ownership of soil in highway.

Extent of conveyance bounded by stream or highway.

Cited in *Goodeno v. Hutchinson*, 54 N. H. 159, holding that where deed describes line as running "to the road" it extends to road's center; *Friedman v. Snare & T. Co.* 71 N. J. L. 605, 108 A. S. R. 764, 70 L.R.A. 147, 61 Atl. 401, holding that title and legal possession of owner or occupant of land abutting upon street presumably extend to its centre; *Elliott v. Jenkins*, 69 Vt. 134, 37 Atl. 272, to point that conveyance presumably extends to centre of adjoining street if grantor be owner of fee in land over which it passes; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631, holding that royal charter which granted lands "to east side of Delaware bay" conveyed eastern half of bed of Delaware river above tide-water.

Distinguished in *Hoboken Land & Improv. Co. v. Kerrigan*, 31 N. J. L. 13, holding no part of road conveyed under deed which describes land as beginning on side of road and without further mentioning road proceeds with courses and distances which do not include road.

Modified in *Higbee v. Camden*, 20 N. J. Eq. 435, being cited upon point whether any part of highway is conveyed where monument upon side thereof is called for as terminus of boundary line.

What amounts to dispute as to title.

Cited in *Chambers v. Wambough*, 28 N. J. L. 530, to point that plea of public highway is not one of title to lands; *State, Ely, Prosecutor, v. Schanck*, 52 N. J. L. 119, 18 Atl. 692, holding that court having jurisdiction to try cases involving question of actual possession cannot determine case which rests on constructive possession that follows title.

Distinguished in *Messler v. Fleming*, 41 N. J. L. 108, holding that if in action for rent defendant offer in evidence deeds to show title had passed to another before rent had become due, an issue as to title is involved; *Jeffrey v. Owen*, 41 N. J. L. 260, holding title deeds not admissible as evidence of extent of possession in action wherein questions of title cannot be tried.

What necessary to be proved in action for destruction of trees.

Cited in *State v. Stenner*, 50 N. J. L. 59, 11 Atl. 131, holding that to recover for value of trees wrongfully destroyed plaintiff need only prove the trespass and his actual possession.

Right to recover punitive damages.

Cited in *Pike v. Dilling*, 48 Me. 539, holding that punitive damages may be allowed in action of trespass for assaulting and maiming.

Cited in note in 27 A. D. 689, on allowance of exemplary damages for trespass upon realty.

Determination of nuisance.

Cited in reference note in 69 A. D. 545, on whether a certain thing is a nuisance as question of law or fact.

61 AM. DEC. 683, LOONIE v. HOGAN, 9 N. Y. 435.

Right to mechanics' lien.

Cited in *Randolph v. Garvey*, 10 Abb. Pr. 179, to point that certain mechanics' lien laws were intended to enable subcontractor to reach any balance due by owner of building to his immediate contractor.

Cited in reference notes in 65 A. D. 57, on who are entitled to mechanics' liens and the different kinds; 68 A. D. 549, on when materialman's lien attaches; 65 A. D. 672; 74 A. D. 742,—on when mechanics' lien attaches; 78 A. D. 694, on what structures are subject to mechanics' liens; 78 A. D. 699, on mechanics' liens on houses built on land of another; 31 A. S. R. 238, on necessity for valid contract to existence of mechanics' lien; 64 A. S. R. 278, as to necessity of contract to creation of mechanics' lien; 76 A. S. R. 462, on constitutionality of mechanics' lien law.

Cited in notes in 79 A. D. 270, on what is necessity to give materialman lien where statute gives lien to persons contracting with owner or his agent; 13 L.R.A. 701, on legislative intent in New York mechanics' lien law of 1885.

— Estates and interests affected by.

Cited in *Bates v. Santa Barbara County*, 90 Cal. 543, 27 Pac. 438, to point that notice given by materialman of his claim to owner of building operates to make owner liable as garnishee or assignee for unpaid portion of building's cost; *Showalter v. Lowndes*, 56 W. Va. 467, 49 S. E. 448, 3 A. & E. Ann. Cas.

1096, holding that oil well derrick attached to leasehold estate is subject to mechanics' lien, and citing annotation also on this point.

Annotation cited in *Congdon v. Cook*, 55 Minn. 1, 56 N. W. 253, to point that lien against interest of owner out of possession is sustained on ground that he assented to improvement; *Greene v. McDonald*, 70 Vt. 372, 40 Atl. 1035, holding that lien for necessary repairs to factory ordered by superintendent who had no authority to charge interest of owner does not attach to such interest.

Cited in reference notes in 96 A. D. 135, on effect of mechanics' lien upon mortgagee; 79 A. D. 529; 80 A. D. 746; 83 A. D. 475; 95 A. D. 576; 100 A. D. 211,—on estates and interests affected by mechanics' liens; 1 A. S. R. 464, on possibility of creating mechanics' lien on wife's estate through husband's agency; 3 A. S. R. 586, on nature of estate to which mechanics' lien attaches; 5 A. S. R. 494, on validity of builders' lien against vendee as against vendor; 5 A. S. R. 494, on interest to which mechanics' lien attaches; 33 A. S. R. 829, as to what interests mechanics' liens are limited; 36 A. S. R. 495, on mechanics' lien on lessee's interest; 48 A. S. R. 873, on extent of materialman's lien on making or repairing building under contract with lessee; 58 A. S. R. 124, on mechanics' liens on leasehold estate; 69 A. S. R. 486, on mechanics' lien on vendor's interest in land; 95 A. S. R. 150, on interests subject to mechanics' liens.

Cited in notes in 79 A. D. 268, on estates and interests affected by mechanics' liens; 9 A. S. R. 537, as to what estate mechanics' lien attaches to.

Who is "owner" of premises generally.

Cited in *Otis v. Cusack*, 43 Barb. 546, holding that interest of cotenant in land which he actually occupies under parol partition may be subject of mechanics' lien; *Rollin v. Cross*, 45 N. Y. 766, holding that lien may be filed against one who, while equitable owner, permitted building to be erected and who acquired legal title before filing of lien; *Wadsworth v. Hodge*, 88 Ala. 500, 7 So. 194, holding that no lien attaches to land of wife for improvements made thereon under contract with husband although wife knew that work was being done, citing annotation also on this point; *McMahon v. Tenth Ward School Officers*, 12 Abb. Pr. 129, holding that person for whom building is erected and who contracts to pay for it, is "owner" within meaning of mechanics' lien law; *Brinckerhoff v. Board of Education*, 6 Abb. Pr. N. S. 428, 37 How. Pr. 513, 2 Daly, 443, to point that one for whom building is erected is, though he has not legal title, "owner" within meaning of such laws; *Stuyvesant v. Browning*, 1 Jones & S. 203, holding that lessee is "owner" of improvements made by him though lessor advanced money therefor and was to become entitled thereto at end of term; *Schmalz v. Mead*, 125 N. Y. 188, 26 N. E. 251; *Riley v. Watson*, 37 Hun, 568, 6 Thomp. & C. 310; *Nellis v. Bellinger*, 6 Hun, 560,—holding that statute has established the rule that legal owner who permits another to build is to be deemed "owner" of building; *Vosseller v. Slater*, 25 App. Div. 368, 49 N. Y. Supp. 478, in same connection.

Cited in reference notes in 79 A. D. 529, on who is owner within mechanics' lien law; 55 A. S. R. 86, on who owns property so as to be able to bind it by mechanics' lien.

— Who is owner where contract to sell has been given.

Cited in *Hallahan v. Herbert*, 11 Abb. Pr. N. S. 326, 4 Daly, 209, holding that where mechanic contracts with person to whom owner of land agreed to convey and to make loan to enable him to erect building, lien can be asserted

only against interest of such person; *Fuller v. Detroit Loan & Bldg. Asso.* 119 Mich. 71, 77 N. W. 642, holding that one who deeds land to another and takes back land contract whereby loan is made to him to enable him to complete building, is not an original contractor within meaning of statute giving subcontractors' liens; *Ragon v. Howard*, 97 Tenn. 334, 37 S. W. 136, holding that vendor in executory contract under which purchaser takes possession of lot, and which contemplates erection of building by him and passing of title and execution of mortgage to secure purchase price and advances, is not "owner" within meaning of mechanics' lien laws; *Miller v. Clark*, 2 E. D. Smith, 543, holding that owner of land who advances another money to erect building thereon agreeing to convey him title when building is completed and to take back mortgage to secure advances is not "owner" within meaning of such laws; *Burbridge v. Marey*, 54 How. Pr. 446, holding to same effect.

Priority between mechanics' lien and vendor's lien.

Cited in *Charleston Lumber & Mfg. Co. v. Brockmyer*, 18 W. Va. 586, holding that lien of mechanic, building under contract with one to whom owner of land agreed to convey when building was completed is subject to lien reserved by vendor for unpaid purchase money.

Cited in reference note in 41 A. S. R. 771, on priority between vendors' lien and mechanics' lien.

Distinguished in *Hackett v. Badeau*, 63 N. Y. 476, holding that lien of vendor of land is subject to lien of mechanic who assisted vendee in erecting building which latter in his contract with vendor agreed to erect with money advanced him by vendor.

Priority between chattel mortgages and statutory liens.

Cited in reference note in 66 A. S. R. 20, on priority between chattel mortgage and statutory liens.

Intervention in mechanics' lien proceedings.

Cited in *Pool v. Sanford*, 52 Tex. 621, holding that intervention may be allowed in mechanics' lien proceedings where interests of parties are intimately connected and interdependent.

Meaning of word "own."

Cited in *Gibson v. Gibson*, 43 Wis. 23, 28 A. R. 537, to point that verb "own" implies estate and applies only to things subject to sale and transfer.

Oral agreements to answer for another's debt.

Cited in *Weyer v. Beach*, 14 Hun, 231, holding oral agreement by owner of building to see that subcontractor is paid what is due him by principal contractor, within statute of frauds; *Woods v. Wilder*, 43 N. Y. 164, 3 A. R. 684, to point that agreement to pay drafts of another should be in writing.

Cited in note in 95 A. D. 251, as to what promises to answer for third person's debt are within statute of frauds and what are not.

Oral promise to accept order or bill not drawn.

Cited in note in 26 L.R.A. 621, on validity of parol promise to accept order or bill of exchange not yet drawn.

61 AM. DEC. 700, GRIFFIN v. NEW YORK, 9 N. Y. 456.

Municipal liability in actions of tort.

Cited in *Detroit v. Blackeby*, 21 Mich. 84, 4 A. R. 450, 2 Legal Gaz. 337, holding city not liable in private action by injured party for neglect to keep cross-

walk in repair; *Hubbell v. Viroqua*, 67 Wis. 343, 58 A. R. 866, 30 N. W. 847, holding city not liable to one injured while upon streets by firing of gun in licensed shooting gallery; *Savannah v. Walder*, 49 Ga. 316, holding it duty of city to see that proper measures are taken to secure safety of public when its streets are torn up by independent contractor to lay sewers therein; *Hickok v. Plattsburgh*, 15 Barb. 427, holding that where statute gives village officers control over streets for public's and not village's benefit no private action can be maintained against village for negligence of such officers in caring for streets; *Smith v. New York*, 66 N. Y. 295, 23 A. R. 53, holding that one cannot recover for damage caused his property by overflow of sewer unless city was negligent in constructing or maintaining it; *O'Donnell v. Syracuse*, 184 N. Y. 1, 112 A. S. R. 558, 3 L.R.A. (N.S.) 1053, 76 N. E. 738, 6 A. & E. Ann. Cas. 173, holding city not liable, in absence of negligence, to abutting owners for damages arising from stream's overflow in times of freshet due to city's building bridges to carry streets across stream; *Morton v. New York*, 65 Hun, 32, 19 N. Y. Supp. 603, holding that municipal corporation is liable for maintenance of nuisance upon same principles as are private individuals; *Cornell v. New York*, 20 N. Y. Supp. 314, to same point; *Collins v. Macon*, 69 Ga. 542, holding that no action lies against city for permitting destruction of levee which it had many years previously voluntarily constructed; *Dewey v. Detroit*, 15 Mich. 307, holding in action for injury caused by defect in sidewalk, that number of officers city employs can never be made basis of complaint against it; *Hunt v. New York*, 20 Jones & S. 198, holding that one injured by explosion of gas which had accumulated in man-hole built in city streets and owned by private corporation cannot recover from city.

Cited in reference notes in 59 A. D. 530, on duty of municipal corporation to keep streets in repair; 66 A. D. 466, on liability of cities and towns for injuries arising from defective highways; 89 A. D. 425, on city's liability for injuries caused by unauthorized obstruction in street; 98 A. D. 587, on defects in streets and highways for which cities and towns are liable.

Cited in notes in 5 L.R.A. 253, on liability of municipal corporations for injuries resulting from defective streets, bridges, etc.; 39 L.R.A. 656, on municipal power over nuisances consisting of obstructions or encroachments on street.

— **For failure to enact or enforce ordinances.**

Cited in *Lorillard v. Monroe*, 11 N. Y. 392, 62 A. D. 120, to point that city is not liable for injury resulting from neglect of its officer to execute its ordinances; *Stillwell v. New York*, 17 Jones & S. 360, holding city not liable for injury resulting from failure of its officers to enforce street ordinances; *Studeor v. Gouverneur*, 15 App. Div. 220, 44 N. Y. Supp. 122, holding same where officers failed to enforce by-law regulating standing of wagons in streets; *O'Meara v. New York*, 1 Daly, 425, holding city not liable to one struck by its fire engine which was being unlawfully driven over sidewalk by its firemen; *Faulkner v. Aurora*, 85 Ind. 130, 44 A. R. 1; *Lafayette v. Timberlake*, 88 Ind. 330,—holding town not liable for injury caused by coasting in streets which, though unlawful, its officers permitted to continue; *Hull v. Roxboro*, 142 N. C. 453, 12 L.R.A. (N.S.) 638, 55 S. E. 351, holding city not liable for sickness of its inhabitants arising from its failure to enforce ordinances imposing penalties for maintenance of nuisances; *Hutson v. New York*, 5 Sandf. 289, to point that city may not be liable for obstructions placed in its streets by third persons in violation of its ordinances; *Cain v. Syracuse*, 95 N. Y. 83, holding city which failed

to exercise its charter power to have dangerous walls demolished not liable to one injured by fall of dangerous wall; *Landau v. New York*, 90 App. Div. 50, 85 N. Y. Supp. 616, holding city which had suspended ordinance prohibiting discharge of fireworks not liable to person injured by explosion of fireworks in public street; *Rogers v. Binghamton*, 101 App. Div. 352, 92 N. Y. Supp. 179, holding city not liable to one struck by bicycle while on sidewalk in section of city to which it failed to extend ordinance prohibiting riding of bicycles on sidewalks; *Rivers v. Augusta*, 65 Ga. 376, 38 A. R. 789, holding town not liable to child gored by cow running at large in public streets.

— As dependent upon knowledge of existence of cause of complaint.

Cited in *Sully v. Goldsmith*, 33 Iowa, 397, holding that for city to be liable for injuries resulting from obstruction in sidewalk it must have had either actual or constructive notice thereof; *Seaman v. New York*, 3 Daly, 147, holding city though responsible for river's condition not liable where injury was caused by spiles driven by third person and of which it had no notice; *Theall v. Yonkers*, 21 Hun, 265, holding that one injured by falling into hole in bridge, of which city, whose duty it was to keep bridge in repair, had no notice, cannot recover; *Lafayette v. Blood*, 40 Ind. 62, holding city not liable for accident resulting from leaving of coal chute in sidewalk open for short time; *Wendell v. Troy*, 4 Abb. App. Dec. 563, 4 Keyes, 261, as to city's liability for injuries caused by temporary obstructions placed in streets by third persons; *Wessman v. Brooklyn*, 40 N. Y. S. R. 698, 16 N. Y. Supp. 97, holding city failing to repair its drain after having been notified of its obstruction by third person liable for damages resulting from such obstruction; *Requa v. Rochester*, 45 N. Y. 129, 6 A. R. 52, holding city liable where between removal of plank from bridge by third person and occurrence of accident some days had elapsed; *Ploedterll v. New York*, 55 N. Y. 666, holding that one injured by tripping over stone allowed to remain in sidewalk for some months may recover; *Hume v. New York*, 47 N. Y. 639 (reversing 9 Hun, 674), holding city not liable to one injured by fall of awning from some hidden defect; *Parker v. Cohoes*, 10 Hun, 531 (dissenting opinion), as to city's liability to one who drove into excavation made by it where guards which it had erected were removed by stranger.

Cited in notes in 30 A. S. R. 389, on negligence and not injury as test of municipal liability for injury by defect in public streets; 5 L.R.A. 255, on showing knowledge of defect to charge municipality for injury by defect in highway.

Distinguished in *Wallace v. New York*, 18 How. Pr. 169, 9 Abb. Pr. 40, holding city liable where accident occurs through its allowing streets to be out of repair; *Barton v. Syracuse*, 36 N. Y. 54, 1 N. Y. Transp. App. 317 (affirming 37 Barb. 292), holding in action against city for damages resulting from its failure to keep sewer in repair that proof of notice that sewer needed repair need not be made; *Worster v. Forty-Second Street & G. Street Ferry R. Co.* 50 N. Y. 203, applying same principle where plaintiff's horse was injured by reason of bad condition of railway company's track.

Modified in *McVee v. Watertown*, 92 Hun, 306, 36 N. Y. Supp. 870, holding that actual notice need not be shown to charge city with liability for injury resulting from defect in sidewalk which had existed for six months.

Contributory negligence as bar to recovery.

Cited in *Fox v. Glastenbury*, 29 Conn. 204, holding that one guilty of want of ordinary prudence in attempting to pass over defective cause way cannot recover for resulting injuries; *Riest v. Goshen*, 42 Ind. 339, holding that one

cannot recover for injury received while on defective bridge with condition of which he was familiar; *Welling v. Judge*, 40 Barb. 193, holding that where evidence is conflicting it is for jury to determine whether plaintiff who was injured by passing team had negligently taken dangerous position; *Clark v. Kirwan*, 4 E. D. Smith, 21, to point that if one be injured in driving over obstruction in highway which he could have avoided he cannot recover; *Delafield v. Union Ferry Co.* 5 Robt. 207 (dissenting opinion), upon point that contributing negligence upon part of plaintiff will defeat recovery.

What constitutes contributory negligence.

Distinguished in *Pomfrey v. Saratoga Springs*, 34 Hun, 607, holding it not negligence per se for one to attempt to pass over mound of snow three feet high.

Force of plea of general issue.

Cited in *Kendall v. Brownson*, 47 N. H. 186, to point that general issue plea includes no affirmative allegations but is mere denial of material facts averred in declaration.

Summary abatement of public nuisance by individual.

Cited in reference note in 28 A. D. 527, on right of individual to summarily abate public nuisance.

61 AM. DEC. 706, LEWIS v. SMITH, 9 N. Y. 502.

Nature of contract to convey land.

Cited in *Adams v. Green*, 34 Barb. 176, holding that as between executor and heir or devisee of vendor contract for sale of land is personal estate and goes to executor; *Baldwin v. Humphrey*, 44 N. Y. 609; *Thomson v. Smith*, 63 N. Y. 301,—to point that interest of vendor in contract to purchase land passes as personalty to his personal representative while legal title descends to his heirs in trust for purchasers; *Armstrong v. McLean*, 153 N. Y. 490, 47 N. E. 912, to same effect; *Bowen v. Lansing*, 129 Mich. 117, 95 A. S. R. 427, 57 L.R.A. 643, 88 N. W. 384, holding that vendor's interest in partially performed contract to purchase land of which vendee is in possession passes to his personal representatives and is not subject to execution for debts of heirs; *Hamilton v. Patrick*, 62 Hun, 74, 16 N. Y. Supp. 952 (dissenting opinion), upon point that equity treats vendee in contract for sale of land as owner and vendor as creditor with land as security for purchase money; *Smith v. Gage*, 41 Barb. 60, holding that where will gives beneficiary contracts which testator had made for sale of land he takes personal estate; *Potter v. Ellice*, 48 N. Y. 321, holding that administrators of deceased vendor are necessary parties to action for specific performance of his contract to convey land; *Accidental Realty Co. v. Palmer*, 117 App. Div. 505, 102 N. Y. Supp. 648, holding that vendee in contract for sale of land has, if through no fault of his contract is not completed, an equitable lien for advances made by him; *Holly v. Hirsch*, 63 Hun, 241, 17 N. Y. Supp. 821, holding that executor though given power of sale cannot execute valid legal deed to one to whom testator had contracted to sell land.

Cited in reference note in 95 A. S. R. 430, on liability to execution against heir of deceased vendor's interest in land.

Cited in note in 57 L.R.A. 643, on application of doctrine of equitable conversion to nature of interest of vendor or vendee in land contract.

Distinguished in *Holly v. Hirsch*, 135 N. Y. 590, 32 N. E. 709, holding that executor given a power in trust over testator's lands may execute to one to whom testator had agreed to convey, a deed of conveyance.

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Meaning of "or otherwise."

Cited in *Weldon Nat. Bank v. Smith*, 30 C. C. A. 133, 57 U. S. App. 136, 86 Fed. 398, holding that words "or otherwise" in phrase "as common carriers, warehousemen or otherwise" should be read *ejusdem generis*; *Barnes v. Blake*, 59 Hun, 371, 13 N. Y. Supp. 77, 20 N. Y. Civ. Proc. Rep. 17, upon construction to be placed upon words "or otherwise."

Election between will and dower or widow's allowance.

Cited in *Re Smith*, 1 Misc. 269, 32 N. Y. Supp. 1061, holding that any provision that is made for wife in will is presumably intended as an addition to dower; *Tobias v. Ketchum*, 32 N. Y. 319 (reversing 36 Barb. 304), holding that widow is not put to her election unless devise be clearly inconsistent with claim of dower; *Wood v. Seely*, 32 N. Y. 105; *Mills v. Mills*, 28 Barb. 454 (dissenting opinion),—upon same point; *Vernon v. Vernon*, 7 Lans. 492, holding that widow may retain her dower in addition to what will gives her unless its retention defeats some disposition made by will; *Re Gordon*, 172 N. Y. 25, 92 A. S. R. 689, 64 N. E. 753, holding that widow will not be put to her election unless will contain provisions inconsistent with her right to demand dower. *Dodge v. Dodge*, 21 How. Pr. 63, 31 Barb. 413, 10 Abb. Pr. 401, holding that widow will be required to elect only when provisions of will are such as to manifest intention to put her to her election; *Like v. Cooper*, 132 Ind. 391, 31 N. E. 1118, holding that widow need not elect where will shows testator intended to give her property in addition to that allowed her by law; *Veeder v. Saxton*, 46 Barb. 188, holding widow entitled to her statutory allowance though by will she was given life estate in all of husband's property; *Purdy v. Purdy*, 18 App. Div. 310, 46 N. Y. Supp. 215, holding dower not barred by devise to wife for life of all of husband's estate, she being required to keep property in repair and pay to particular person a monthly allowance; *Horstmann v. Flegel*, 172 N. Y. 381, 65 N. E. 202, holding widow not put to her election where will after dividing land among children charges upon each child's share an annuity in favor of widow for life; *Konvalinka v. Schlegel*, 104 N. Y. 125, 58 A. R. 494, 9 N. E. 868, holding same where will directs executors to sell testator's property and divide proceeds between widow and children share and share alike; *Re Smith*, 1 Power, 271, holding widow not necessarily put to her election because she is given through trustees income of the estate; *Lauby v. Gill*, 42 Misc. 334, 86 N. Y. Supp. 718, holding that devise to wife of all of the real estate in fee does not put her to her election; *Bond v. McNiff*, 6 Jones & S. 83, holding election not required where widow is devised free and uninterrupted use of all husband's property until majority of youngest child; *Hopkins v. Cameron*, 34 Misc. 688, 70 N. Y. Supp. 1027, to point that devise of life estate in entire real property to wife does not put her to her election; *Kimbel v. Kimbel*, 14 App. Div. 570, 43 N. Y. Supp. 900, holding that widow may claim dower and also take under will though executor was given power to sell any part of the estate; *Freeland v. Mandeville*, 28 N. J. Eq. 559, holding that claim of dower is not inconsistent with testator's direction that realty be sold to secure means for furnishing special provision made for widow; *Shipman v. Keys*, 127 Ind. 353, 26 N. E. 896, holding that testator intended widow to have her statutory allowance though will gave her land and money and contained residuary clause; *Nelson v. Brown*, 144 N. Y. 384, 39 N. E. 355 (affirming 66 Hun, 311, 20 N. Y. Supp. 978), holding devise of income of husband's estate for widow's life, same to be received "in lieu of dower, and in addition to what she would have as

dowress if this devise was not so made to her" bars dower; *Watrous v. Winn*, 37 Iowa, 72, holding wife's right of dower not barred by devise to her of one-third of all of husband's realty and personalty with residue to children; *Colgate v. Colgate*, 23 N. J. Eq. 372, holding that widow must elect where will directs executors to pay widow during her life income from one-half of proceeds of sale of his estate, residue being divided among children; *Re Johnson*, 50 Misc. 99, 100 N. Y. Supp. 373, holding widow put to her election where will created a trust of husband's entire estate for her benefit during her widowhood; *Helm v. Leggett*, 66 Ark. 23, 48 S. W. 675, holding that devise of lands to wife, in which was included homestead, she to have full control over same during her lifetime or widowhood bars her homestead right; *Nagel's Estate*, 35 N. Y. S. R. 245, 12 N. Y. Supp. 707, holding widow's failure to elect within time allowed by law not excused by her ignorance of condition of husband's estate or fact that testamentary provision is disproportionate to dower's value; *Huff v. Wheeler*, 27 Misc. 763, 59 N. Y. Supp. 716, holding that though husband had made deed of land to stranger and latter had six months thereafter conveyed same to wife, she may claim dower.

Cited in reference notes in 28 A. D. 459, on testamentary provision as bar to dower; 64 A. D. 760, on when devise or legacy is in lieu of dower; 81 A. D. 216, as to when widow's election between dower and testamentary provision will be compelled; 92 A. D. 399, on dower being paramount to all conveyances and contracts executed by husband; 1 A. S. R. 775, on election by widow between bequest and dower; 58 A. S. R. 461, on election between will and dower.

Cited in notes in 92 A. S. R. 699, on effect of devise of life estate on widow's duty to elect between benefits of will and right to dower or in community property; 3 L.R.A. 498-499, on when widow is put to election between provision in will and dower; 12 L.R.A. 227, on method by which widow may elect to take under the will; 12 L.R.A. 229-230, as to when widow is put to her election between her rights under the will and under the law; 10 E. R. C. 347, on election by widow between testamentary provision and dower.

Distinguished in *Re Zahrt*, 94 N. Y. 605, holding that where will gives wife rents and income from whole estate upon condition that she pay taxes, etc. and keep property in repair dower cannot be claimed; *Closs v. Eldert*, 16 Misc. 104, 37 N. Y. Supp. 353, holding that devise of residue "equally" to widow, son, and daughter "share and share alike" is inconsistent with right of dower; *Wilson v. Wilson*, 120 App. Div. 581, 105 N. Y. Supp. 151, holding same as to will which directed that estate be divided into two equal parts, one part to be held in trust for widow and other to be divided among children; *Jurgens v. Rogge*, 16 Misc. 100, 37 N. Y. Supp. 249, holding same as to devise of entire estate to widow with provision that if she remarried she was to retain one-third and balance to be divided among children.

Right of one who had lived apart from husband to claim widow's privileges.

Cited in *Shed's Estate*, 33 N. Y. S. R. 10, 11 N. Y. Supp. 788, holding widow entitled to her exemption upon husband's death though she had not lived with him for ten years prior thereto.

Effect of judgment which determines matters not litigated.

Cited in *Finders v. Bodle*, 58 Neb. 57, 78 N. W. 480, to point that judgment of court upon question not presented for its decision may be assailed collaterally; *Spoors v. Coen*, 44 Ohio St. 497, 9 N. E. 132, holding that judgment of court

annulling a conveyance in respect to which petition had not invoked its jurisdiction is void and open to collateral attack; *Sache v. Wallace*, 101 Minn. 169, 118 A. S. R. 612, 11 L.R.A. (N.S.) 803, 112 N. W. 386, 11 A. & E. Ann. Cas. 348, holding same as to so much of judgment in action to determine adverse claims to real property as awarded relief beyond prayer of complaint or scope of its allegations; *Grady v. McCorkle*, 57 Mo. 172, 17 A. R. 676, holding that in suit for specific performance of contract to convey land brought against widow and heirs of owner, widow's dower can be barred only by specifically litigating her right thereto; *Clements v. Davis*, 155 Ind. 624, 57 N. E. 905, holding that in proceedings to enforce claims to which right of dower is paramount, such right to be concluded must be specifically put in issue; *Hix v. Gosling*, 1 Lea, 560, holding that decree will not estop married woman except as to rights actually litigated; *Jewett v. Feldheiser*, 68 Ohio St. 523, 67 N. E. 1072, holding that judgment in suit brought by husband's judgment creditors to marshal liens does not affect wife's inchoate right of dower; *Malloney v. Horan*, 49 N. Y. 111, 10 A. R. 335, 12 Abb. Pr. N. S. 289, holding that judgment in action by husband's creditors vacating deeds from him and his wife to stranger and from latter back to wife does not estop her from claiming dower upon husband's death, if question of dower was not litigated in creditor's action.

Matters triable in foreclosure proceedings.

Cited in *Coe v. New Jersey Midland R. Co.* 31 N. J. Eq. 105, holding that rights of one claiming in hostility to mortgagor cannot be litigated in foreclosure suit; *Frost v. Koon*, 30 N. Y. 428, holding to same effect; *Clapp v. McCabe*, 84 Hun, 379, 32 N. Y. Supp. 425, holding that in foreclosure suit court cannot adjudge that land not mentioned in complaint is covered by mortgage; *Keeler v. McNeirney*, 6 N. Y. Civ. Proc. Rep. 363, holding that in action to foreclose mortgage question whether mortgagee purchased in good faith and for value cannot as against grantee in deed executed but not recorded before mortgage be determined.

Cited in notes in 89 A. D. 434, 435, on right to try title in foreclosure proceedings; 18 E. R. C. 490, on right of mortgagee to bring action to foreclose mortgagor of his equity of redemption.

Distinguished in *Iowa County v. Mineral Point R. Co.*, 24 Wis. 93, holding that if issue as to priority between mortgages be distinctly raised by pleadings in foreclosure action decree therein is conclusive upon such question.

— Matters as to prior claims and claimants generally.

Cited in *Pancoast v. Travelers' Ins. Co.* 79 Ind. 172, holding that parties claiming title paramount to that of mortgagor are not proper parties in foreclosure suit; *Banning v. Bradford*, 21 Minn. 308, 18 A. R. 398, holding that mortgagee cannot make one claiming title paramount to mortgagor party to foreclosure suit; *Foval v. Benton*, 48 Ill. App. 638, holding interest of first mortgagee not affected by foreclosure suit brought by second mortgagee though he was made party and bill alleged his interest accrued subsequent to lien of complainant's mortgage; *Summers v. Bromley*, 28 Mich. 125, holding it improper in foreclosure suit to litigate rights of one who sets up legal title paramount to title of both mortgagor and mortgagee; *Wing v. Field*, 35 Hun, 617, holding that one claiming under title paramount may ignore mortgage foreclosure proceeding; *Condit v. Goodwin*, 44 Misc. 312, 89 N. Y. Supp. 827, holding that persons whose claims are prior to mortgage are not proper parties to foreclosure suit; *Pelton v. Farmin*, 18 Wis. 222, holding that under statute declar-

ing that sheriff's deed shall pass "rights and interests of parties in property adjudged to be sold" questions of paramount title cannot be tried in foreclosure action; *Beronio v. Ventura County Lumber Co.* 129 Cal. 232, 79 A. S. R. 118, 61 Pac. 958, holding that where bill for foreclosure avers that a defendant other than mortgagor claims interest in property which it avers, is subsequent to that of mortgagee's, the judgment does not affect any prior interest of such defendant; *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 38 A. S. R. 747, 55 N. W. 218, holding to same effect; *Buzzell v. Still*, 63 Vt. 490, 25 A. S. R. 777, 22 Atl. 619, holding that general clause in foreclosure decree barring interests of parties defendant does not affect lien of prior mortgage not specifically attacked in foreclosure suit; *Strobe v. Downer*, 13 Wis. 10, 80 A. D. 709, holding to same effect; *Payn v. Grant*, 23 Hun, 134, holding that general clause in foreclosure decree does not affect rights of defendants claiming by title paramount; *Rathbone v. Hooney*, 58 N. Y. 463, holding that decree in foreclosure suit does not affect rights paramount to those of mortgagor and mortgagee; *Re Walgering*, 84 Hun, 527, 32 N. Y. Supp. 853, holding to same effect; *Emigrant Industrial Sav. Bank v. Goldman*, 75 N. Y. 127, holding that judgment in foreclosure suit purporting to bar interests of all parties affects no interest paramount to that of both mortgagee and mortgagor; *Lee v. Parker*, 43 Barb. 611, holding that defendant in foreclosure action is not affected by judgment therein unless his claim of title when arising prior to mortgage is specifically litigated; *Ruyter v. Reid*, 121 N. Y. 498, 24 N. E. 791, to point that any title occupant of property has which is superior and adverse to complainant's mortgage cannot be determined in foreclosure suit; *Becker v. Howard*, 4 Hun, 359, 6 Thomp. & C. 603, holding that parties claiming in hostility to mortgage or by title paramount are unaffected by *lis pendens* filed in foreclosure action; *Short v. Noonery*, 16 Kan. 220, holding that bill to foreclose mortgage must allege that interest of persons brought in as defendants is junior to mortgagee's; *Mayer v. Margolies*, 47 Misc. 24, 95 N. Y. Supp. 204, to point that judgment taken by default in foreclosure suit to which one who claims easement under deeds antedating mortgage is made party does not affect his easement; *Frost v. Koon*, 30 N. Y. 428, holding that one holding liens both prior and subsequent to lien of mortgage sought to be foreclosed is by confessing complaint in foreclosure suit concluded only as to subsequent lien; *Adams v. McPartlin*, 11 Abb. N. C. 369, holding that subsequent mortgagee cannot bring suit to foreclose his mortgage and by making prior mortgagee a party prevent latter's foreclosing his mortgage; *Fincke v. Buffalo*, 5 N. Y. S. R. 237, holding that if title acquired by eminent domain be paramount to lien of mortgage it is not affected by judgment in foreclosure suit unless specifically attacked therein; *Goebel v. Iffa*, 48 Hun, 21, holding that hostile and paramount claims may be adjudicated in foreclosure action if complaint set forth facts upon which they are founded; *Harland v. Bankers' & M. Teleg. Co.* 33 Fed. 199, to same point; *Jacobie v. Mickle*, 144 N. Y. 237, 39 N. E. 66, holding first mortgagee concluded where complaint in foreclosure suit brought by second mortgagee made former a party and alleged that he held prior lien, and judgment rendered, required that his lien be first satisfied; *Wilkins v. Kirkbridge*, 27 N. J. Eq. 93, holding remainderman who did not join in mortgage in fee made by life tenant no proper party to foreclosure suit; *Ruyter v. Reid*, 121 N. Y. 498, 24 N. E. 791, holding that occupant of land may properly be made party to foreclosure action if he claims under mortgagor.

Cited in notes in 80 A. D. 714, on prior mortgagees and lienors as necessary or proper parties on foreclosure; 68 L.R.A. 327, on waiver of junior lien by failure to assert it in foreclosure proceedings in which a default was taken.

Distinguished in *Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 31 L. ed. 309, 8 Sup. Ct. Rep. 337, holding decree of foreclosure taken pro confesso against owner of tax title adjudging that he had no lien or title, conclusive against him; *Lembeck & B. Eagle Brewing Co. v. Sexton*, 184 N. Y. 185, 77 N. E. 38, holding that question whether title asserted in foreclosure action is in fact paramount or hostile may be determined if pleadings present such question as an issue.

— As to taxes and assessments.

Cited in *Oliphant v. Burns*, 146 N. Y. 218, 40 N. E. 980, to point that validity of tax title which is paramount to mortgagor's title cannot be properly tested in foreclosure action; *Dickinson v. Trenton*, 33 N. J. Eq. 63, holding that interest one has under an assessment against land is not concluded by any judgment in foreclosure suit to which he is made party unless question of such interest be specifically litigated therein.

— As to dower.

Cited in *Wade v. Miller*, 32 N. J. L. 296, holding that widow's claim to dower not cut off by foreclosure of husband's mortgage, when bill makes no allusion to such dower right, although widow on other grounds, is party; *Anderson v. McNeely*, 120 App. Div. 676, 105 N. Y. Supp. 278, holding wife's inchoate right of dower not affected by foreclosure of husband's mortgage not executed by her; *Lanier v. Smith*, 37 Hun, 529, holding that where paramount claim of dower is set up in foreclosure suit, complaint must be dismissed as to claimant or her claim excluded from operation of judgment; *Ligare v. Semple*, 32 Mich. 438, holding that wife who is not entitled to dower need not be made party to foreclosure suit defense to which is based on her right of dower; *Barker v. Burton*, 67 Barb. 458, holding that wife need not be made party to suit to foreclose husband's mortgage in which she did not join; *Parmenter v. Binkley*, 28 Ohio St. 32, holding widow's claim to dower not barred by foreclosure of mortgage executed by husband alone, though she is made party to suit; *Merchants' Nat. Bank v. Thomson*, 55 N. Y. 7, holding that wife's dower is not barred by judgment against defendants in suit to foreclose mortgage not executed by her though she be made party to such suit; *Nelson v. Brown*, 66 Hun, 311, 20 N. Y. Supp. 978, to point that wife's paramount right of dower is not barred by judgment in foreclosure action taken against her by default; *Wade v. Miller*, 32 N. J. L. 296, holding that for decree of foreclosure to cut off dower of widow made party to foreclosure suit question of her dower must be specifically litigated therein; *Jordan v. Van Epps*, 85 N. Y. 427, to point that in foreclosure suits prior dower-rights cannot be cut off where it is merely alleged that the interest is subsequent and objection is taken; *Fern v. Osterhout*, 11 App. Div. 319, 42 N. Y. Supp. 450, holding that claim of dower can be barred by judgment in foreclosure suit only when complaint specifically shows that such claim is to be litigated.

Cited in reference note in 112 A. S. R. 627, on mortgage foreclosure sale of husband's lands as bar of wife's right to dower.

Distinguished in *Feitner v. Hoeger*, 14 Daly, 470, holding that decree in foreclosure suit bars dower of wife who was made party thereto where bill averred that mortgage was executed by herself and husband and conveyed all their title

and prayed foreclosure against both; *Matthews v. Duryee*, 4 Keyes, 525, 3 Abb. App. Dec. 227 (dissenting opinion), upon point that wife's contingent right of dower is unaffected by foreclosure proceedings.

Defenses available to wife in foreclosure proceedings.

Cited in *Feitner v. Hoeger*, 14 Daly, 470, holding that wife who in infancy joined in husband's mortgage may plead such fact as defense in foreclosure suit.

Right to attack collaterally judgment of court of general jurisdiction.

Cited in *Banking House of A. Castetter v. Dukes*, 70 Neb. 648, 97 N. W. 805, holding that where record of court of general jurisdiction shows that it acted without jurisdiction in particular case its judgment may be collaterally attacked.

Effect of default judgment.

Cited in notes in 68 A. S. R. 361, on effect of default judgment against holder of adverse or paramount title; 11 L.R.A.(N.S.) 804, on effect of default judgment beyond scope of the relief asked.

61 AM. DEC. 716, COTHEAL v. TALMAGE, 9 N. Y. 551.

Liquidated damages and penalties.

Cited in *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45 (modifying 51 How. Pr. 31), holding that whether stipulation creates penalty or liquidated damages depends upon intention of parties as evinced by entire agreement construed in light of particular circumstances; *Taylor v. Risley*, 28 Hun, 141 (dissenting opinion), upon same point.

Cited in notes in 30 A. R. 32-36, on liquidated damages and penalties; 108 A. S. R. 52, on uncertainty of actual damages as test for determining as between liquidated damages and penalty; 13 L.R.A. 671, on distinction between liquidated damages and penalty in contract; 6 E. R. C. 561, on distinction between a penalty and liquidated damages mentioned as payable in event of nonperformance of contract.

— When amount stipulated for deemed a penalty.

Cited in *Lampman v. Cochran*, 16 N. Y. 275, holding that sum agreed on must be deemed penalty where it is necessarily inadequate compensation for breach of some of contract's provision and excessive compensation for breach of others; *Bryton v. Marston*, 33 Ill. App. 211, holding provision in contract for sale of drama that five thousand dollars was to be paid for breach of any covenant, a penalty where one such covenant was that vendee was always to use author's name in advertising drama; *Colwell v. Lawrence*, 38 N. Y. 71, 5 N. Y. Trans. App. 307, 36 How. Pr. 306 (affirming 24 How. Pr. 324, 38 Barb. 643), holding stipulation to pay one hundred dollars for every day that completion of engines is delayed, a penalty; *Giles v. Spaulding*, 5 Hun, 458, holding provision for forfeiture of lease and payment of \$5000 for breach of covenants against subletting or use of building for any but theatrical purposes, a penalty; *Frank v. Block*, 9 N. Y. S. R. 101, holding stipulation for payment by vendor to vendee of one thousand dollars if former fails to make shipment of goods to value of two thousand dollars, a penalty.

Distinguished in *Salters v. Ralph*, 15 Abb. Pr. 273, holding that provision that for breach of contract party shall "forfeit" named sum implies a penalty and not liquidated damages.

— When deemed liquidated damages.

Cited in *Chaude v. Shepard*, 122 N. Y. 397, 25 N. E. 358, to point that if

damages be uncertain and sum agreed on be reasonable it will be held liquidated damages; *Studabaker v. White*, 31 Ind. 211, 99 A. D. 628, holding that where agreement consists of one or more stipulations, breach of which cannot be measured, sum agreed on will be held liquidated damages; *Staples v. Parker*, 41 Barb. 648, to point that sum fixed in contract may be deemed damages although it is to be paid on breach of any one of several distinct stipulations of varying degrees of importance; *Emack v. Campbell*, 14 App. D. C. 186, holding provision in building contract to pay five dollars for each day building remains incomplete after named date enforceable as being liquidated damages; *Lennon v. Smith*, 14 Daly, 520, 1 N. Y. Supp. 97, holding same as to stipulation for payment of twenty dollars for every day's delay in completion of mason work; *Curtis v. Van Bergh*, 161 N. Y. 47, 55 N. E. 398, holding same as to agreement to pay manufacturer fifty dollars for each day's delay in turning over to him building which was to be erected for and leased by him; *Dunn v. Morganthau*, 73 App. Div. 147, 76 N. Y. Supp. 827, holding same as to stipulation to pay fifty dollars for each day's delay in removing rocks from building lots; *Shute v. Hamilton*, 3 Daly, 462, holding same as to agreement to pay fifty dollars for each day's delay in completing building contract; *Reichenbach v. Sage*, 13 Wash. 364, 32 A. S. R. 51, 43 Pac. 354, holding same as to stipulation for payment of ten dollars for every day's delay in completing seven thousand dollar residence; *Clement v. Cash*, 21 N. Y. 253, holding same as to agreement to pay fixed sum for breach of any condition in contract to convey land; *Streeper v. Williams*, 48 Pa. 450, holding same as to agreement to forfeit five hundred dollars if contract for sale of fourteen thousand dollar hotel were abandoned; *Parsons v. Taylor*, 12 Hun, 252, holding same as to stipulation for forfeiture of ten dollars for failure of parties to contract for exchange of property to abide by arbitrator's decision as to its value; *Little v. Banks*, 85 N. Y. 258, holding same as to agreement that book-seller is to keep certain books upon his shelves for sale or "forfeit and pay sum of one hundred dollars;" *Wilson v. Duls*, 1 N. Y. City Ct. Rep. 132, holding same as to stipulation for payment of two hundred and fifty dollars by employee for breach of contract of employment; *Manice v. Brady*, 15 Abb. Pr. 173, holding sum which one is to pay for temporary use of another's land unless he performed certain conditions, not a penalty if it be no more than land's rental value; *Noyes v. Phillips*, 60 N. Y. 408, 16 Abb. Pr. N. S. 400, to point that penalty is not necessarily created by agreement to exchange real estate or "forfeit five hundred dollars;" *Pastor v. Solomon*, 26 Misc. 125, 55 N. Y. Supp. 956 (affirming 25 Misc. 322, 54 N. Y. Supp. 575), holding that sum of five hundred dollars may be recovered as liquidated damages where actors violate their agreement not to perform in rival theatre; *Taylor v. Times Newspaper Co.*, 83 Minn. 523, 85 A. S. R. 473, 86 N. W. 760, holding that one who was to sell secret plan for newspaper advertising and to receive, if plan were adopted, large percentage of advertising receipts, may recover as liquidated damages percentage agreed on; *General Electric Co. v. Westinghouse Electric & Mfg. Co.*, 144 Fed. 458, holding provision in agreement between manufacturers that party who violates his agreement not to sell particular article is to pay as damages fifty per cent of price at which it is being sold by party entitled to its exclusive manufacture, not a penalty.

Cited in reference notes in 25 A. S. R. 110, on liquidated damages for breach of contract; 30 A. S. R. 870, on what are deemed to be liquidated damages.

Cited in notes in 108 A. S. R. 57, on contracts containing several provisions,

as agreements for liquidated damages; 10 L.R.A. 829, on when provision in contract is considered as for liquidated damages.

— **Proper subject for liquidated damages.**

Cited in *Cowdrey v. Carpenter*, 1 Abb. App. Dec. 445, holding that damages which are entirely uncertain are proper subject of liquidation by parties.

Construction of contracts.

Cited in *Gillet v. Bank of America*, 160 N. Y. 549, 55 N. E. 292, holding that contracts are to be construed in light of circumstances-surrounding their making; *Gallup v. Sterling*, 22 Misc. 672, 49 N. Y. Supp. 942, holding to same effect.

61 AM. DEC. 721, HENDRICKSON v. PEOPLE, 10 N. Y. 13.

Admissibility of self-incriminating testimony.

Cited in *People v. Wieger*, 100 Cal. 352, 34 Pac. 826; *State v. Hopkins*, 13 Wash. 5, 42 Pac. 627,—holding that voluntary statements made in civil action may be used against witness in subsequent criminal prosecution; *People v. Burt*, 51 App. Div. 106, 64 N. Y. Supp. 417, 15 N. Y. Crim. Rep. 43, holding that testimony given by one at preliminary examination of another may be used against former when subsequently accused and prosecuted for same offense; *Dickerson v. State*, 48 Wis. 288, 4 N. W. 321, holding voluntary statements made by one under arrest at preliminary examination of another accused of same crime admissible against former upon his trial for such crime; *People v. Meyer*, 162 N. Y. 357, 56 N. E. 758, 14 N. Y. Crim. Rep. 487, holding statements made by one while under arrest admissible against him; *People v. Kennedy*, 159 N. Y. 346, 70 A. S. R. 557, 54 N. E. 51, 14 N. Y. Crim. Rep. 114, holding same as to voluntary statements to officers made and sworn to by one under arrest; *People v. Chacon*, 3 N. Y. Crim. Rep. 418, holding same as to statements voluntarily made by accused to officers who have him in custody; *People v. Montgomery*, 13 Abb. Pr. N. S. 207, holding to same effect; *Murphy v. People*, 63 N. Y. 590, 2 Cowen, Crim. Rep. 217, holding that accused's statement is not necessarily involuntary because made to officer who has him in custody; *Jeffreds v. People*, 5 Park. Crim. Rep. 522, holding same as to statements made to officer who disguising himself secured accused's friendship and brought about his intoxication; *Gardiner v. People*, 6 Park. Crim. Rep. 155, holding letter to prosecuting attorney voluntarily written and sworn to by one while in jail which sought to throw blame upon another admissible against writer; *People v. Sharp*, 45 Hun, 460, 5 N. Y. Crim. Rep. 388, holding statement voluntarily made before senatorial committee admissible in subsequent prosecution of witness.

Cited in reference notes in 1 A. S. R. 526, as to when confessions are admissible as voluntary; 25 A. S. R. 716, on admissibility of confessions; 55 A. S. R. 24, on admissibility of confessions under oath.

Cited in notes in 6 A. S. R. 246, on when confessions inadmissible; 38 A. S. R. 149, as to when confessions of accused are admissible; 41 A. S. R. 523, on admissibility of confession under oath; 8 E. R. C. 105, on admissibility of confession made by prisoner.

— **Testimony before coroner.**

Cited in *People v. Kief*, 58 Hun, 337, 11 N. Y. Supp. 926, holding testimony given by defendant before coroner admissible in subsequent criminal prosecution; *State v. Coffee*, 56 Conn. 399, 16 Atl. 151; *Newton v. State*, 21 Fla. 53; *State*

v. Finch, 71 Kan. 793, 81 Pac. 494,—holding voluntary statements made by one called before coroner admissible against him when subsequently prosecuted for crime then under investigation; *People v. McGloin*, 91 N. Y. 241, 12 Abb. N. C. 172, 1 N. Y. Crim. Rep. 154, to same point; *People v. Molineux*, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286, 16 N. Y. Crim. Rep. 120, holding same as to testimony given before coroner by one not advised of his rights, but who was not then under arrest or formally accused; *Teachout v. People*, 41 N. Y. 7, 1 Cowen Crim. Rep. 247, holding same as to statements voluntarily made before coroner by one who knew that he was under suspicion; *State v. Gilman*, 51 Me. 206, holding testimony given before coroner by one accused of the crime but who was not then under arrest and who was warned that he was not required to give incriminating testimony admissible against him upon trial; *Adams v. State*, 129 Ga. 248, 17 L.R.A.(N.S.) 468, 58 S. E. 822, 12 A. & E. Ann. Cas. 158; *Farkas v. State*, 60 Miss. 847; *People v. McMahon*, 15 N. Y. 384,—holding testimony given before coroner by one held on charge of having committed crime then being investigated not admissible against him when subsequently prosecuted therefor; *Tuttle v. People*, 33 Colo. 243, 70 L.R.A. 33, 79 Pac. 1035, 3 A. & E. Ann. Cas. 513, holding testimony given before coroner's jury inadmissible against witness when subsequently prosecuted for crime then under investigation, where feeling in community was such as to force him to testify.

Cited in notes in 95 A. S. R. 767-768, on admissibility in cases of homicide of evidence given at coroner's inquest by defendant; 95 A. S. R. 769, on admissibility in cases of homicide of voluntary statements made at coroner's inquest; 70 L.R.A. 35 on competency, on trial for murder, of testimony of accused at coroner's inquest given before arrest; 70 L.R.A. 42, on competency, on trial for murder, of testimony of accused at coroner's inquest given after arrest.

Distinguished in *People v. Mondon*, 103 N. Y. 211, 57 A. R. 709, 8 N. E. 496, 4 N. Y. Crim. Rep. 552 (reversing 38 Hun, 188, 4 N. Y. Crim. Rep. 112), holding statements made before coroner by ignorant foreigner who was then under arrest inadmissible in subsequent prosecution against him for crime under investigation.

—Testimony before grand jury.

Cited in *Jenkins v. State*, 35 Fla. 737, 48 A. S. R. 267, 18 So. 182, holding statements made by witness before grand jury admissible against him when subsequently prosecuted for crime then under investigation; *State v. Campbell*, 73 Kan. 688, 9 L.R.A.(N.S.) 533, 85 Pac. 784, 9 A. & E. Ann. Cas. 1203, holding that statements by accused, in denial of his guilt, while witness before grand jury, are not confessions within rule requiring them to be first shown to have been voluntarily made.

Validity of indictment founded on self-incriminating testimony.

Cited in *State v. Duncan*, 78 Vt. 364, 112 A. S. R. 922, 4 L.R.A.(N.S.) 1144, 63 Atl. 225, 6 A. & E. Ann. Cas. 602, holding that failure to instruct witness as to his rights respecting giving of incriminating testimony when summoned before grand jury does not invalidate indictment against him subsequently found in part upon such testimony.

Proof of motive.

Cited in *Moore v. United States*, 150 U. S. 57, 37 L. ed. 996, 14 Sup. Ct. Rep. 26; *Boyle v. State*, 61 Wis. 440, 21 N. W. 289,—to point that considerable latitude is allowed on question of motive; *Clark v. Folkers*, 1 Neb. (Unof.) 96, 93 N. W. 328, holding that considerable latitude is allowed on question of motive in

action for malicious prosecution; *People v. Townsend*, 37 Barb. 520, holding that great latitude is to be allowed upon question of interest and good faith where fraud is charged; *People v. Wilson*, 117 Cal. 688, 49 Pac. 1054, holding in prosecution for assaulting officer in resisting arrest evidence as to assault for which arrest was being made admissible; *Tuttle v. People*, 36 N. Y. 431, 2 N. Y. Trans. App. 306, holding in prosecution for perjury in respect to deed fact that deed was surreptitiously taken from attorney's office provable.

Cited in note in 105 A. S. R. 987, on admissibility of other offenses as tending to show likelihood of motive to commit the crime.

— On trial for murder.

Cited in *State v. Hansen*, 25 Or. 391, 35 Pac. 976, holding evidence concerning deceased's pecuniary affairs and accused's connection therewith admissible in prosecution for murder; *Kennedy v. People*, 39 N. Y. 245, 1 Cowen Crim. Rep. 119, 5 Abb. Pr. N. S. 147, 6 N. Y. Trans. App. 19, holding it competent to prove in prosecution for murder that deceased had money in his possession; *People v. Greenfield*, 23 Hun, 454, holding upon trial of husband for murder of wife evidence to show his indifference as to her death admissible; *McVin v. United States*, 17 App. D. C. 323, holding that where evidence shows that accused was actuated by jealousy in committing homicide, evidence of his previous conduct and declarations admissible to show object and motive of crime; *People v. Sutherland*, 154 N. Y. 345, 48 N. E. 518, 12 N. Y. Crim. Rep. 495, holding letters from deceased to one accused of killing her showing that former believed latter to be father of her bastard child admissible; *McCann v. People*, 3 Park. Crim. Rep. 272, holding in prosecution for murder fact that deceased had made complaint against accused for assault and battery provable.

Cited in reference note in 38 A. S. R. 150, on evidence of motive in homicide.

61 AM. DEC. 731, WEISSER v. DENISON, 10 N. Y. 68.

When knowledge of agent imputable to principal.

Cited in *Spadone v. Manvel*, 2 Daly, 263, holding that notice to agent is not notice to principal unless it concern transaction within scope of agent's authority; *Jackson v. Mutual Ben. L. Ins. Co.* 79 Minn. 43, 61 N. W. 366, to same point; *Butler v. Michigan Mut. L. Ins. Co.* 184 N. Y. 337, 77 N. E. 398, holding information given insurer's soliciting agent by insured as to condition of her health, not notice to insurer; *Re Guldenkirch*, 35 Misc. 123, 71 N. Y. Supp. 310, holding client not chargeable with knowledge of his attorney in respect to latter's obligation which attorney's conduct shows he desired to evade; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 63 A. S. R. 399, 70 N. W. 769, holding that principal cannot be made liable through his agent's forging payee's name as indorser; *Getman v. Second Nat. Bank*, 23 Hun, 498, holding knowledge acquired by bank's president while acting as such, bank's knowledge; *Powers-Taylor Drug Co. v. Faulconer*, 52 W. Va. 581, 44 S. E. 204, holding that knowledge of cashier and president of bank in respect to fraudulent preference to be made in its favor is its knowledge; *Manning v. Keenan*, 9 Hun, 686, to point that to bind principal act of agent must be within his real or apparent authority.

Cited in reference notes in 73 A. D. 549, on notice to agent in respect of agency as notice to principal; 9 A. S. R. 708, on imputing agent's knowledge to principal; 65 A. D. 189; 68 A. D. 367; 78 A. D. 514; 68 A. S. R. 464,—on notice to agent as notice to principal.

Cited in notes in 24 A. S. R. 228, on notice to agent as notice to principal; 21 E.

R. C. 842, on imputing agent's knowledge to principal so that principal will not be bona fide purchaser.

— Knowledge acquired while not acting for principal.

Cited in *Slattery v. Schwannecke*, 44 Hun, 75, holding knowledge of agent not imputable to principal unless acquired while acting in his behalf; *Wittenbrock v. Parker*, 102 Cal. 93, 41 A. S. R. 172, 24 L.R.A. 197, 36 Pac. 374, holding to same effect; *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314, to point that principal is chargeable with knowledge acquired by agent while executing his agency; *United States v. 278 Barrels of Distilled Spirits*, 2 Cliff. 261, Fed. Cas. No. 16,580, to point that principal is not bound by knowledge of agent acquired before employment; *Crooks v. People's Nat. Bank*, 72 App. Div. 331, 76 N. Y. Supp. 495 (dissenting opinion), upon point that knowledge acquired by bank officer while not acting in his official character is not imputable to bank.

— Agent acting for his own benefit.

Cited in *Henry v. Allen*, 151 N. Y. 1, 36 L.R.A. 658, 45 N. E. 355, holding that knowledge of agent is not knowledge of principal where agent is engaged in perpetration of fraud for his own benefit; *Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326, holding same as to knowledge acquired by agent while dealing with principal's property for his own benefit.

Duty of detecting forgery of bill or note.

Cited in *Frank v. Lanier*, 91 N. Y. 112, holding that vendor of forged note cannot avoid his liability to refund purchase money because of vendee's delay in detecting forgery if latter use reasonable diligence in giving notice after forgery is ascertained; *First Nat. Bank v. Toppan*, 6 Kan. 456, 7 A. R. 568, holding that failure of firm whose name was forged as acceptor of draft to discover and report such fact immediately does not relieve bank from responsibility for having made payment upon such forged acceptance; *United States v. Onondaga County Sav. Bank*, 39 Fed. 259, holding money which government paid upon drafts which it was fraudulently induced to issue upon forged pension vouchers may be recovered if purchaser of draft had same opportunity as it of discovering forgery; *Salt Springs Bank v. Syracuse Sav. Inst.* 62, Barb. 101, holding that bank which pays to holder for value forged check upon itself cannot recover from such holder money so paid him.

Cited in notes in 39 A. D. 525, on discovery of forgery and notice thereof; 86 A. S. R. 124, on right to recover money paid on altered instrument.

— As between bank and its depositors.

Cited in *Morgan v. Bank*, 11 N. Y. 404, holding that bank remains liable to depositor if it pay his check on forged indorsement; *Corn Exch. Bank v. Nassau Bank*, 91 N. Y. 74, 43 A. R. 655, holding that bank is bound to see that payee's indorsement is genuine; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L.R.A. 529, 63 N. E. 969 (reversing 60 App. Div. 241, 70 N. Y. Supp. 246), holding that depositor owes to bank duty of exercising reasonable care to verify returned vouchers; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 A. S. R. 595, 77 N. E. 693, holding that depositor need not when paid checks are returned make investigation to see whether indorsements of payees are forgeries; *Harlem Co-op. Bldg. & L. Asso. v. Mercantile Trust Co.* 10 Misc. 680, 31 N. Y. Supp. 790; *Shipman v. Bank of State*, 126 N. Y. 318, 22 A. S. R. 821, 12 L.R.A. 791, 27 N. E. 371 (affirming 36 N. Y. S. R. 966, 13 N. Y. Supp. 475),—holding that depositor may assume that bank has ascertained genuineness of indorsements on checks returned to him; *Bank of British N. A. v. Merchants' Nat. Bank*, 91 N.

Y. 106, holding that bank which paid certified check upon payee's forged indorsement remains liable to depositor, although he, in ignorance of facts, had received check from bank when returned to him as paid; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281, holding that failure of depositor to examine returned vouchers does not preclude him from denying genuineness of any check unless bank was prejudiced by his negligence; *Devine v. Bank of Baldwin*, 91 Wis. 68, 64 N. W. 589, holding illiterate person not concluded by his failure to observe and report that some person had made unauthorized use of his certificate of deposit; *Clark v. National Shoe & Leather Bank*, 32 App. Div. 316, 52 N. Y. Supp. 1064, holding that depositor has right to assume in examining returned vouchers that bank would not pay check for larger amount than he authorized; *Merchants' Nat. Bank v. Nichols & S. Co.* 223 Ill. 41, 7 L.R.A. (N.S.) 752, 79 N. E. 38 (affirming 123 Ill. App. 430), holding that principal may though he failed to examine pass book and returned vouchers assert bank had no authority to pay his agent's over-draft; *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69, 16 A. R. 569, holding that failure of depositor to examine returned vouchers except through agency of clerk does not absolve bank from liability for paying checks agent was not authorized to draw; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 A. R. 325, holding that knowledge of clerk who entered in bankbook checks which he had forged cannot be imputed to principal; *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 125, holding to same effect; *Shipman v. Bank of State*, 126 N. Y. 318, 22 A. S. R. 821, 12 L.R.A. 791, 27 N. E. 371 (affirming 36 N. Y. S. R. 966, 13 N. Y. Supp. 475), holding clerk's knowledge of his own wrong in forging checks and fabricating false papers to conceal his forgery not imputable to principal; *August v. Fourth Nat. Bank*, 15 N. Y. S. R. 956, 1 N. Y. Supp. 139, holding that where clerk who examined returned vouchers was the forger burden is on depositor to show that account stated by bank is wrong in that money was improperly paid out; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 A. R. 501 (affirming 13 Jones & S. 452, a second appeal of 5 Jones & S. 26), holding that though to clerk who committed the forgery duty of examining returned vouchers was assigned and though some of the forged checks could not be located bank is liable to depositor for full amount of his deposit; *Kenneth Invest. Co. v. National Bank*, 103 Mo. App. 613, 77 S. W. 1002, holding that where examination of returned vouchers is made by clerk who committed the forgery, depositor is not in same position as if no examination were made; *Wachsman v. Columbia Bank*, 8 Misc. 280, 28 N. Y. Supp. 711 (affirming 6 Misc. 62, 26 N. Y. Supp. 885), holding delay of depositor in notifying bank that returned check was forgery excused where clerk who examined returned vouchers was the forger; *Welsh v. German-American Bank*, 73 N. Y. 424, 29 A. R. 175, holding that where depositor's clerk who examined returned vouchers procured depositor to draw checks on customers, upon which checks clerk forged indorsements and had them paid by bank, bank remains liable to depositor.

Cited in reference notes in 64 A. D. 631, on bank's duty to know customers' signatures; 71 A. D. 62, on presumption that bankers know signatures of depositors; 74 A. D. 441, on when payment by drawee admits genuineness of drawer's signature; 5 A. S. R. 28, on estoppel from proving checks returned forgeries by neglect to examine when returned; 11 A. S. R. 616, on rights of one paying forged check or draft; 74 A. D. 446; 96 A. D. 567; 43 A. S. R. 250,—on liability of bank for paying forged check.

Cited in notes in 39 A. D. 519, 520, on effect of payment of forged check on

rights of party defrauded; 17 A. S. R. 890, on drawee's right to recover back money paid on check or draft to which drawer's signature is forged; 7 L.R.A. 849, on effect of bank's payment of forged paper; 12 L.R.A. 793, on liability of banker who pays money on a forged check; 27 L.R.A. 427, on duty of depositor as to forged checks charged to him by bank; 27 L.R.A. 429, on duty of depositor as to forged indorsements; 27 L.R.A. 430, on effect of depositor intrusting examination of checks to agent who happens to have forged them; 7 L.R.A. (N.S.) 745, on depositor's right to recover amount of forged or raised checks paid by bank as affected by his having intrusted examination of vouchers to employee guilty of original fraud; 10 L.R.A. (N.S.) 51, on right of drawee of forged check or draft to recover money paid thereon as against others than bona fide holders for value; 41 L. ed. U. S. 859, on payment of forged check.

Distinguished in *Weinstein v. National Bank*, 69 Tex. 38, 5 A. S. R. 23, 6 S. W. 171, holding that depositor may by failing to report forgery within reasonable time after return of vouchers estop himself to set up claim against bank; *Leather Mfr's Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, holding that depositor who fails to supervise properly work of his clerk in checking up passbook and returned checks cannot recover against bank for forgery of clerk in raising checks where bank was misled to its prejudice by relying on clerk's work; *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72, holding that failure of depositor to exercise reasonable diligence to discover when paid checks are returned him that endorsements thereon are forgeries relieves bank from liability where in consequence of his negligence it was prejudiced.

Disapproved in *Janin v. London & S. F. Bank*, 92 Cal. 14, 27 A. S. R. 82, 14 L.R.A. 320, 27 Pac. 1100, holding that depositor owes bank duty of examining his checks within reasonable time after they are returned in order to discover and give notice of any forgery; *First Nat. Bank v. Allen*, 100 Ala. 476, 46 A. S. R. 80, 27 L.R.A. 426, 14 So. 335, holding that depositor who entrusts examination of returned vouchers to clerk who forged his name is charged with clerk's knowledge of such forgery.

Accounts stated.

Cited in *Clark v. Mechanics' Nat. Bank*, 11 Daly, 239, holding that depositor's retaining without objection pass-book after bank has struck balance thereon makes it a stated account; *Gonville v. Shook*, 144 N. Y. 686, 39 N. E. 405, holding that for material mistake an account stated may be reopened; *Ballard v. Beveridge*, 171 N. Y. 194, 63 N. E. 960, holding that where mistake occurs as to some items in an account, it may be corrected in respect thereto and sustained as to other items.

Cited in notes in 4 L.R.A. 504, on equitable jurisdiction over stated account; 27 L.R.A. 820, on what constitutes an account stated between banker and depositor.

61 AM. DEC. 739, HATHAWAY v. BENNET, 10 N. Y. 108.

Good will of a business as a property right.

Cited in *Wallingford v. Burr*, 17 Neb. 137, 22 N. W. 350, holding that goodwill of business may form subject of sale; *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 45 L.R.A. 126, 55 N. E. 685, holding that goodwill of foreign corporation resulting from its carrying on business within state is taxable as "capital employed in state;" *Buzby v. Buzby*, 13 Pa. Dist. 587. 30 Pa. Co. Ct. 225, holding that there may be property rights in business of selling

and serving newspapers; *Long v. Evening News Asso.* 113 Mich. 261, 71 N. W. 492 (dissenting opinion), upon question whether good will of newspaper business is subject to sale on execution; *Barber v. Connecticut L. Ins. Co.* 15 Fed. 312, holding that where one purchases agency with understanding that it is custom to allow agents to relinquish their agencies and to sell good will thereof, he may maintain action if such right is denied him.

Cited in note in 4 L.R.A. 400, on conveyance of property to be acquired in the future.

61 AM. DEC. 743, BALDWIN v. PALMER, 10 N. Y. 232.

Statute of frauds as applied to partly performed contracts.

Cited in *Cagger v. Lansing*, 43 N. Y. 550, holding that where part payment is made on parol contract for sale of land vendor cannot sue to recover balance due; *Stone v. Thaden*, 16 Daly, 280, 10 N. Y. Supp. 236, holding statute of frauds applicable to contract for sale of land although receipt for part of purchase price was given; *Wright v. Mischo*, 20 Jones & S. 241, to point that payment of money on account of purchase of land is not in itself evidence of contract to purchase; *Harsha v. Reid*, 45 N. Y. 415, to point that notwithstanding voluntary performance of part of contract void by statute of frauds residue cannot be enforced; *Towle v. Jones*, 1 Robt. 87, 19 Abb. Pr. 448 (dissenting opinion), upon point that equity may recognize partly performed oral contracts which are unenforceable in law under statute of frauds; *Becker v. Mason*, 30 Kan. 697, 2 Pac. 850, holding oral contract whereby plaintiff was to convey land and notes to defendant in consideration of his conveying bank stock to plaintiff unenforceable either in whole or in part; *Dow v. Way*, 64 Barb. 255, holding that where one orally agreed to pay lump sum for house which owner was to have completed, agreement as to completion is within statute of frauds although conveyance of house was made.

Cited in reference notes in 68 A. D. 201, on discretion of equity courts as to specific performance; 68 A. D. 538, on part performance of parol contract concerning land as taking it out of statute of frauds.

Cited in notes in 70 A. D. 465, on part payment on parol contract for sale of lands insufficient to take case out of statute of frauds; 38 A. S. R. 133, on payment of purchase money unaccompanied by possession as validating contract void by statute of frauds; 11 E. R. C. 233, on parol evidence when specific performance of contract to convey is sought.

Distinguished in *Morrill v. Cooper*, 65 Barb. 512, upon point that part payment of purchase money for land is insufficient to take case out of statute of frauds.

Right to recover consideration paid under partly performed contracts.

Cited in *Wood v. Shultis*, 4 Hun, 309, 6 Thomp. & C. 557, holding that where one receives property under contract void under statute of frauds law implies promise upon his part to pay its value; *Fuller v. Reed*, 38 Cal. 99, to point that party may maintain action at law to recover money paid or value of services rendered under such contract; *White v. Whiting*, 8 Daly, 23, to same effect; *Chitenden v. Morris*, 52 Hun, 601, 5 N. Y. Supp. 713, holding that party who is unable or unwilling to complete contract unenforceable under statute of frauds cannot compel party ready to go on to refund what he has received.

Cited in reference note in 38 A. D. 622, on rights of one who has partly performed contract within statute of frauds on rescission by other party.

Force of contract partially illegal.

Cited in *Friedman v. Bierman*, 43 Hun, 387, holding that where part of consideration for discontinuance of divorce proceedings is that parties shall live separate whole agreement is void.

61 AM. DEC. 746, DUNLOP v. GREGORY, 10 N. Y. 241.**Validity of contracts in restraint of trade.**

Cited in *Mackinnon Pen Co. v. Fountain Ink Co.* 16 Jones & S. 442, holding contract restraining trade only so far as reasonably necessary to protection of promisee, valid; *Mallinckrodt Chemical Works v. Nemnich*, 83 Mo. App. 6, to same point; *Watkins v. Morley*, 2 Tex. App. Civ. Cas. (Willson) 634, to point that for contract to be valid, restraint of trade must be partial only; *People v. Klaw*, 55 Misc. 72, 106 N. Y. Supp. 341, to point that agreement whereby business rival is prevented from competing may be valid; *United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, to point that buyer may legally agree not to use property purchased in competition with business retained by seller; *Curtis v. Gokey*, 68 N. Y. 300, holding agreement by retiring partner not to engage in retail shoe business in particular town while other remained in such business, valid; *Washburn v. Dosch*, 68 Wis. 436, 60 A. R. 873, 32 N. W. 551, holding agreement by vendor not to engage for five years in grocery business in particular town valid; *Roller v. Ott*, 14 Kan. 609, holding agreement not to sell furniture in particular city valid; *Webster v. Williams*, 62 Ark. 101, 34 S. W. 537, holding agreement by physician to withdraw permanently from practice within particular town and its vicinity valid; *Ewing v. Johnson*, 34 How. Pr. 202, holding agreement restraining trade and covering territory in and about three cities valid; *John D. Park & Sons Co. v. Hartman*, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24 (reversing 145 Fed. 358), holding that proprietor of patent medicine cannot by contracts with wholesalers destroy competition between them and retailers with view to maintaining uniform price to consumer.

Cited in reference notes in 65 A. D. 515, on validity of contracts in restraint of trade; 71 A. D. 721, on what contracts are in restraint of trade and void as against public policy; 90 A. D. 207, on contracts in restraint of trade.

Cited in notes in 7 A. D. 743, on contracts in restraint of trade; 92 A. D. 758, on restraint as to space in contracts in restraint of trade; 92 A. D. 752; 13 A. R. 174, 175,—on validity of contracts in restraint of trade; 1 L.R.A. 458, as to extent of prohibition in contracts in restraint of trade; 4 L.R.A. 154, on validity of contracts in partial restraint of trade; 4 L.R.A. 157, on agreements in partial restraint of trade; 11 L.R.A. 503, on validity of contracts in general restraint of trade; 41 L. ed. U. S. 1008, on monopoly and contracts in restraint of trade.

— Contracts affecting whole state.

Cited in *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600, 46 A. R. 527, to point that contract in restraint of trade which extends in its operation over whole state is void; *Taylor v. Blanchard*, 13 Allen, 370, 90 A. D. 203, holding agreement not to engage in business of manufacturing or selling shoe-cutters within particular state void; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315, holding agreement by purchaser not to use steamboat upon waters of particular state for period of ten years, valid; *Wright v. Ryder*, 36 Cal. 342, 95 A. D. 86, holding to contrary; *Oregon Steam Nav. Co. v.*

Hale, 1 Wash. Terr. 283, 34 A. R. 803, holding agreement by vendee not to run steamboat upon waters of either of two states or of particular portion of certain territory void; Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 51 A. S. R. 193, 41 N. E. 1048, holding agreement by vendor engaged in retailing oil in particular town not to carry on such business at any place within state except at one city void; Maier v. Homan, 4 Daly, 168, holding agreement to cease the cabinet business, void if unlimited as to time and place; Bingham v. Maigne, 20 Jones & S. 90, holding contract by one skilled in manufacturing of printers' rollers and composition not to engage in such work at any place within radius of two hundred and fifty miles of New York city void; Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 63 A. S. R. 736, 41 L.R.A. 185, 49 N. E. 1030, holding agreement by vendor not to engage in particular business for period of twenty-five years in particular state or in any other state void.

Distinguished in Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 A. R. 464, 13 N. E. 419 (affirming 35 Hun, 421), holding agreement by vendor of business of manufacturing and selling matches not to engage in such business in any but two particular states valid.

Construction of contracts.

Cited in Bradford v. Montgomery Furniture Co. 115 Tenn. 610, 9 L.R.A. (N.S.) 979, 92 S. W. 1104, holding that organization of corporation to conduct a business does not terminate contract by strangers not to compete in business with organizers.

Distinguished in Baker v. Pottmeyer, 75 Ind. 451, in construing agreement by seller of ice-business not again to engage in such business at particular place.

Liquidated damages.

Cited in General Electric Co. v. Westinghouse Electric & Mfg. Co. 144 Fed. 458, holding that where damages are inherently uncertain and unascertainable with exactness amount agreed on must be held liquidated damages; Kemp v. Knickerbocker Ice Co. 51 How. Pr. 31, to point that if sum fixed upon applies to each breach or if all conditions are to be sumultaneously performed it will be held liquidated damages; Riggins v. Hinchman, 3 Tex. App. Civ. Cas. (Willson) 50, holding that sum agreed on will be held liquidated damages where purpose of contract is to secure plaintiff against competition in particular business; Johnson v. Gwinn, 100 Ind. 466, holding that where liveryman contracts with plaintiff and others not to engage in livery business in their town, plaintiff may upon breach of such contract recover, if others be unwilling to sue, whole amount agreed upon as liquidated damages; Curtis v. Van Bergh, 161 N. Y. 47, 55 N. E. 398, construing stipulation for payment of fifty dollars for every day's delay in having ready a building which was to be erected for and leased by manufacturer, as liquidated damages; Morse v. Rathburn, 42 Mo. 594, 97 A. D. 359, holding stipulation for forfeiture of two thousand dollars for breach of any covenants in agreement to convey land valued at twenty-one thousand dollars, enforceable as liquidated damages.

Cited in reference note in 65 A. D. 515, as to when sum stipulated to be paid for breach of contract is deemed to be liquidated damages.

Cited in notes in 1 A. D. 335, as to whether provision is one for liquidating damages or one for penalty; 30 A. R. 31, on liquidated damages and penalties.

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61 AM. DEC. 749, POOR v. GUILFORD, 10 N. Y. 273.**Parties to actions.**

Cited in *Swift v. State Lumber Co.* 71 Wis. 476, 37 N. W. 441, holding that as trustee of express trust may maintain action without joining cestui que trust so he may defend in like manner; *Salter v. Krueger*, 65 Wis. 217, 26 N. W. 544, holding that where note and mortgage were taken in name of one creditor but secured in part another's claim, latter need not be made party to action to have note and mortgage cancelled; *Walsh v. Reinhart*, 20 Misc. 407, 45 N. Y. Supp. 1026, holding that party in whose name contract was made and who furnished the property may sue for purchase money though contract provided that title to property was to remain in another until full payment made.

Cited in reference note in 65 A. D. 239, on right of agent to sue on instrument payable to him.

Cited in note in 35 A. D. 622, on right of third person to avail himself of contract made for his benefit.

Effect of foreclosure proceedings on mortgagee's title.

Cited in *Pickersgill v. Read*, 7 Hun, 636, holding that where decree obtained by plaintiff enforcing his mortgage against another's property was reversed because such property had been released from lien of mortgage, legal title to mortgage remains in plaintiff.

Assignment of part of claim.

Cited in *Beardslee v. Morgner*, 4 Mo. App. 139, to point that where no injury to debtor can accrue or second claim for same demand be made, interest in part of note may be assigned and legal title be passed.

When law will imply a promise.

Cited in *Sheldon v. Sherman*, 42 N. Y. 484, 1 A. R. 569, holding that where one becomes liable to another for damages caused his land law will imply promise upon his part to pay such damages.

61 AM. DEC. 751, JEWETT v. MILLER, 10 N. Y. 402.**Rights and liabilities of trustees in dealing with trust property.**

Cited in *Re Terry*, 31 Misc. 477, 65 N. Y. Supp. 655, holding that no actual fraud need be shown to make trustee personally liable where he deals with trust funds for his own benefit; *Beebe v. Sullivan County*, 64 Hun, 377, 19 N. Y. Supp. 629, holding contract whereby county supervisors employed one of their number as their attorney void; *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362, holding that corporation may avoid settlement made for it by its officers acting for themselves and others as creditors; *Pearson v. Concord R. Corp.* 62 N. H. 537, 13 A. S. R. 590, holding that stockholder may sue to enjoin action of common directors of two corporations in respect to matters in which interests of each corporation conflict.

—In acquiring title to trust property.

Cited in *Woolf v. Barnes*, 46 Misc. 169, 93 N. Y. Supp. 219, holding that trustee cannot for his own benefit acquire title to property in respect to which he has duty to perform inconsistent with character of purchaser; *Marquam v. Ross*, 47 Or. 374, 83 Pac. 852; *Hamilton v. Dooly*, 15 Utah, 280, 49 Pac. 769,—to same effect; *Golson v. Dunlap*, 73 Cal. 157, 14 Pac. 576; *Le Comte's Estate*, 8 N. Y. S. R. 784,—holding trustee's purchase of trust property voidable at election of beneficiary; *James v. Throckmorton*, 57 Cal. 368, holding that

whatever interest trustee acquires in trust property enures to benefit of cestui que trust; *Russell v. Peyton*, 4 Ill. App. 473, holding to same effect; *King v. Remington*, 36 Minn. 15; 29 N. W. 352, to same point; *Golson v. Dunlap*, 73 Cal. 157, 14 Pac. 576, holding sale made by executors to themselves through intervention of third person voidable at election of devisees; *Gardner v. Ogden*, 22 N. Y. 327, 78 A. D. 192, holding that clerk of broker employed to sell land cannot as against vendor become purchaser; *Cook v. Martin*, 75 Ark. 40, 87 S. W. 625, 5 A. & E. Ann. Cas. 204, holding that receiver appointed to hold attached property cannot as against attaching creditors purchase superior outstanding title for benefit of his wife; *Lingke v. Wilkinson*, 57 N. Y. 445 (dissenting opinion), upon question whether relationship of father and son will invalidate lease by former, as agent or trustee, to latter; *Roberts v. Moseley*, 64 Mo. 507, holding that trustee cannot as against cestui que trust purchase at judicial sale under title superior to that conveyed to him as trustee; *Colburn v. Morton*, 3 Keyes, 296, 1 Trans. App. 145, 1 Abb. App. Dec. 378, 36 How. Pr. 150, 5 Abb. Pr. N. S. 308, to same point; *Fulton v. Whitney*, 5 Hun, 16, holding that title acquired by trustee by purchasing at judicial sale enures to benefit of beneficiary; *Newcomb v. Brooks*, 16 W. Va. 32, to point that purchase by trustee at judicial sale is voidable at election of beneficiary; *Kelly v. Pratt*, 41 Misc. 31, 83 N. Y. Supp. 636, holding that administrator who has funds in his hands may not allow decedent's lands to be sold for taxes and then acquire tax title in his own name; *Carson v. Marshall*, 37 N. J. Eq. 213, holding that executors cannot as against estate's creditors purchase at judicial sale lands of the estate; *Holman v. Holman*, 66 Barb. 215, holding that executor who purchases at execution sale property of his estate takes title subject to right of beneficiary to compel reconveyance; *Merrick v. Waters*, 51 App. Div. 83, 64 N. Y. Supp. 542, holding that executor cannot as against beneficiaries acquire title by purchasing at judicial sale property of estate; *Ford v. Wright*, 114 Mich. 122, 72 N. W. 197, holding that heir may claim title acquired by administrator at foreclosure sale of property belonging to estate; *Valentine v. Belden*, 20 Hun, 537, holding that title acquired by administrator at sale had under foreclosure of mortgage belonging to his estate enures to its benefit; *Atkins v. Judson*, 33 App. Div. 42, 53 N. Y. Supp. 504, holding agreement by trustees under mortgage and by receiver to sell secretly to third persons for inadequate consideration, void.

Cited in reference notes in 63 A. D. 230, on rule that trustee cannot purchase trust property; 64 A. D. 477, on validity and effect of trustee's purchase at his own sale; 70 A. D. 551, on effect of trustee purchasing outstanding title adverse to that of cestui que trust; 72 A. D. 792, on purchase by trustee of claim adverse to cestui que trust inuring to latter's benefit; 73 A. D. 516, on right of person occupying position of trust to be both buyer and seller of the same property; 77 A. D. 323, on right of trustee to purchase property of his cestui que trust; 78 A. D. 211, on effect of one undertaking to act for another acting for himself in same matter; 90 A. D. 68, on right of trustee to buy and sell same property; 91 A. S. R. 620, on trustees' lack of right to purchase trust property for themselves.

Cited in notes in 9 L.R.A. 794, on trustee's right to profit by trust estate; 13 L.R.A. 491, on party's right to purchase property for his own benefit where he has duty to perform in relation to it.

Distinguished in *Stephen v. Beall*, 22 Wall. 329, 22 L. ed. 786, holding that

where trustee purchases in good faith property which he had many years previously sold at public auction to vendor, his title is good.

Equitable estoppel.

Cited in *Eitel v. Bracken*, 6 Jones & S. 7, holding that mortgagor may prevent purchaser of mortgage from asserting equitable estoppel by showing that latter was not influenced by his representations; *Chipman v. Montgomery*, 4 Hun, 739 (dissenting opinion), upon point that one may, though he has received legacy, claim his inheritance if will be avoided, provided no one has been prejudiced.

Cited in reference notes in 63 A. D. 670, on estoppel by silence, concealment, or misrepresentations; 67 A. D. 302, on silence of party as estoppel to assert rights against party deceived thereby; 68 A. D. 603, on doctrines of equitable estoppels; 70 A. D. 650, on estoppel in pais; 80 A. D. 172; 87 A. D. 318,—as to what constitutes estoppel in pais.

— Misleading of other party as essential.

Cited in *Sanford v. Sanford*, 2 Thomp. & C. 641, holding that one does not estop himself by conduct which does not mislead or injure anyone; *Willis v. Carpenter*, 14 Nat. Bankr. Reg. 521, Fed. Cas. No. 17,770; *Schnitzer v. Heusted*, 39 N. Y. S. R. 219, 14 N. Y. Supp. 918,—to point that equitable estoppel occurs only when one party intends to mislead and other is actually misled; *Christianson v. Linford*, 3 Robt. 215, holding that equitable estoppel does not arise in favor of one who has not been prejudiced by relying upon matter complained of; *Nicholas v. Austin*, 82 Va. 817, 1 S. E. 132, holding that equitable estoppel arises where one is led by another's silence to act to latter's advantage; *Forbes v. McCoy*, 24 Neb. 702, 40 N. W. 132, holding that equitable estoppel arises against one who silently permits another to improve land which latter believes to be his; *Calkins v. Bloomfield & R. Natural Gaslight Co.* 1 Thomp. & C. 541, holding landowner not estopped by his acquiescence in acts of another in laying pipes upon his land where such other knew he was but a trespasser; *Iselin v. Henlein*, 16 Abb. N. C. 73, 7 N. Y. Civ. Proc. Rep. 431, 2 How. Pr. N. S. 211, holding that no estoppel arises against creditor who in filing his claim expressly stated that he did not recognize validity of debtor's general assignment.

Cited in reference note in 83 A. D. 349, on right of one not misled to equitable estoppel.

Equitable relief from mistake.

Cited in notes in 70 A. D. 576, on defect of title and outstanding equities as ground for relief in equity sales; 5 L.R.A. 159, on showing mistake by parol evidence in equity.

61 AM. DEC. 756, BAGLEY v. SMITH, 10 N. Y. 489.

Actions growing out of partnership compact.

Cited in *White v. Scott*, 26 Kan. 476, holding action at law to recover moneys which defendant promised to pay into proposed partnership sustainable; *Hill v. Palmer*, 56 Wis. 123, 43 A. R. 703, 14 N. W. 23, holding that injured partner may maintain action at law against party to partnership contract who prevents launching of partnership business; *Hyer v. Richmond Traction Co.* 168 U. S. 471, 42 L. ed. 547, 18 Sup. Ct. Rep. 114, to same point; *Mann v. Bowen*, 85 Ga. 616, 11 S. E. 862, holding that for breach of agreement to form partnership or for refusal to permit partnership business to be launched, action lies; *Rockwell Stock & Land Co. v. Castroni*, 6 Colo. App. 521, 42 Pac. 180, holding that refusal to carry out agreement to form copartnership gives rises to cause of

action; *Madge v. Puig*, 12 Hun, 15, holding that one may maintain action against his copartner for breach of agreement which established partnership relation; *Howard v. France*, 43 N. Y. 593, to point that action of covenant will lie upon agreement to continue partnership; *Guccione v. Scott*, 21 Misc. 410, 47 N. Y. Supp. 475, to point that partners may sue one another at law for breach of any distinct covenant in partnership agreement; *Singer v. Heller*, 40 Wis. 544, upon right of equity to retain suit for dissolution of partnership for purpose of assessing damages in nature of profits for noncontinuance of partnership.

Cited in note in 42 L. ed. U. S. 484, on wrongful dissolution of partnership.

Distinguished in *Price v. Middleton*, 75 S. C. 105, 55 S. E. 156, holding that action by partner for his share of profits as damages for breach of partnership agreement is, where intricate accounting is involved, an action for equity.

Loss of profits as damages.

Cited as leading case in *Jones v. Nathrop*, 7 Colo. 1, 1 Pac. 435, holding loss of profits which would have been made on shingles had shingle mill been furnished as agreed not recoverable.

Cited in *Taylor v. Bradley*, 4 Abb. App. Dec. 363, holding that probable benefits of contract to let land on shares may be recovered in action for its breach brought before time set for commencement of term; *Schleider v. Dielman*, 44 La. Ann. 462, 10 So. 934, in holding future profits of a business not recoverable under the particular circumstances, to point that remote and speculative damages are not recoverable; *Goodsell v. Western U. Teleg. Co.* 21 Jones & S. 46, holding that future damages can be allowed only when proved with reasonable certainty; *Hitchcock v. Supreme Tent*, K. M. 100 Mich. 40, 43 A. S. R. 423, 58 N. W. 640, holding that for breach of contract to employ plaintiff in organizing societies, profits which would probably have accrued to him are recoverable; *Wells v. National Life Asso.* 53 L.R.A. 33, 39 C. C. A. 476, 99 Fed. 222, holding for breach of contract to employ plaintiff as exclusive insurance agent for particular territory upon commission basis, loss of anticipated profits recoverable; *Wakeman v. Wheeler & W. Mfg. Co.* 101 N. Y. 205, 54 A. R. 676, 4 N. E. 264, holding that in action for breach of contract of agency prospective profits so far as reasonably certain may be recovered; *Culley v. Taylor*, 62 Neb. 651, 87 N. W. 334, holding that measure of damages for total breach of cropper's contract is value of what landowner's share of crop would have been had contract been fulfilled; *Mitchell v. Cornell*, 12 Jones & S. 401, holding probable future profits of excursion business not recoverable for breach of contract to charter excursion boat; *Nash v. Thousand Island Steamboat Co.* 123 App. Div. 148, 108 N. Y. Supp. 336, holding that in action for breach of contract to grant plaintiff newstand privileges upon line of boats prospective profits may be recovered though they be difficult of estimation; *Crittenden v. Johnston*, 7 App. Div. 258, 40 N. Y. Supp. 87, holding that for breach of contract for running hotel, prospective profits may be recovered; *Savery v. Ingersoll*, 46 Hun, 176, holding that for breach of contract to deliver lecture such profits as jury can see would probably have been made can be recovered; *Hitchcock v. Anthony*, 28 C. C. A. 80, 54 U. S. App. 439, 83 Fed. 779, holding that in action for loss of profits from breach of contract not to carry on competing business evidence of past profits as bearing upon future profits admissible; *Horton v. Hall & C. Mfg. Co.* 94 App. Div. 404, 88 N. Y. Supp. 73, holding that for breach of contract to employ plaintiff as sales agent on commission basis he may recover for loss of prospective profits as estimated upon amount of previous year's business; *Wash-*

burn v. Hubbard, 6 Lans. 11, holding in action for breach of contract to employ plaintiff as sales agent evidence of amount of profits which might have been earned based upon calculation of probable amount of sales, inadmissible; Allison v. Chandler, 11 Mich. 542, holding that in action for rendering plaintiff's place of business untenable loss of probable profits may be recovered and evidence of past profits is admissible; Menard v. Stevens, 12 Jones & S. 515, holding damages which necessarily flow from breaking up of one's business recoverable, and evidence of past profits, admissible; Schile v. Brokhahus, 80 N. Y. 614, holding in action for damages resulting from partial interruption of business evidence of amount of business done previous to trespass complained of as compared with amount done thereafter admissible; Merschiem v. Musical Mut. Protective Union, 24 Abb. N. C. 252, 8 N. Y. Supp. 702, holding that in action for wrongful expulsion from membership of musical union plaintiff may show his earnings while a member and their diminution and his inability to obtain employment after expulsion; Armour v. Gaffey, 30 App. Div. 121, 51 N. Y. Supp. 846, to point that past profits may be shown and considered as bearing on future profits.

Cited in reference notes in 63 A. D. 476, on loss of profits as measure of damages; 78 A. D. 387, on recovery of loss of profits as damages.

Cited in notes in 3 L.R.A. 588, on loss of profits as element of damages for breach of contract; 53 L.R.A. 106, on loss of profits as element of damages for breach of contract for charter or rental of vessel.

Distinguished in Roth v. Spero, 48 Misc. 506, 96 N. Y. Supp. 211, holding that in estimating amount of prospective profits recoverable in action for breach of contract of agency, what plaintiff earned in different employment cannot be considered.

— In actions affecting copartners.

Cited in Ramsay v. Meade, 37 Colo. 465, 86 Pac. 1018, holding in action for breach of partnership agreement profits which would probably have accrued but for wrongful dissolution of partnership, recoverable; Karrick v. Hannaman, 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. Rep. 135, to point that partner who dissolves partnership before expiration of period agreed upon is liable to copartner in action at law to respond in damages for value of profits latter would otherwise have received; Locke v. Filley, 14 Hun, 139; Becker v. Hill, 20 Lanc. L. R. 353,—to same effect; Ellsler v. Brooks, 22 Jones & S. 73, to point that measure of damages for dissolving partnership before time fixed therefor is prospective profits; Neudecker v. Kohlberg, 81 N. Y. 296, in same connection; Dart v. Laimbar, 107 N. Y. 664, 14 N. E. 291, 1 Silv. Ct. App. 533, holding that in action for damages for loss of future profits resulting from breach of copartnership contract court need not be too exacting in regard to evidence upon which such claim is based; Bathrick v. Coffin, 13 App. Div. 101, 43 N. Y. Supp. 313, in same connection.

Cited in notes in 53 L.R.A. 81-82, on loss of profits as element of damages for breach of partnership contracts; 42 L. ed. U. S. 485, on measure of damages for wrongful dissolution of partnership.

Distinguished in Van Ness v. Fisher, 5 Lans. 236, holding that for breach of copartnership agreement possible future profits cannot be recovered where no certain data upon which to base them are before jury.

Measure of damages for breach of contract.

Cited in reference note in 96 A. D. 378, on measure of damages for breach of contract.

Cited in notes in 34 A. D. 266; 1 L.R.A. 842, on measure of damages for breach of contract.

Form of requests to charge.

Cited in *Carpenter v. Stilwell*, 11 N. Y. 61, holding that request must be in such form that judge may properly charge in terms of request without qualification.

61 AM. DEC. 762, JOHNSON v. CARNLEY, 10 N. Y. 570.**Title required for maintenance of replevin or trover.**

Cited in *Ryan v. Hook*, 34 Hun, 185, holding that though plaintiff be in possession only as equitable owner he may maintain replevin against mere wrongdoer having no privity with true owner; *Frost v. Mott*, 34 N. Y. 253, holding that actual possession, accompanied by equitable interest in plaintiff at time of officer's wrongful seizure, entitles him to maintain action for property's recovery; *Lewis v. Birdsey*, 19 Or. 164, 26 Pac. 623, holding that one in possession and exercising dominion over personalty may replevin it from mere wrongdoer having no privity with true owner; *Stowell v. Otis*, 71 N. Y. 36, holding under answer in action of replevin setting up fact that plaintiff had pledged property to defendant's wife, but containing no allegation that defendant had any relation to wife's interest, evidence of such pledge inadmissible; *Van Namee v. Bradley*, 69 Ill. 299, holding that wife in possession, through agent of property purchased with her separate means may replevin same from trespasser who pleads property in husband; *Appleby v. Hollands*, 8 App. Div. 375, 40 N. Y. Supp. 808, holding that actual possession under conditional bill of sale entitles one to maintain replevin; *Wyckoff v. Anthony*, 9 Daly, 417, holding in action for conversion of bonds that one simply entitled to possession of property may maintain action for its conversion against mere wrongdoer.

Cited in reference notes in 64 A. D. 80, on necessity of right to immediate possession in replevin; 71 A. D. 105, on replevin for property held by officer under execution; 84 A. D. 373, on when replevin lies and what title is necessary to maintain it; 88 A. D. 734, on replevin for goods taken in execution or attachment.

Cited in notes in 25 A. S. R. 257, on replevin against officer by stranger to writ; 11 L.R.A. 172, on replevin as a possessory action.

Remedy for injuries to real estate held adversely.

Cited in note in 85 A. D. 321, on remedy for injuries to real estate held adversely to plaintiff.

Matters open to objection upon appeal.

Cited in *Merriweather v. Erwin*, 27 Ark. 37 (dissenting opinion), upon point that before appellate court will pass upon point ruling must be had upon it in court below; *Reynolds v. Continental Ins. Co.* 36 Mich. 131, holding that it will be presumed that trial court ruled upon proposition of proof as it appeared and not upon it as covering some meaning requiring different ruling.

— Formal errors in judgments.

Cited in *Corn Exch. Bank v. Byle*, 119 N. Y. 414, 23 N. E. 805, holding that error in form of judgments must be corrected in court below; *Cochran v. Got-*

twald, 9 Jones & S. 317, holding that remedy for defects in form of judgment is not by appeal but by motion to set it aside; Robinson v. Hall, 35 Hun, 214, holding entry of judgment for costs before determination of certain issues an irregularity which must be availed of in court below; Gerity v. Seeger & G. Co. 163 N. Y. 119, 57 N. E. 290, holding failure of attorney securing judgment upon decision of referee to obtain extract from minutes of court showing order of reference, an irregularity not warranting reversal on appeal; Ingersoll v. Bostwick, 22 N. Y. 425, holding that irregularity of not entering judgment for return of property or its value must be corrected by motion below and is not ground for reversal upon appeal on merits; Mitchell v. Mitchell, 22 N. Y. S. R. 70, 4 N. Y. Supp. 72, holding to same effect; Loom v. Sweeney, 1 Mont. 584; Gallarati v. Orser, 27 N. Y. 324 (dissenting opinion),—upon same point.

